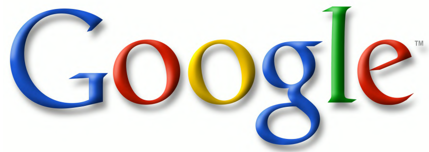

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OF

CASES ARGUED AND ADJUDGED

IN THE

Court of Appeals of Maryland.

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NAMES OF THE JUDGES, ETC.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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CORRIGENDA:

Page 103, read "*Frank L. Stoner*," instead of "*Frank L. Stokes*".

Page 140, read "*C. Gus Grason*," instead of "*C. Gus Grayson*".

Page 384. In Syllabus, read "*prejudicial injury*," instead of "*some injury*".

Page 423, In first paragraph Syllabus, read "*rejected*," instead of "*revoked*".

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IN MEMORIAM.

Court of Appeals,
February 27th, 1913.

Among the proceedings of the Court on this date was the following:*

Joshua W. Miles addressed the Court as follows:

It is with a feeling of sadness and sorrow that we lay aside our professional routine labors and pause to pay tribute to the memory of an honored member of our profession and an ex-member of this Court, whom the hand of Providence has removed from Earth. While all who knew Judge Page admired his great ability, his high sense of honor and his personal character, his passing away meant more to me than to the average man. Being residents of the same town and he nearly twenty years my senior, my first relations with him were those of a young man just entering the Bar, who looked up to him for advice and counsel, which he was always free to give. Afterwards I met him in many legal contests and found him a foe to be feared. Later, in 1888, we ceased to be adversaries at the trial table and became associated together as partners, and so continued until his elevation to the Bench of this Court in 1892.

During the various stages of his life, Henry Page was my counselor, my companion, my law-partner; he was *always my friend.* I knew him, therefore, as only one can know another who comes in daily contact with him in business relations and in private life.

It has been said that the value of eulogy largely depends upon its truthfulness. We are often led, sometimes by the intensity of our affections, sometimes by unbounded admiration for certain qualities of heart and mind, to exaggerate the virtues of our friends, and to minimize their faults; but the highest tribute that can be paid to the memory of our departed friend is to speak of him accurately and as we all know him.

*The manuscript of this tribute to the memory of the late Judge Henry Page was received too late for publication in its place with the other addresses in his honor, which will all be found in 120 Md. xxxi, etc.

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JUDGE PAGE was distinctly a lawyer. Sir Walter Scott said: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

JUDGE PAGE was not only learned in the law, well versed in its history and development, with a broad knowledge acquired from the reading of miscellaneous literature, but he was endowed by nature with a legal mind. It might be said of him that he was a born lawyer. He was truly an architect in his profession. He was possessed of another thing essential to a successful lawyer, absolute devotion to his profession. Public notoriety and political preferment had no attraction for him as compared with the duties attending his legal work.

His shining talents appeared to better advantage in the forum than on the hustings or in the legislative halls.

This was clearly manifested by the fact, well known by those who knew him intimately, that during his term of service in the 52nd Congress his duties were not as congenial to him as were the duties of either advocate or judge. As an advocate he was powerful. While he did not possess either physique or voice to give him front rank as an orator from the platform in large assemblies, in the court room, when aroused in the argument of a case before judge or jury, he was eloquent. Mr. Massey, former Chief Counsel of the Pennsylvania Railroad Company, once said of him he was one of the strongest "all around" lawyers he ever met at the trial table. As a judge at *nisi prius* he was quick of perception and always ready with his decisions. As a judge of this Court he was careful, conscientious, painstaking, and his opinions were convincing.

JUDGE PAGE'S private life was a model. If I were asked to state, from my association with him, what trait of his character stood out more conspicuously than any other, I would say it was extreme modesty and simplicity. We rarely find in public life a man of his ability who is so devoid of vanity. No man, if a gentleman, was too humble to be his associate. As Tennyson wrote in his ode on the death of the Duke of Wellington, he was:

"Rich in saving common-sense,
And, as the greatest only are,
In his simplicity sublime."

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Although he was of a retiring disposition, there was a tragic episode in connection with his career on the bench in which he demonstrated that he was not lacking in courage when duty called. A prisoner had been tried before him and convicted of a heinous capital offense. JUDGE PAGE had sentenced him to death. Before the convict could be taken to prison, a violent lynching mob seized him, almost from the very presence of the Court, and started with him on their mission of death. The Judge addressed the frenzied mob from the Court House steps, pleading with them to desist and let the prisoner be executed under the law. Failing in this, he started to rush into the crowd, when an admiring friend took him up and practically bore him away in his arms lest violence might be done him. I mention this incident only to illustrate that behind that simple life was the courage of the man's conviction and a fearlessness to do his duty in the midst of impending danger.

What the world most needs today is more men of his type, more men upon the public rostra, in the learned professions, in stations of trust, in the chairs of State and in all the spheres of human activity, who possess a devotion to the truth because it is the truth, and a readiness to make sacrifice for the right because it is right.

JUDGE PAGE's domestic life was ideal. To him there was "no place like home." He was the devoted husband and father of an equally devoted family, and in their companionship he found his greatest pleasure.

He was constant in his attendance upon the Presbyterian Church of which he was a member, and contributed liberally of his means to the support of the Gospel.

Our hearts are beating in unison today with the hearts of his bereaved family, but it must be comforting to them as it is to us, to know that having lived for more than three-score years and ten, he served a life of great usefulness and died at peace with his fellow-men and his God, and that in the Great Beyond he will receive his reward.

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MARYLAND REPORTS.

Beginning with Cases Argued at the JANUARY and APRIL TERMS, 1913.

MAURICE GREGG ET AL.

vs.

PHILIP D. LAIRD, JOSHUA W. HERING AND E. CLAY TIMANUS, COMPRISING THE PUBLIC SERVICE COMMISSION.

Public Service Commission: Act of 1910; construction of—; repeal of inconsistent statutes; telephone companies subject to jurisdiction of—. Public utilities: rates; power of Legislature to regulate; may delegate power to commission.

The proceedings of the Public Service Commission, established under the Act of 1910, in having hearings upon telephone rates proposed to be adopted, and its right to promulgate the rates which the telephone company may be permitted to charge, is a legislative rather than judicial or administrative act, and is not objectionable on constitutional grounds to Art. 8 of the Declaration of Rights. p. 29

Repeal of statutes by implication are not favored. p. 29

Chapter 180 of the Acts of 1910, in section 31½, by express terms, repeals all prior Acts or parts of Acts that prescribe or limit the price at which any gas corporation or electric company or any other corporation subject to the Act may furnish or sell its gas, etc., or other product or utility. p. 29

Telephones and telephone service are a utility in that sense, and telephone companies are subject to the provisions of the Act. p. 29

All statutes upon the same subject-matter are to be harmonized as far as possible, even though passed at different dates

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and although the time of their passage may be separated by a long or short interval, and this rule of construction is to be applied even when the construction of the statute is called in question. p. 30

Where statutes are reasonably susceptible of two constructions, it is the duty of courts to adopt such a one as will save the constitutionality of the statute, and, to avoid constructions which raise grave and doubtful constitutional questions, the statute can be so construed as to avoid such questions. p. 30

The purpose of the Public Service Commission Act was to place all corporations handling public utilities under the supervision and control of the Public Service Commission, with power to it to regulate the rates charged for service; but until the commission does so regulate such rates, any Act or Acts in force respecting them should remain unimpaired. p. 30

By such an Act, the Legislature itself repeals the former enactments, and only leaves to the commission the power to fix the time when the repeal shall become operative. p. 31

The Legislature can establish the rates to be required by the corporations operating public utilities, and change them from time to time; provided that the rates established be not confiscatory. p. 30

And such regulations may be made either by the Legislature directly or through a board, with such power as may be delegated. p. 31

By a certain order of January 2, 1912, the Public Service Commission promulgated an order prescribing the rate for telephone charges in the City of Baltimore, to be effective on and after the following 1st of May, with an opportunity to a certain class of subscribers to continue their then existing contracts until the 1st of the next October; this option was further extended to April 1st, 1913, with the right to an association of that class of subscribers to show cause against the said rates up to January 1, 1913, and by another order dated October 20, 1913, such extension was made to be effective until January 1, 1913. The original order of January 2, 1912, under the Act, was so far final as to form the ground

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for a motion for a rehearing, and was such an order from which an appeal could have been taken within sixty days after its promulgation; the parties made no move for such a rehearing and took no action to stay the order within the time prescribed by section 43 of the Act, and therefore could not, in December, 1912, be heard to complain that an execution had been issued against them without an opportunity to be heard. p. 33

The fact that the proceedings for the investigation of the rates of the telephone charges were instituted by the telephone company when it submitted to the commission its schedule of proposed rates, and asked approval of them, does not differentiate the case from one where the investigation was instituted by the commission. p. 32

The presumption is always in favor of the proper performance of duty by public officials until the contrary is alleged and proved. p. 31

Decided April 30th, 1913.

Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

George Stewart Brown and *J. S. T. Waters* (a synopsis of whose brief follows), for the appellant.

I. *The Commission Cannot Give "Execution" before "Judgment."*—By its order, of October 29th, 1912, the Commission deprived us of our annual rate telephones on January 1st, 1913, while, by the same order, it reserved its decision upon the question of flat rates and agreed to take further evidence up to the final hearing in April, 1913, upon

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the question of continuing, or not, flat rate service, and further declared that later at some indefinite time in the future following said date of April 1st, 1913, it would finally decide the question concerning flat rates.

Up to the passage of the order of October 29th, 1912, we were protected in our holding of a flat rate service. The order of January 2nd, 1912, left us undisturbed until October 1st, 1912. Before October arrived the order of September 26th, 1912, continued us in possession of our rights till April 1st, 1913, three months after the date then set for final hearing.

The order of September 26th, 1912, makes a fresh start on the question of flat rates. You cannot make a new order reconsidering, rewriting and amending all that part of a previous order relating to the subject-matter (flat rates), and call it anything else than a new order, speaking for itself anew, from its own date, September 26th, 1912.

II. *The Entire Procedure by the Commission in the Telephone Company's Case Was Without Authority of Law, Ultra Vires and Void.*—There was no formal complaint from any user of telephones brought before this Commission against the Telephone Company, asking for the abolition of our service or of any flat rate service.

There was no action instituted by the Commission itself of its own motion on the subject of telephones. But this matter originated solely and entirely with the Chesapeake and Potomac Telephone Company.

Instead of publishing new rates and schedules in the method intended by the Act the Company filed a complaint against its own patrons.

No such initial procedure is contemplated by the Act. *I. C. C.* v. *D., L. & W. R. R.*, 216 U. S. 531; *C. I. & L. Ry. Co.* v. *Comm.*, 38 Ind. App. 439; *State* v. *C. M. & St. P. Ry. Co.*, 16 South Dakota, 517; *Commrs.* v. *O. Ry. & Nav. Co.*, 17 Oregon, 65.

Secondly, the Commission cannot propose rates and never obtained jurisdiction to fix a rate in this case, because, as

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we allege in our bill, and as is admitted on demurrer, they had not determined the existing rate to be unreasonable. *I. C. C., etc.*, v. *L. & N. R. R.*, 227 U. S. 92; *L. & N. R. R.* v. *I. C. C.*, 195 Fed. Rep. 545.

The complaint must be either:

(*a*) An investigation of the Company and its practices by the Commission on its own motion and acting for the public, which this was not; or

(*b*) A complaint against unreasonable, discriminating or preferential rates by subscribers or users, or the officers of a municipality which this was not.

(*c*) Followed by a finding that the rate was unreasonable, etc. We specifically allege in the bill that such finding was never made as to our rate, which allegation the demurrers admit.

(*d*) Then and then only the power is given to establish maximum rates. *So. Pac. Co.* v. *I. C. C.*, 219 U. S. 433.

III. *Denying a Judicial Review to Test the Jurisdiction of the Commission, denies "Due Process of Law."*—There is no appeal given by this Act, nor any Court given jurisdiction thereof.

Section 43 speaks of commencing "any" action "in any Court of Baltimore City of appropriate jurisdiction which may be adopted for the purpose, meaning, may we conjecture, if by injunction, etc., in equity before the chancellor, or if by mandamus or other legal right, then in a Court of Common Law?

An appeal would go to one definite certain Court, which would be given jurisdiction thereof in terms.

But section 43 is unintelligible, and therefore wholly void; for instance who is to adopt the Court and how is it to be adopted? What is a Court of "appropriate jurisdiction," and who is to say it is appropriate, the Court, the Commission, the Suitor, or who? Is it to be a Court of Law, a Court of Equity, or the Criminal Court? No appellate jurisdiction is conferred upon any Court by any provision

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of the Act creating the Public Service Commission, and independent of that Act no such jurisdiction exists.

Other Courts can only act entirely independently of this Act and upon substantive grounds of relief within their already existing jurisdiction.

The case of *C. M. & St. P. Ry.* v. *Minn.* 134 U. S. 418, struck down a rate fixed by the Minnesota Railroad Commission because the law gave no judicial review of the reasonableness of the rate, while this Maryland Commission seeks to deny us the fundamental right to challenge its jurisdiction, which right would necessarily exist without any mention in the Act itself of either an appeal or a judicial review.

IV. *The Act Provides for No Appeal to a Maryland Court to Test the Reasonableness of Rates Fixed by the Commission, Without Which the Rate-Making Provisions are Invalid.*—Irrespective of any constitutional or jurisdictional questions the Act must give an appeal to a State Court to review the reasonableness of the rates fixed by the Commission as merely too high or too low, extortionate or the reverse.

(1) A statutory rate, on the one hand, is not subject to judicial review except as confiscatory. *Budd* v. *New York*, 143 U. S. 517.

(2) A commission-made rate, on the other hand, must be reviewable as to its reasonableness merely, irrespective of any constitutional or jurisdictional question. *C. M. & St. P. Ry.* v. *Minn.*, 134 U. S. 418.

That case was not a case of confiscation. The Court was there dealing with a trifling milk rate from some local points in Minnesota to the City of St. Paul which could hardly affect the railway earnings one way or the other. Yet the Court said (at page 457):

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in con-

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troversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which in view of the powers conceded to it by the State Court, cannot be regarded as clothed with judicial functions or possessing the machinery of a Court of Justice."

Nor can our Maryland Commission be clothed with judicial functions or possess the machinery of a Court of Justice except in violation of our State Constitution, which describes definitely all the Courts in which judicial power shall be vested, and provides that the judges shall be elected, not appointed, and in violation also of Article 8 of our Bill of Rights, forbidding the union of legislative and judicial powers in one body.

V. *The Repeal (if any) Relates Solely to the Question of Price and Gives no Power to Abolish Our Service.*—Section 31½ uses the following language: "Every gas corporation and every electrical corporation shall furnish and provide such service, instrumentalities and facilities as shall be reasonably safe and adequate and in all respects just and reasonable. All charges made or demanded by such gas corporation and electrical corporation for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by the order of the Commission; and all Acts or parts of Acts heretofore passed and now existing, prescribing or limiting the price at which any gas corporation or electricical corporation, or any other corporation subject to this Act, may furnish, sell or dispose of its gas or electricity or other product or utility are hereby repealed, it being the intent of this Act that the powers of the Commission herein created to ascertain the price of such gas or electricity or other product of utility as provided for herein, shall supersede all such Acts or parts of Acts aforesaid. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the Commission, is prohibited."

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VI. *Section 31½ Relates Solely to Gas and Electrical Corporations.*

VII. *The Telephone Laws are Not Repealed.*—We contend that the words in the statute "not more than allowed by law," "conformably to the law," "within legal limits," etc., etc., and appearing in similar form of expression at least twenty times, wherever the fixing of rates or the enforcement of rates or the like is mentioned, show a clear purpose on the part of the Legislature to place a definite limit on the powers intended to be conferred. *Brinckerhoff* v. *Bostwick,* 99 N. Y. 185.

That while the Commission could fix rates they could not exceed the existing maxima.

Even in the repealing section itself it was thought necessary to twice repeat these expressions and to close the section in these emphatic words:

"Every unjust or unreasonable charge made or demanded for gas, electricity or any such service or in connection therewith, or in excess of that allowed by law or by order of the Commission is prohibited."

If the words immediately preceding had eliminated everything but the Commission's discretion why in writing that section should the expression "or in excess of that allowed by law" remain?

It immediately precedes the words "or by order of the Commission." This latter would have been sufficient if the preceding words had wiped the slate clean.

As is said by this Court:

"Why were the words 'not exceeding' thus inserted? What is their significance?" * * * "We cannot neglect these words." *Scott* v. *B. & O. R. Co.,* 93 Md. 505.

There is only one way to give both expressions a meaning, and that is that the "powers of the Commission to ascertain the price" are expressly limited by the latter clause, and their discretion prohibited to be exercised "in excess of that allowed by law" particularly when all the sections granting the rate-making power carefully repeat the qualification.

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Again all the sections providing for enforcement of the Act charge the Commission and its counsel to prevent charges by any Public Corporations of more than allowed by law.

And the only section referring to suits by the corporations to collect charges provides that, if "a price has been demanded in excess of that fixed by the Commission or by law in the municipality or county wherein the action arose no recovery shall be had therein, etc."

VIII. *The Necessity For Maximum Rate Laws. U. S.* v. *Asso.*, 168 U. S. 332.

IX. *Any Legislative Intent to Destroy the Existing Maximum Rates is Negatived by the Serious Consequences Which Would Ensue.*

X. *There can be no Power to Repeal a Law Granted to an Executive Board.*—It will not do to say that power to repeal and reconstruct the many maximum rate laws of the State, local, special and general in character, was intended to be conferred upon and confided to this Commission.

The power to repeal a law cannot be granted to an executive official, in violation of our fundamental division of powers into executive, legislative and judicial.

There has been no attempt heretofore in this State to establish a rate-making commission. And, therefore, our bill raises the question distinctly as to whether it can be done or not. *Bradshaw* v. *Langford*, 73 Md. 430.

But granting for the purposes of the argument, that the theory of rate-making by Commission will be accepted and applied in Maryland, here we have a step much further, namely, an attempt to delegate to this Commission the power to repeal one after another the various existing maximum rate laws, and in so doing to repeal them as to parts of the State while leaving them in full force in other parts as is attempted in this case, which only affects the City of Baltimore. Such power does not come within the theory on which rate-making by Public Commissions is sustained, but is to flatly confer upon an executive board the right to legislate

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and thus subvert the structial division of powers in our government, and cannot be sustained on any theory of constitutional construction. *St. L. Merchant's B. T. Ry. Co.* v. *U. S.*, 188 Fed. Rep. 195.

We have in this case an existing grounded-circuit-service telephone law which by the action of the Commission in passing the order is said to be "modified" out of existence.

At the same time the Commission makes a new rate and a new service "which necessarily involves a discretion as to what" the new law "shall be."

Nothing could be more clearly of the essence of fundamental legislative action which cannot be delegated to a Commission.

This is apparently the only case that has ever arisen where an executive officer, on the claimed authority of the statute creating his office, has asserted the right by action of his own to wipe from the statute books another and a different law which in his opinion conflicted with and limited his powers.

This is the power which we submit cannot be delegated to an executive officer by the General Assembly of Maryland.

Charles J. Bonaparte (by leave of Court) filed a brief in behalf of certain users of the "Flat Rate" telephone service, under Chapter 387 of the Acts of 1910. The following is a synopsis of the brief:

Section 368 and section 372 of Article 23 of the Code of 1912 (formerly section 333 and section 337 of the same article in the Code 1904) prohibited charges for certain telephone service at any rate exceeding $6.50 *per* month. It is claimed that these sections were repealed by section 31½ of the Public Service Commission Law (Law of 1910, p. 375; Code 1912, section 744), which attempts to vest in the Public Service Commission the right to regulate the rates of such services notwithstanding sections 368 and 372 of the Code.

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Section 54 of the Public Service Commission Laws declares that each section of the Act, every part of each section is to be independent (Laws 1910, p. 391; Code 1912, p. 758).

This section 31½ may be divided into three sections or parts, thus:

Part 1—

> Sec. 31½. Every gas corporation and every electrical corporation shall furnish and provide such service, instrumentalities and facilities as shall be reasonably safe and adequate and in all respects just and reasonable. All charges made or demanded by such gas corporation and electrical corporation for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the Commission.

Part 2—

> "And all Acts or parts of Acts heretofore passed and now existing, prescribing or limiting the price at which any gas corporation or electrical corporation, or any other corporation subject to this Act, may furnish, sell or dispose of its gas or electricity or other product or utility are hereby repealed, it being the intent of this Act that the powers of the Commission herein created to ascertain the price of such gas or electricity or other product or utility as provided for herein, shall supersede all such Acts or parts of Acts aforesaid."

Part 3—

> Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the Commission, is prohibited.

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These three parts of this section are therefore not only independent under the terms of the Act, but are, in fact, altogether inconsistent and mutually repugnant. The provisions of Part 1 and Part 3 show beyond reasonable doubt, an intention of the Legislature to maintain in force the existing rates "allowed by law" as maximum rates, leaving the Commission to determine what rates might be "just and reasonable" below these maximum charges. Part 2, however, professes to repeal "all Acts or parts of Acts * * * *prescribing or limiting* the price at which any * * * corporation subject to this Act may furnish, sell or dispose of its * * * product or utility." The words "not more than allowed by law" in Part 1, and the words "in excess of that allowed by law" in Part 3, become altogether meaningless and superfluous if this language of Part 2 is to be given its most obvious meaning and is to be considered an expression of legislative will.

If two successive sections of an Act are mutually repugnant, so that it is impossible to give a rational meaning to all the language of the first if the second be enforced, and to all the language of the second if the first be enforced, then the second operates as a repeal to the first. *Smith* v. *School Commissioners*, 81 Md. 516; *State* v. *Shelby County*, 36 Ohio St. 326; *Packer* v. *Sunbury and Erie R. R. Co.*, 19 Pa. St. 211.

From which it would appear that Part 2 of this section is in effect repealed by Part 3, and only Part 1 and Part 2 left effective.

In answer to an objection that these sections relate only to gas and electric light companies, we find that in section 40 of the same Act the following language occurs:

> All rates, tolls and charges used, made or demanded by any such telegraph company or telephone company for any telegraphic or telephonic communication or service shall be just and reasonable *and not more than allowed by law* or by order of the Commission and made as authorized by this Act. *Laws of* 1910, p. 386; *Bagby*, Art. 23, sec. 454, Vol. 1, p. 753.

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So that even if Part 2 of section 31½ be not repealed by Part 3, it is repealed by this section 40.

The essential element of the repugnancy of Part 2 of section 31½, with Parts 1 and 3, and with the language quoted from section 40, lies in the word "limiting."

In construing statutes, the mere words which the Legislature uses are not always controlling; it is the real intent which is to be sought after and must prevail. *Roland Park Co.* v. *State,* 80 Md. 451; *State* v. *Milburn,* 9 Gill, 109; *Milburn* v. *State,* 1 Md. 17; *Wilson, etc.,* v. *State, use of Davis,* 21 Md. 1.

The word "limiting," as used in section 31½, may be used of minimum no less than of maximum, charges, and if we consider, therefore, "limiting" as synonymous with "prescribing" or "fixing," we can give a sense to Part 2 of section 31½ which will make it harmonize with Parts 1 and 3, above quoted, and section 40. Reading the three parts of this paragraph of section 31½ together, it would then amount to laying down the rule that charges and tolls must be (1) just and reasonable, (2) not greater than prescribed by the Commission, (3) not more than allowed by law, and that all limitations or prescriptions contained in existing laws, *except those fixing the maximum charges,* should be repealed, to the end that, subject to the provisions of law fixing the highest rate which may be charged for a "product, service or utility," the Commission shall determine what rates would be just and reasonable in each particular case. It may be said and truly that this is giving a somewhat unusual meaning to the word "limiting;" but this Court gave more unusual and indeed an ungrammatical sense to the word "since" in *Roland Park Company* v. *The State,* above quoted and in the language of CHIEF JUDGE MCSHERRY, "the real intention when ascertained will always prevail over the literal sense of the language."

Moreover, Part 2 of section 31½ is in quotation marks, and amounts substantially to a statement that it is not the original thought of the Legislature, but that it is taken from

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some other statute or document, and without some statement as to the source and purpose of the quotation the indication of this fact would seem to be altogether meaningless and inappropriate. It suggests that something has been omitted, which, of course, the Court cannot supply; but as we have only a part of what the Legislature meant to say, it leaves it doubtful as to whether the Court has before it a sufficiently complete expression of the legislative will in this respect to justify it in treating the quoted passage as an expression of the legislative will at all. This is greatly strengthened when it is noted what glaring inconsistency there is between this passage and the whole tenor of the remainder of the Act. References to a rate of compensation fixed *by law* and *not* under the control of the Commission are found twice in section 13 of the Act—Laws of 1910, p. 355; *Bagby, I,* p. 726; once in section 23—Laws of 1910, p. 366, *Bagby, I,* p. 736; twice as already noted, in section 31½ itself—*supra;* three times in section 37—Laws of 1910, p. 382, *Bagby, I,* p. 750; once in section 38—Laws of 1910, p. 384, *Bagby, I,* p. 752; and once, as already noted, in section 40.

Ten times, at least, in the course of this enactment, the Legislature has used words clearly inconsistent with the provisions of the quoted portions of section 31½; ten times, at least, it has spoken in this Act of obedience to statutes when, if the part within quotation marks of section 31½ is a part of the law, and is to be construed as claimed by the appellees in this case, the statutes to which these references were made had no legal existence whatever. Under these circumstances the Court is authorized to hold that this borrowed portion of section 31½ is no part of the law, because, although physically inserted (just how, we know not) in the text of the statute, it forms no part of the expression of the legislative will. See—*Holy Trinity Church* v. *U. S.*, 143 U. S. 457; *U. S.* v. *Delaware and Hudson Co.*, 213 U. S. 366; *Same case*, 213 U. S. 403-415.

By Chapter 734 of the Laws of 1912 it is provided: "That a new section be and the same is hereby added to Article 23

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of Bagby's Annotated Code of the Public Civil Laws of Maryland, title 'Public Service Commission,' to be known as section 428-A, and to come immediately after section 428, and to read as follows": Laws of 1912, p. 1231.

By so doing the Legislature recognized Article 23 of Mr. Bagby's Code not only as *evidence* of the law in this State, but as the *law* of the State. It is well settled that such a recognition by the General Assembly makes that law which it treats as law. *State* v. *Greenwell,* 4 G. & J. 407, 418-419; *Basshor* v. *Dressel,* 34 Md. 503; and *Koch* v. *North Avenue Railroad Company,* 75 Md. 222.

And in so doing the Legislature declares that sections 333 and 357 of Article 23 of the Code of 1904, which became sections 368 and 372 of the same Article of Mr. Bagby's Code of 1912, were not to be deemed repealed by section 31½ of the Acts of 1910, Chapter 180, p. 375, and therefore the said sections, 368 and 373, are in force.

Our Public Service Commission, like a majority of the similar bodies created, and especially like the Virginia State Corporation Commission, is a body clothed with both judicial and legislative functions. *Winchester and Strasburg R. R. Co.* v. *Commonwealth of Virginia,* 106 Va. 264; *Dreyer* v. *Illinois,* 187 U. S. 71; *Prentis* v. *Atlantic Coast Line,* 211 U. S. 238; *Norfolk and Portsmouth R. R. Co.* v. *Commonwealth of Virginia,* 103 Va. 289.

But, while the Constitution of the United States and of the State of Virginia allows the same body to exercise judicial and legislative functions, our Declaration of Rights asserts, Article 8:

"That the legistlative, executive and judicial powers of government ought to be forever separate and distinct from each other; and no persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

While no case seems to have arisen in which this Court was compelled to hold an Act of Assembly unconstitutional

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by reason of this particular combination of powers in one office or official body, the force of the prohibition has been repeatedly recognized in decisions of this Court. *University of Md.* v. *Williams,* 9 G. & J. 410; *Beasley* v. *Ridout,* 94 Md. 659; *Prentis* v. *Atlantic Coast Line,* 211 U. S. 237.

The action of this Commission is unlike that of certain administrative powers, such as County Commissioners, Commissioners for Openings Streets, etc., and others which discharge primarily *quasi* judicial functions subject to a right of appeal to the Courts with respect to all questions of law or fact involved in the proceedings.

Their work is essentially preliminary and the right to a determination by those to whom alone the judicial power is entrusted by the Constitution is carefully preserved to any one whose rights are affected by their action. *Steuart* v. *Baltimore,* 7 Md. 500; *Danner* v. *State,* 89 Md. 226.

Charles H. Carter (with a brief by *Bernard Carter & Sons,* of which a synopsis follows), for the C. & P. Tel. Co., appellee.

I. As to whether the Public Service Commission Act was unconstitutional, on the ground of its being an illegal delegation of legislative power. See—*Tilley* v. *Savannah, etc., R. R. Co.,* 5 Fed. Rep. 641, 653, 659; *Chicago, etc., R. R. Co.* v. *Dey,* 35 Fed. Rep. 866, 875; *Railroad Commission Cases,* 116 U. S. 307, 336, 347, 352; *Reagan* v. *Farmers' Loan, etc., Trust Co.,* 154 U. S. 362, 393 and 394; *Honolulu Rapid Transit Co.* v. *Hawaii,* 211 U. S. 282, 290, 291; *Pensacola, etc., R. R. Co. Case,* 29 Fla. 620; *Gulf, etc., R. R. Co.* v. *State,* 120 S. W. Rep. 1028, 1034; *Mich. Central R. R. Co.* v. *Mich. R. R. Com.,* 160 Mich. 355; see also—*Downs* v. *Swann,* 111 Md. 53 and 61.

II. As to the 4th paragraph of the bill, alleging that the Commission has no warrant in law or authority to abolish the Statutory Flat Rate Terms of $78.00 per annum.

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Sections 368 to 372, inclusive, of Bagby's Code of 1912, were enacted by Act of 1892, Chapter 387, and prescribe the maximum rate of $6.50 per month for telephone services in cities and towns; rates for telephone services between cities and towns within the State; provide against discrimination between patrons and penalties for violations of the provisions of the laws.

Section 373 was enacted by Act of 1894, Chapter 207, providing for special contracts in writing for special forms and amounts of telephone equipment and service, but that nothing therein contained should prevent or interfere with the furnishing the service established by the Act of 1892, Chapter 387.

Such was the law in regard to regulation of telephone companies for 18 years, when the Act of 1910, Chapter 180, known as the "Public Service Law of Maryland," was enacted.

This Act provides for the whole subject of regulation and administration of telephone companies within the State, and inasmuch as the provisions of the Acts of 1892 and 1894 greatly interfere with the broad power and wide discretion conferred upon the Public Service Commission of Maryland by the Act of 1910, the Acts of 1892 and 1894 were repealed by the Act of 1910. *W. Md. R. R. Co.* v. *Appeal Tax Court,* 50 Md. 296; *State* v. *N. C. Rly. Co.,* 90 Md. 473-4.

Moreover, the Acts of 1892 and 1894 are expressly repealed by section 31½ of the Act of 1910.

III. Chapters 21 and 734 of the Act of 1912, the first making Bagby's Code of 1912 evidence of the law, and the second adding a new section to that Code, do not re-enact the provisions of the Acts of 1892 and 1894, codified in Bagby's Code. *Erb* v. *Grimes,* 94 Md. 104.

IV. But assuming that the Act of 1892, as codified in Bagby's Code of 1912, was not repealed by the Act of 1910, the Public Service Commission had power under the provisions of the Act of 1910 to discontinue the Statutory Service.

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V. The allegation that the effect of the orders of the Commission of September 26th and October 29th, 1912, were to re-open the decision reached by the Commission to abolish the Statutory Flat Rate for business service, are unsupported by and contrary to the provisions of the exhibits and are not to be taken as true under the demurrer. *Gusdorf* v. *Schleisner,* 85 Md. 360.

VI. No confusion or uncertainty as to the legal status of the complainants occasioned by the order of the Commission.

VII. The complainants have not filed proper exhibits with their bill to enable the Court to consider the questions raised by the allegations that the order of the Public Service Commission passed January 2nd, 1912, was passed at the instance and on the petition of the Chesapeake and Potomac Telephone Company of Baltimore City, and that the Commission did not determine the $78.00, or Statutory Rate for business service, to be unreasonable. *Sprigg* v. *Western Telg. Co.*, 46 Md. 74 and 77; *Mayor* v. *Weatherby*, 52 Md. 450; *Burr's Case,* 19 Md. 135; *Banks* v. *Busey*, 34 Md. 439; *Morton* v. *Grafflin,* 68 Md. 545 and 556; *Miller* v. *Balto. County Marble Co.*, 52 Md. 646.

W. Cabell Bruce (a synopsis of whose brief follows), for the Public Service Commission, appellee.

(1) If the General Assembly had no constitutional power to confer upon the Public Service Commission the authority to fix telephone and other rates, as is contended in the bill, it is, of course immaterial to inquire whether the plaintiffs appealed seasonably from the orders of the commission of January 2, 1912, April 25, 1912, and September 26, 1912: for, in that case, they would have a standing in a Court of Equity entirely independent of the Public Service Commission Law for the purpose of restraining the Commission and the Telephone Company from interfering with their use of "the statutory telephone service." But at this late day,

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when the Interstate Commerce Commission is asserting its vast and undisputed jurisdiction, founded on provisions, upon which those of the Public Service Commission Law of Maryland are closely modeled, and Public Service Commissions in New York, Wisconsin and other States, to say nothing of railroad and other like commissions, based upon similar grants of authority by the Legislature, are in full operation, we deem it unnecessary to argue that the Public Service Commission Law of this State is not unconstitutional and void as involving an undue delegation by the General Assembly of powers committed to it exclusively by the State Constitution. The law does not delegate legislative power but merely confers upon the commission the administrative function of enforcing certain definite standards or rules of regulation which the Legislature has itself prescribed. If this Court has any judicial curiosity left for such a stale inquiry as this distinction involves, it will soon be set at rest, we think, by an examination of the following authorities: *Stone et al.* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 336; *Stone et al.* v. *Illinois Central R. R. Co.*, 116 U. S. 347; *Stone et al.* v. *New Orleans & Northeastern R. R. Co.*, 116 U. S. 352.

These three cases are collectively known as the Railroad Commission cases: *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 393, 394.

To the same effect substantially the decisions in the following two cases: *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, 418; *Reagan* v. *Farmers Loan and Trust Co.*, 154 U. S. 420; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 19; *Honolulu Rapid Transit Co.* v. *Hawaii*, 211 U. S. 282, 290, 291; *Joyce, Franchises* (1909), secs. 160, 166, 167, 168, 169, 170, 381, 390, 400, 401, 408; *Hutchinson, Carriers* (1906), Vol. II, sec. 574, p. 651, sec. 575; 8 *Cyc.* 834; 6 *Ency.* 1022, 1030, note 14; *Cooley, Constitutional Limitations*, pp. 163 to 174 871 to 873; *Beale & Wyman, Railroad Rate Regulation*, sec.

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1309; *Noyes, American Railroad Rates,* page 206; *Mobile, Jackson and Kansas City R. R. Co. v. Mississippi,* 210 U. S. 187, 202; *Dow v. Beidelman,* 125 U. S. 680; *Georgia R. R. and Banking Co. v. Smith,* 128 U. S. 174, 179, 180; *Charlotte, Columbia and Augusta R. R. Co. v. Gibbes,* 142 U. S. 386, 393, 394; *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota,* 134 U. S. 418; *Budd v. New York,* 143 U. S. 517; *New York and New England R. R. Co. v. Bristol,* 151 U. S. 556, 571; *St. Louis and San Francisco Ry. Co. v. Gill,* 156 U. S. 649, 659, 666; *Chicago, Milwaukee and St. Paul Ry. Co. v. Tompkins,* 176 U. S. 167; *McChord v. Louisville and Nashville R. R. Co.,* 183 U. S. 483, 499; *Minneapolis and St. Louis R. R. Co. v. Minnesota,* 186 U. S. 257; *Atlantic Coast Line R. R. Co. v. Florida,* 203 U. S. 256; *Seaboard Air Line Ry. Co. v. Florida,* 203 U. S. 261; *Alabama and Vicksburg R. R. Co. v. Mississippi Railroad Commission,* 203 U. S. 496; *Siler v. Louisville and Nashville R. R. Co.,* 213 U. S. 175; *Central of Georgia Ry. Co. v. Railroad Commission,* 161 Fed. Rep. 925, 984, 985; *s. c.* 170 Fed. Rep. 225; *State v. New Haven and Northampton Co.,* 43 Conn. 351, 382; *State v. Atlantic Coast Line R. R. Co.,* 56 Fla. 617, 624, 636, 637; *Southern Ry. Co.* v. *Atlantic Stove Works,* 128 Ga. 207, 216; *Southern Ry. Co.* v. *Melton,* 133 Ga. 277, 290; *Tilley* v. *Savannah, Florida and Western R. R. Co.,* 5 Fed. Rep. 641, 653 to 659; *Chicago, Burlington and Quincy R. R. Co.* v. *Jones,* 149 Ill. 361, 378; *Southern Indiana Ry. Co.* v. *Railroad Commission,* 172 Ind. 113, 123; *Burlington, Cedar Rapids and Northern Ry. Co.* v. *Dey et al.,* 82 Iowa, 312; *State* v. *Missouri Pacific Ry. Co.,* 76 Kansas, 467, 473 to 481; *Railroad Commissioners* v. *Portland and Oxford Central R. R. Co.,* 63 Me. 269, 283; *Michigan Central Ry. Co.* v. *Michigan Railroad Commission,* 160 Mich. 355; *State* v. *Fremont, Elk Horn and Missouri Valley R. R. Co.,* 22 Nebraska, 313, 329; *Southern Pac. Co.* v. *Bartine,* 170 Fed. Rep. 725, 749; *Merrill* v. *Boston and Lowell R. R.,* 63 N. H. 259, 264; *Trustees of the Village of Saratoga Springs* v. *Saratoga Springs Electric Light and Power Co.,* 191 N. Y.

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123; *People ex rel. R. R. Co.* v. *Public Service Commission*, 194 N. Y. 383; *Atlantic Express Co.* v. *Wilmington and Weldon R. R. Co.*, 111 N. C. 463; *Gulf, C. and S. F. Ry. Co.* v. *State*, 55 Texas Civ. App. 108; *State ex rel. Great Northern Ry. Co.* v. *Railroad Commission*, 52 Wash. 33, 36, 37; *Minneapolis, St. Paul and Sault Ste. Marie Ry. Co.* v. *Railroad Commission*, 136 Wisc. 146, 163, 164.

It is needless to further multiply the citation of authorities upon this point. It is sufficient to say that in twenty-four States of the Union the power of the Legislature to commit to a commission the regulation of corporations has been expressly upheld, and in no State in the Union, it is believed, has this power ever been judicially denied. See also, *Downs* v. *State*, 111 Md. 53, 61; *Baltimore* v. *Clunet*, 23 Md. 449, 469; *Baltimore* v. *Gahan*, 104 Md. 145, 155.

Our State Board of Medical Examiners, State Board of Commissioners of Practical Plumbing, Live Stock Sanitary Board, State Board of Dental Examiners, Bureau of Industrial Statistics, and State Roads Commission, are illustrations of the extent to which powers which the Legislature itself may exercise have been committed to commissions in this State. We select these boards as illustrations because their powers have all been upheld by the Court of Appeals. *Scholle* v. *State*, 90 Md. 729; *Manger* v. *Board*, 90 Md. 659; *Watson* v. *State*, 105 Md. 650; *Singer* v. *State*, 72 Md. 464; *State* v. *Broadbelt*, 89 Md. 565; *State* v. *Knowles*, 90 Md. 646; *State* v. *Hyman*, 98 Md. 596; *Bonsal* v. *Yellott*, 100 Md. 481.

But if the plaintiffs have no standing in this Court independent of the Public Service Commission Law, it then becomes a matter of essential importance that their appeal to the Circuit Court was too late, so far as the orders of January 2, 1912, April 25, 1912, and September 26, 1912, are concerned, inasmuch as their bill, which was filed (as we have seen) on December 23, 1912, was filed after the lapse of more than sixty days from the date of each and every one of these orders (Pub. Serv. Com. Law, sec. 43). It was filed,

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it is true, within the period of sixty days from the passage of the order of October 29, 1912, but, if that order operated no change in the order of January 2, 1912, except in extending the life of existing flat rate contracts from October 1, 1912, to January 1, 1913, it was a mere dependency (of purely secondary importance) of the order of January 2, 1912, and in itself wholly insufficient to supply a basis for an appeal seeking to enjoin the substitution of the measured business service for the statutory service finally worked by the order of January 2, 1912. When, therefore, the bill was dismissed in this case, the order of October 29, 1912, logically, if not necessarily, drawn into the decree of dismissal along with the three previous orders of the Commission. A mere order extending the time when the flat rate service was to be supplanted by the measured service finally provided for by the order of January 2, 1912, obviously furnished no adequate foundation for such relief as that prayed in this case. But how untenable seems to be the position of the plaintiffs that they did not take their appeal earlier because to do so before a final determination would have been premature and productive of unnecessary litigation and expense, when we recollect that the order of January 2, 1912, was an absolutely final order in every sense, and that the order of April 25, 1912, was merely explanatory of some of its terms, and that no other order was passed in the case by the Commission until September 26th, 1912, and that yet the plaintiffs never took an appeal to the Circuit Court until December 23, 1912. The truth is that not only was the order of January 2nd, 1912, a final order in its terms, but there was nothing in the terms of any one of the three subsequent orders to disturb this finality. An examination of the four orders which are filed as exhibits with the bill and which, of course, control any inaccurate version of their terms contained in the bill, shows that from first to last the continuity of the order of January 2nd, 1912, substituting the measured service for the flat rate service remained unbroken, and that the three subsequent orders of the Commission

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operated no practical result except that of extending on the whole the time when existing contracts for the flat rate service were to cease pursuant to the provisions of the order of January 2nd, 1912, and affording an opportunity to the Protective Telephone Association to produce good reasons why the Commission (which unlike a Court has complete control over its own orders at all times) should not revise the rates fixed by the order of January 2nd, 1912.

(2) The real basis, however, upon which the bill in this case rests is not the claim that the orders of the Commission are so devoid of finality that any interference with the preexisting contractual relations between the plaintiffs and the Telephone Company should be enjoined for the present, but the claim that the statutory provisions relating to the $78.00 grounded circuit telephone were not repealed by the Public Service Commission Law. Our answer is that they were. By section 31½ of that law it is provided that "all Acts or parts of Acts heretofore passed and now existing, prescribing or limiting the price at which any gas corporation or electrical corporation or *any other corporation subject to this Act,* may furnish, sell, or dispose of its gas or electricity or *other product or utility* are hereby repealed, it being the intent of this Act that the powers of the Commission herein created to ascertain the price of such gas or electricity or *other product or utility* as provided for herein, shall supersede all such Acts or parts of Acts aforesaid." Language more apt or comprehensive than this for the purpose of abolishing all rates fixed by statute at the time of the passage of the Public Service Commission Law and of delegating the determination of all such rates to the commission, it is hard to conceive. It is true that these words are found in a paragraph otherwise relating to gas and electrical corporations alone. It is no unusual thing for special legislative provisions to be found out of place even in measures which were not amended as hurriedly and freely as this law was. But the words themselves are too palpably general and clear to apply to anything less than the rates for all public utilities or services under

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the supervision of the commission. It is observable, besides, that in the Public Service Commission Law, under the headings relating especially to common carriers, there are similar references to other public service agencies than common carriers. For instance, under the heading "General Powers and Duties of the Commission in Respect to Common Carriers, Railroads and Street Railroads," there are repeated allusions in section 20 to persons and corporations subject to the Act other than common carriers. See also, to go no further, section 21, under the heading "Reports of Common Carriers, Railroads, Street Railroads."

Some stress was laid by the counsel for the appellants in the argument below upon the fact that the words of repeal which we have just cited are immediately preceded by these words: "All charges made or demanded by any such gas corporation and electrical corporation for gas, electricity, or any service rendered or to be rendered shall be just and reasonable and not more than allowed by *law* or by order of the commission," and are immediately succeeded by these words, "Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by *law* or by the order of the commission, is prohibited." The words "by law," it was contended, shows that rates fixed by statute were not intended to be repealed, but that co-existent rates, some fixed by statute and some fixed by the order of the commission, were contemplated by the law. The contention is of course hopelessly repugnant to the express language of the repeal,—"All Acts or parts of Acts *heretofore passed and now existing,* prescribing or limiting the price, etc." The requirements of the words "by law" can readily be gratified without doing any such direct violence to the unqualified wording of the repeal. It can be referred to future statutes fixing rates passed subsequent to the passage of the Public Service Commission Law or to tariff schedule rates filed by corporations and persons pursuant to section 15 and other similar sections of the law, and which until changed with the consent of the

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commission, are just as much rates fixed "by law" as maximum rates prescribed by orders of the commission after controversy and hearing.

Sections 368 to 372 of Article 23 of the Code codify the provisions of the Act of 1892, Chapter 387. Section 373 codifies the provisions of the Act of 1894, Chapter 207. The object of the Act of 1892 was to prescribe a fixed rate, $78.00, for the form of telephone equipment and service (now obsolescent) known as "The Grounded Circuit Telephone Equipment and Service." All the provisions of the Act other than those that relate directly to the rate are merely subsidiary to the latter, and are so integrally and dependently associated with the latter that they necessarily fall with the latter. The leading and only object of the Act of 1892 was to secure to the citizen the right to a fixed telephone rate and to define the character of the service for which the rate was paid so clearly that upon paying the rate the citizen would be certain of a service at least as good as that defined. In other words, the sole object of that Act was to prohibit extortionate telephone rates.

The Act of 1894 originated in the desire of the citizen to be left free to enter into a special contract at a higher price than $78.00 for a form of telephone equipment and service (The Metallic Circuit Service) better than the inferior grounded circuit service. The Act conferred this privilege, preserving, however, the right of the citizen to stickle for the defective $78.00 service, if he saw fit to do so. The effect of the Public Service Commission Law was to sweep away the $78.00 service and rate, as well as the unqualified freedom of the citizen to enter into special contracts for telephone service with the Telephone Company. If the Act of 1894 has been swept away, why not the Act of 1892 too? It manifestly has been.

Under statutes similar to our Maryland law it is held that the Court does not decide what order is, in its opinion, reasonable, but whether the Commission's order is unreasonable; that unless the corporation shows by clear and satis-

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factory evidence that the order is unreasonable then it must stand; that great weight must be given to the Commission's orders; and that if the order is such that reasonable men might differ with regard to it, then it cannot be said to be unreasonable, even though the Court itself might not have passed the order. *M. St. P. & St. M. Ry.* v. *R. R. Com.,* 136 Wisc. 146, 164, 167, 169; *Morgan's Line* v. *R. R. Com.,* 109 La. 247, 263, 265; *R. R. Co.* v. *Neb. St. Ry. Com.,* 85 Neb. 818, 824, 827, 830; *D. L. & W. R. R. Co.* v. *R. R. Com.,* 74 A. R. 269, N. J. 1909.

STOCKBRIDGE, J., delivered the opinion of the Court.

The General Assembly of 1892 by an Act, Chapter 387, undertook the regulation of the rates to be charged by Telephone Companies for the service rendered to their subscribers. The rental fixed by the Act was what is known as a flat rate of six dollars and fifty cents per month for one telephone. and a lesser rate where the customer had two or more instruments. The service rendered at that time was what is called the grounded circuit. As improvements were made in the apparatus, the metallic circuit came into use, and in 1894, the Legislature of that year by Chapter 207, amended the Act of two years earlier by providing that any person, firm or corporation might, by special contract, agree with the Telephone Company for special equipment or service, at such rates and upon such terms and conditions as might be stipulated in the contract. There were then two rates in force for the furnishing of telephone service, one a flat rate of $78.00 per annum, and the other a contract rate which might be varied according to the character of the service afforded.

In 1910 the Legislature passed an Act entitled "An Act to Create a Public Service Commission, and prescribing its powers and duties, and to provide for the regulation and control of Public Service Corporations and Public Utilities." (Chapter 180 of the Acts of 1910, page 338.)

This Act was, in the main, like similar Acts passed in a number of the States, in response to a supposed popular de-

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mand for a more effective and stringent regulation of firms or corporations engaged in the conduct of public utilities.

On January 2nd, 1912, the Pubilc Service Commission of Maryland promulgated an order prescribing the rates of charges for telephone service in the City of Baltimore, to be effective on and after May 1st, 1912, with an option to flat rate subscribers to continue their flat rate contracts until the first of October, 1912. These rates were included in seven distinct schedules, under which service for residences was placed on a flat rate basis, and a measured rate was substituted for the flat rate theretofore prevailing for business service. The order further provided that the rates so prescribed should be the only charges made for local telephone messages for a period of three years from May 1st, 1912. An order dated April 25th, 1912, recited that numerous complaints had been made with regard to the interpretation given to the order of January 2nd, and then the order proceeds to amplify and make additions to some of the provisions of that order which do not enter into the present case.

By an order passed by the Commission on September 26th, 1912, the order of the 2nd of January was still further modified by extending the period during which the flat rate subscribers might continue their contracts on that basis from October 1st, 1912, to April 1st, 1913, and granted to the Protective Telephone Association the right to show cause against the proposed revision up to January 1st, 1913. On October 29th, the Public Service Commission passed a fourth order, by the terms of which January 1st, 1913, was set as the date on which the measured rates provided for in the orders of January 2nd, and April 25th 1912, should become operative. By a letter of the Telephone Company dated December 18th, 1912, the plaintiffs were notified that on December 31st, their flat rate contract would be discontinued. Five days later the bill of complaint was filed, praying for an injunction to restrain any interference with the flat rate which the plaintiffs had been enjoying. A demurrer to the bill of complaint was sustained by the Circuit Court of Bal-

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timore City, and the bill dismissed. It is from that action that this appeal is taken.

A large number and variety of objections have been urged against the action of the Commission, most of which depend upon a careful examination and construction of the Act itself, in which adjudications elsewhere can have little force unless there is identity in the phraseology of the two Acts.

The most serious of the attacks made is that which is directed against the constitutionality of the Act. This is claimed to result from an attempt to invest the Commission with powers both legislative and judicial, possibly administrative as well, and therefore to be inimical to Article 8 of the Declaration of Rights, "that the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other; and no persons exercising the functions of one of said departments shall assume or discharge the duties of any other." What has the Commission done in this case? It has had hearings upon rates proposed to be adopted for the services to be rendered by a public utilities corporation, and has by its order promulgated the rates which the company shall be permitted to charge to those making use of the service. Nowhere is the nature of such an Act better characterized than in the opinion by JUSTICE HOLMES, in *Prentis* v. *Atl. Coast Line,* 211 U. S. 210, when he says: "The establishment of a rate is the making of a rule for the future and therefore an act legislative, not judicial in kind. Proceedings legislative in nature are not proceedings in a Court, no matter what may be the general or dominant character of the body in which they may take place. That question depends not on the character of the body, but upon the character of the proceedings. The decision upon them can not be *res judicata* when a suit is brought. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations, but the effect of the inquiry and of the decision upon it, is determined by the nature of the act to which the inquiry and decision led up.

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The nature of the final act determines the nature of the previous inquiry. So when the final act is legislative the decision which induces it can not be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case." And the same holding is made in *The Home Telephone Co.* v. *Los Angeles*, 211 U. S. 274. Following these cases it must be held that the order of the Public Service Commission complained of in this case was a legislative rather than a judicial or administrative act, or a combination of any two of them, and consequently not objectionable on the constitutional ground.

It has been strenuously argued on behalf of the appellants that there has been no express repeal of the Acts of 1892 and 1894, by which a maximum charge was established by the Legislature; that repeals by implication are never favored by the Courts, and that the Public Service Act recognizes that rates, fixed by the Legislature, may co-exist with rates established by the Commission, provided there is no conflict between them. That repeals by implication are not favored is perfectly true, but the difficulty with this contention of the appellants is that in sec. 31½ of the Act of 1910 (Ch. 180, p. 375), it is provided, "that all Acts or parts of Acts heretofore passed and now existing, prescribing or limiting the price at which any gas corporation or electric corporation, *or any other corporation subject to this Act,* may furnish, sell or dispose of its gas, electricity, *or other product or utility* are hereby repealed, it being the intent of this Act that the powers of the Commission hereby created to ascertain the price of such gas or electricity or other product or utility as provided for herein, shall supersede all such Acts or parts of Acts aforesaid." A more sweeping repeal is rarely to be met with. By express terms it relates not merely to gas and electrity, but to all other *products and utilities* produced or furnished by any corporation subject to the operation of the Act. Telephones and telephone service can not be declared otherwise than as a utility, and telephone companies are undoubtedly subject to the operation of the Act. Any possible doubt as to

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that is removed by section 39 which declares: "That this Act shall apply to telegraph companies, telephone companies, telephone lines and telegraph lines within this State and to persons and corporations engaged in the transmission of intelligence within this State by telephone or telegraph."

It is a well recognized rule that all statutes upon the same subject matter are to be harmonized as far as possible, and this is true whether the Acts relating to the same subject were passed at different dates, separated by long or short intervals They are all to be compared harmonized if possible, and, if not susceptible of a construction which will make all their provisions harmonize, they are made to operate together so far as possible consistent with the evident intent of the latest enactment. *Sutherland on Statutory Construction*, section 283. This rule of construction is applied even when the constitutionality of a statute is called in question. CHIEF JUSTICE WHITE has expressed it as follows in *U. S.* v. *Del. & Hudson Co.*, 213 U. S. 366: "The duty of the Court in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, is to adopt that construction which saves its constitutionality (*Knights Templar* v. *Jarman*, 187 U. S. 197) and this includes the duty of avoiding a construction which raises grave and doubtful constitutional questions, if the statute can be reasonably construed so as to avoid such questions. (*Harriman* v. *Int. St. Com. Comm.*, 211 U. S. 407.)" Bearing this rule in mind, and looking to the manifest intent of the Legislature, it is perfectly apparent that the purpose was to place all corporations handling public utilities under the supervision and control of the Public Service Commission, and with power in the Commission to regulate the rates charged for service, but that until the Commission did so regulate the charge any act or acts in force respecting them should remain unimpaired.

It has been urged that the effect of the Act, if it has any effect at all, is to invest the Commission with the power of repeal of an Act of the Legislature, and that this is beyond

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the power of the Legislature to do. The all sufficient answer to this contention is, that the Legislature itself has repealed the prior enactments, only leaving it to the Commission to fix the time when such repeal shall become operative. That the Legislature itself can establish the rates to be charged by corporations operating pubilc utilities, and change them from time to time is admitted. The only limit thereto is that such rates shall not be confiscatory; and it is settled by a long line of decisions in this State that the regulation of various agencies dealing with the public may be made either by the Legislature directly or through a board to which such power may be delegated. *Singer* v. *State,* 72 Md. 464; *State* v. *Broadbelt,* 89 Md. 565; *State* v. *Knowles,* 90 Md. 646; *Scholle* v. *State,* 90 Md. 729; *State* v. *Hyman,* 98 Md. 596.

An additional ground of objection urged by the appellants is that the only mode by which the Commission acquires jurisdiction over a utilities corporation is through an investigation instituted by that body or by its authority, or upon the complaint of some party feeling aggrieved by the action of the Commission; that the proceeding in this case came under neither of those heads, but was originated by the Telephone Company submitting to the Commission a schedule of proposed rates and asking the approval of them by the Commission. This is substantially the allegation of the first paragraph of the bill of complaint, and must be taken on demurrer as admitted. The bill does not, however, charge the Commission with acting in bad faith, or being derelict in the performance of any duty resting upon it. Assuming that the Telephone Company was the original actor in the proceeding, it was the plain duty of the Commission before passing any order or adopting any schedule to satisfy itself of the reasonableness of the charges proposed to be made for the service to be rendered. To have done less than this would have been a dereliction of duty, and until the contrary is alleged and made to appear by proof, the presumption in favor of the proper performance of duty by a public official must control. In no respect then does that which is alleged

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to have been done in this case differ from an investigation instituted by the Commission, concluded by an order by the Commission based upon the investigation so made.

Complaint is also made that in the present case the action of the Commission amounts to the granting of an execution before judgment is entered against the appellant. The line of argument upon this point is difficult to follow.

The original order of the Commission of January 2nd 1912, bore upon its face every appearance of finality. There were formally adopted a large number of schedules, and as to those which were reserved for future action, none of them could have affected the appellants. Immediately upon the passage of that order the appellants could have applied to the Commission for a rehearing under the provisions of section 11 of the Act, wherein it is provided "that after an order has been made by the Commission, any party interested therein may apply for a rehearing in respect to any matter determined therein, and the Commission may grant and hold such a rehearing, if, in its judgment, sufficient reason therefor be made to appear," but it is not alleged that the present appellants, or any of them, ever applied for such a rehearing. So far as can be judged from their conduct they acquiesced in the order which had been made by the Commission. Some suggestion was made in the argument that the act was invalid because it made no provision for an appeal to the Courts from an order of the Commission. It is true that the Act does not use the word "appeal" in connection with a resort to the Courts to obviate the effect of an order, but the rights of parties who may feel aggrieved by the action of the Commission are fully guarded and protected by the provision of section 43 of the Act "that any corporation subject to this Act, or any of the provisions of this Act, and *any person in interest being* dissatisfied with any order of the Commission, fixing any rate or rates, tolls, charges, schedules, joint rate or rates, or any order fixing any regulations, practices acts or service may commence any action in the Circuit Court for any county or before any judge of the Supreme Bench of

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Baltimore City of appropriate jurisdiction which may be adopted for the purpose, against the Commission as defendant to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is unlawful, or that any such regulation, practice, act or service fixed in such order is unreasonable, in which action a copy of the complaint shall be served with the summons," * * * provided such action or suit be begun within 60 days after the entry or rendition of the order. Section 45 then gives an express right of appeal to this Court from any judgment rendered in any action or suit so had. The order of the Commission now complained of was made on the 2nd January, 1912, no application for a rehearing by the Commission appears to have been made at any time, and the bill of complaint in this case was not filed until December 23rd following, more than eleven months later. The same policy of masterly inactivity appears to have been adopted with regard to the order of the Commission of April 25th. These facts have been somewhat fully recited because of the complaint that these appellants have been virtually denied a hearing, and an execution issued against them without an opportunity to be heard. The facts appearing in this record do not in any way support this contention.

A motion was made in the Court below, but not passed on, to dismiss the complaint of the appellants as to the orders of January 2nd, April 25th and September 26th, upon the ground that as to those orders and each of them, the suit was not instituted within the time allowed by the Act. Nor is it necessary to pass upon them now. This is the first case which has come to this Court involving the Act creating the Pubilc Service Commission, and even if the position taken by the counsel for the Commission is well founded a disposal of the case upon that ground would be to some extent an evasion of the questions involved. It has, therefore, seemed wiser to consider the several objections urged upon this Court and squarely meet the issues presented. Nor has there been much in the way of citation of authorities, for the reason that

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in a case of this character the important element is the act itself and the phraseology of it; for as was said by JUSTICE MOODY, in *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 274, "no case, unless it is identical in its facts can serve as a controlling precedent for another, for differences, slight in themselves, may through their relation with other facts, turn the balance one way or the other."

For the reasons indicated the decree appealed from will be affirmed.

Decree affirmed, with costs to the appellee.

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CONRAD CONRAD

vs.

FRED R. WILLIAMS.

Land Patents: previous grants; caveat; discretion of commissioner to extend time. Deeds and grants: construction; calls and courses and distances.

No patent should issue for land for which a patent has been previously granted, so long as such patent remains in force. p. 39

Where the courses and distances in a grant do not agree with a call, the latter must prevail. p. 40

Lands formed by alluvion, or receding waters, belong, in general, to the riparian proprietor. p. 40

When a caveat filed in the Land Office can not be heard on the day fixed, within twelve months of entering the same, the commissioner should extend the time upon proper cause shown. p. 41

Decided May 2nd, 1913.

Appeal from the Commissioner of the Land Office of Maryland (HANSON, Commissioner).

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The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

James J. Archer, for the appellant.

Stevenson A. Williams, for the appellee.

BURKE, J., delivered the opinion of the Court.

On the 29th of September, 1769, a patent was issued by the State of Maryland to Jacob Giles for a tract of land called "Rumney Marsh," located in Baltimore county and containing eleven hundred and eight-four acres. This land was particularly described in the patent which is of record in the Land Office. A certificate and plat of "Rumney Marsh" are recorded in that office,—the certificate of re-survey being dated March 25th, 1755. The first, second, third and fourth lines of "Rumney Marsh," as disclosed by the patent, run as follows:

"Beginning at a bounded sweet gum tree standing by a great swamp or pocoson, it being the beginning tree of the land called 'Dogwood Ridge,' and running thence north sixty perches unto the beginning of the tract of land 'The Marsh,' then bounding on 'The Marsh' *'then bounding on the Marsh,'* northeast by east sixty perches until it intersects the north northeast one hundred and fifty perches line of a tract of land called 'Uties Rumney;' then bounding on that line of 'Uties Rumney' to the end thereof, north northeast thirty-four perches; then still bounding on the said line east thirty-two perches until it intersects the first line of the land called 'The Marsh;' *then bounding on that line northeast by east thirteen perches unto Rumney Creek side;* then bounding upward on the said creek the three following courses, etc."

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On the 2nd day of April, 1910, a warrant was issued out of the Land Office directed to W. Elijah Somerville, a surveyor, to survey for Frederick R. Williams about one acre of vacant land in Harford county, bounded on the north by the land of Conrad Conrad; on the east by the middle of Rumney Creek and also by the lands of the Taylor's Island Ducking and Fishing Company, of Baltimore City; on the south by the lands of Robert Archer; and on the west by the lands of the said Conrad.

Mr. Somerville executed the warrant and filed in the Land Office a certificate of survey of eight acres and thirty-seven square perches of land by the name of "Maude Price's Price." The land surveyed is particularly described by courses and distances, and the certificate states that no part of the land described is covered by navigable water. The first, second, third and fourth lines of the land embraced in the certificate are as follows: "Beginning for the same at the end of the fifth or north fifty-five degrees east sixty perches line of a tract of land called 'Drew's Enlargement Improved' (Certficate of Re-Survey for Joseph Lusby, dated 15th day of December, 1761), which said beginning point is also the beginning of the 3rd or north northeast thirty-four perches line of a tract of land called 'Rumney Marsh' (Certificate of Re-Survey, dated 25th day of March, 1755, for Ann Atkinson. patented 29th September, 1769, to Jacob Giles), then with and binding on said "Rumney Marsh" with an allowance of three degrees, thirty-five minutes to the right to correct variation. the following four courses and distances; north twenty-six degrees, five minutes east thirty-four perches; south eighty-six degrees, twenty-five minutes east thirty-two perches; north fifty-nine degrees, fifty minutes east thirteen perches; north twelve degrees, twenty-five minutes west thirty and three-tenths perches, more or less, to the westerly shore of Romney Creek." A copy of the plat returned by the surveyor which is here inserted, will show the location of the land in dispute.

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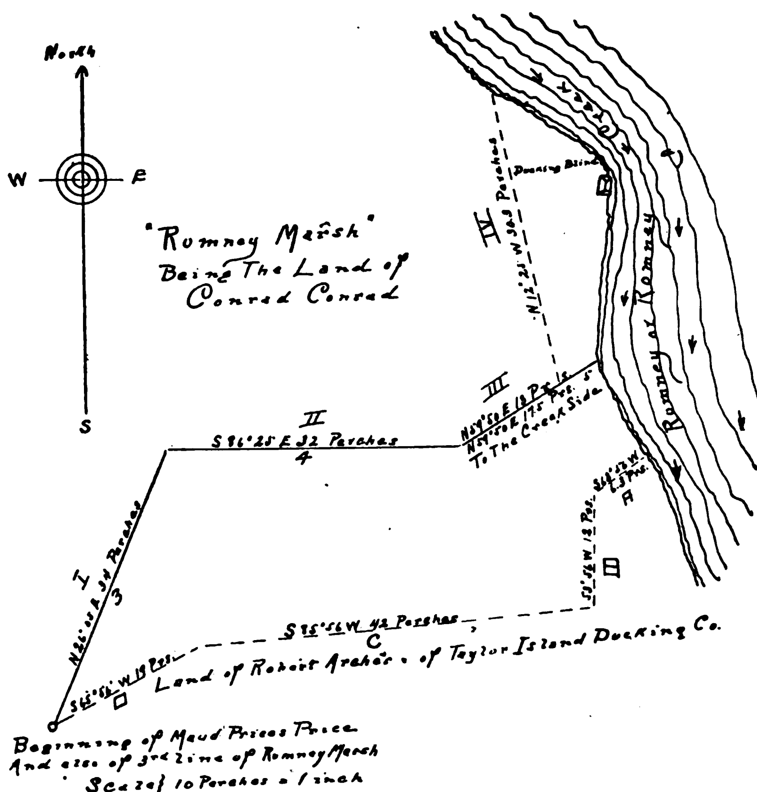

NOTE—The said lines numbered 3, 4, 5, with arabic numerals are the 3d, 4th and 5th lines of "Rumney Marsh" with the 5th line carried to Rumney Creek, as called for in the certificate of survey and patent of said "Rumney Marsh" (The next 3 courses of "Rumney Marsh" run North-Westward binding on said creek for a distance of 112 perches).

Three facts are apparent from the patent of "Rumney Marsh" granted to Jacob Giles in 1769 and from the certificate and plat made and returned to the Land Office by Mr. Somerville: First, that the first, second and third lines of "Maud Price's Price," which is claimed to be vacant land, correspond with the third, fourth and fifth lines of "Rumney Marsh" patented to Jacob Giles; and secondly, that a vacancy was created by rejecting or disregarding the call,—Romney Creek Side, in the Giles patent; and thirdly, that there would

exist no vacancy west of Romney Creek and north of the first, second and third lines of "Maud Price's Price" had Mr. Somerville adopted the *call* instead of *distance* in the Giles patent in running the third line of "Maud Price's Price."

On the 18th of March, 1911, Conrad Conrad filed with the Commissioner of the Land Office a caveat to the issuing of a patent to Mr. Williams for the land described in the survey made by Mr. Somerville, and on the 15th of March, 1912, he applied to the Commissioner to set a day for a hearing upon the caveat, and called his attention on the 21st of March, 1912, to the courses and distances in the Giles patent, and on the 26th of March, 1912, he directed the Commissioner to file in the caveat proceeding a certified copy of the patent issued to Jacob Giles in 1769. The record of the Land Office shows the following entries in this case:

CLOSED. "Verbal application was made by counsel for the caveator (3/15/12), and later made in writing for the setting of a day for the hearing in this matter. The Commissioner upon mature consideration decided this to be a physical impossibility, because of the absolute lack of time for the proper serving subpœna and other necessary notice for a hearing before the caveat would become vacated by operation of law. Therefore it is on March 27th, 1912—Ordered that the caveat of Conrad Conrad be and the same is hereby dismissed as per request of caveatee; the same being released by operation of law, and patent to issue. Caveator to pay costs."

The appeal before us was taken from this order.

Upon the facts we have stated, we are of opinion that the order appealed from must be reversed, and the case remanded to the Commissioner of the Land Office in order that the caveat may be heard and determined upon its merits. The general and well settled rule of the Land Office is, that no patent shall be issued for any land for which a patent has been previously granted, so long as such patent remains in

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force; and it is equally undeniable that exceptions to this general rule should be admitted with much caution. *Smith, Executor;* v. *Baker,* 4 Md. Chancery, 29 and other cases. It is also well settled that where the courses and distances in a grant do not agree with the call, the call will prevail and the courses and distances will be rejected. It is said in *Hammond* v. *Ridgely,* 5 H. & J. 245, that "in doubtful cases, the exposition is to be given which is most beneficial to the grantee; and pursuant to that principle, the preference was given to calls originally because generally, the location by calls gave the grantee more land than the location according to course and distance. Almost every grant that has calls, as well as courses and distances, is susceptible to a double location, because the call, and the course and distance, seldom, if ever precisely agree. If the call is imperative or peremptory, in the judgment of the Court, it must be complied with, and the course and distance rejected, if they do not correspond with the call. If the call is not imperative, or cannot be proved, the location must be according to course and distance."

Tested by this rule, the act of the surveyor in running the third line of "Maud Price's Price" was wrong, because he rejected the call in the Giles patent, and adopted the distance in the fourth line of that patent. He should have been controlled by the call and not by the distance of the line. It may well be assumed that in 1769 thirteen perches in the fifth line of "Rumney Marsh" would have carried to Rumney Creek Side,—the call mentioned in the Giles patent and that the failure of that distance now to reach the call is due to alluvion or receding waters in the intervening years, in which case the added land would belong to the riparian proprietor and could be taken up as vacant land. *Linthicum* v. *Coan,* 64 Md. 453.

The facts before the Commissioner at the time he passed the order appealed from presented a *prima facie* case in support of the caveator's contention. It was a contested case within the principles announced in *Jay* v. *Van Bibber,* 94

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Md. 688, and the Commissioner in dismissing the caveat under the circumstances disclosed by the record fell into an error. The caveator had a right to a hearing, and the commissioner made a mistake in assuming that the caveat could not be heard within the time limited by law. It was his duty to have set a day for the hearing upon the request of the caveator made on the 15th of March, 1912, and if the case could not have been heard upon the day fixed, within the period of twelve months of entering the same, the commissioner had the power to grant further time "Under special circumstances," presented to him.

Order reversed, with costs to the appellant, and case remanded for a hearing on the caveat.

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MARGARET A. BOYD
vs.
MARY KELLOG.

Bills of Exceptions: preparation; time for—.
Rules of Court.

Where a rule of Court provides that, unless otherwise expressly allowed by the Court, bills of exception shall be prepared and submitted during a sitting of the term at which such exceptions were taken, exceptions submitted after the adjournment of the term of Court at which they were taken are too late. pp. 43-45

The sittings of the term referred to in the rule do not include special sittings, held after the sittings of the term, for the transaction of such business as may arise from time to time, after the regular term was ended. p. 44

Decided May 2nd, 1913.

Appeal from the Circuit Court for Howard County (FORSYTHE and BRASHEARS, JJ.).

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

John G. Rogers and *Henry A. Whitaker,* filed a brief for the appellant.

Walter W. Preston and *James Clark,* filed a brief for the appellee.

BURKE, J., delivered the opinion of the Court.

This is an appeal from a judgment of the Circuit Court for Howard County. The amended declaration upon which the case was tried charged the appellee with negligence in guarding and looking after a fire which she had started on

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her own property, and that in consequence of such negligence the fire spread over the lands of the appellant and burned and destroyed her timber, rails and fences. At the conclusion of the plaintiff's case, the Court granted a prayer which directed a verdict in favor of the defendant,—the Court being of opinion that under the pleadings and evidence the plaintiff had offered no evidence legally sufficient to entitle her to recover. A motion has been made by the appellee to dismiss the appeal, and we are of opinion that this motion must prevail.

The thirty-second rule of the Circuit Court for Howard County relating to exceptions taken to the rulings of the Court and the preparation and signing of bills of exception provides that, "in every case, unless otherwise expressly allowed by the Court, the bill of exceptions shall be prepared and submitted to the Court during the sittings of the term at which such exceptions shall be taken." This rule was considered by this Court in *Sieling* v. *Brunner,* 117 Md. 682, and the appeal in that case was dismissed upon the authority of the case of *Livers* v. *Ardinger,* 90 Md. 36. In that case the Court construed the forty-first rule of the Circuit Court for Washington County which was identical in language with that portion of the rule of the Circuit Court for Howard County above quoted. In dealing with the facts disclosed by the record in that case and in determining the proper construction to be placed upon the rule, the Court said: "After the continuous sitting from day to day has ceased; after the jury was discharged for the term, and presumably after the general business, as indicated by the calendar, had been disposed of, there were sittings on special days, during which special matters were attended to; for instance, on one occasion, a motion to quash was heard; on another, several parties were sentenced to various terms of imprisonment; on another, jurors for the ensuing term were drawn, and on other occasions nothing at all. Can these special sittings be parts of the 'sittings of the term,' as contemplated by the Court

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which prepared and established the Rule? Such a construction would not be effectual to work any change whatever in the rule theretofore in force, by which a party had the whole term during which to submit his bills of exception. We are of opinion that the purpose of the rule was to require the presentation of bills of exception, to be made at a time when the testimony given at the trial and the course of its events were still fresh in the minds of Court and counsel. It was therefore, ordered that the attention of the Court should be called to the exceptions, during the period when the general business of the term was being disposed of, and before the minds of the judges had become occupied with other matters. To postpone the submission of bills of exception to a time more remote than this could only result in uncertainties as to what had actually occurred at the trial, and by reason thereof provoke controversies between counsel, which would be most difficult of satisfactory adjustment, by reason of the impossibility of determining with precision what had actually transpired. For these reasons, it seems to be clear, that the phrase 'during the sittings of the term,' as employed in the rule must be taken to mean those sittings which are being held at the time of the trial. According to the practice throughout the State, the Circuit Courts meet on the first day of the term, and continue their sessions from day to day, until they have disposed of all the cases on their several dockets. These sittings are those that are referred to in the rule, by the use of the words 'the sittings of the term,' but they do not include special sittings, held after the 'sittings of the term,' for the purpose of keeping the Court in session during the term, for the transaction of such business as may arise from time to time, after the regular sitting has ended."

The record in this case shows that the verdict was rendered on the 24th of September, 1912, and that the judgment was entered on the verdict in favor of the defendant for costs on the 30th day of September, 1912. It further shows that on September 25th, 1912,—the day following the trial of this case,—the Court took up the case of *Oldfield* v. *Oldfield,* and

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was occupied in the trial of that case until the morning of September 30th, 1912, and in the afternoon of that day the Court disposed of the case of *State* v. *Warfield,* and that being the last case for trial during the September Term, the Court discharged the jury from further attendance. Nearly a month later, the Court met and overruled a motion for a new trial, and nothing further appears to have been done during the September Term.

"No application was made to the Court for an order extending the time for the signing of bills of exception in this case, until the 30th day of November, 1912, when an order was passed extending the time until December 10th, 1912." The bills of exception in this case were signed on the 5th day of December, 1912, after the adjournment of the September Term.

It is perfectly clear, upon the facts and under the authority of the two cases cited, that the bill of exceptions in this case was not signed "during the sittings" of the term at which the exceptions were taken. They were signed over the protest of the appellee. At the time the order extending the time was signed, the time for signing a valid bill of exceptions had passed. The Court then had no power under the rule to sign a bill of exceptions, and it could not re-invest itself with that power by the order of extension signed after the "sittings" of the September Term. Such a construction would nullify the rule. The extension of time for the preparation and signing of the exceptions, if desired, must be obtained during the sittings of the term. To hold otherwise would ignore the reasons which induced the passage of the rule. Where competent official stenographers are employed by the Courts, the reasons which led to the passage of such a rule as the one under consideration no longer exists, but where such a rule is in force this Court has no power to repeal or modify it.

Appeal dismissed, with costs to the appellee.

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JOHN W. E. SUDLER AND ARTHUR E. SUDLER, NEXT FRIENDS OF LAURA L. BEATTY, INFANT, *vs.* FOSTER SUDLER.

Infants: guardians of—. Jurisdiction of Orphans' Court; domicile of infant; change of—. Natural guardian. Guardian's bond. Administrator of decedent: not guardian for the infant children.

An appeal will not lie from an order of the Orphans' Court appointing a guardian, when the Court had jurisdiction to make such appointment. p. 48

The provisions of the Code (section 144, Article 93), conferring jurisdiction for the appointment of guardians of minor children on the Orphans' Courts where the infants reside, refers to the domicile and not to the mere place of the infants' residence. pp. 48, 49

A minor can not by his own intention or act fix or change the place of his legal domicile. p. 50

The domicile of a minor for purposes of guardianship is that of the parents or of those standing *in loco parentis,* even though at the time of such appointment such infant may be residing in another county or State. p. 50

Where the mother of a minor, whose father is dead, has made her domicile in a certain county, the Orphans' Court, of such county, upon her death, has jurisdiction to appoint a guardian for the infant. p. 52

The father of a legitimate child, and, upon his death, the mother, is the natural guardian of the children. pp. 50, 52

Semble: the next of kin will not succeed to such office as of right. p. 53

But before the mother may act as guardian she must qualify and give bond. p. 54

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Under the Code, a guardian, before proceeding to act as such, must file bond in such security as the Court shall approve. p. 53

On the death of the minor's father and mother, one of her uncles removed her from the county to Baltimore City, where she and he intended her permanent home to be made; the uncle appealed from the order of the Orphans' Court of the county, where the parents had died and which had been their residence, appointing a guardian for the infant. *Held,* that, without regard to other questions, since the uncle had not qualified as guardian by giving bond, he could not act as guardian for the purpose of changing the domicile of the infant, and the order of the Orphans' Court appointing the guardian was affirmed. p. 53

Section 151 of Article 93, providing that when no guardian is appointed the administrator of the testator's estate should take charge of the estate and discharge the duties of the guardian to the infant, only contemplates the temporary care of the infant's property. pp. 55-56

The appointment of the administrator of a decedent's estate as guardian for his infant children is not favored. p. 56

Decided May 10th, 1913.

Appeal from the Orphans' Court of Queen Anne's County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Isaac Lobe Straus (with whom were *H. B. W. Mitchell, James T. Bright, J. Frank Harper,* and *Walter D. Eiseman,* on the brief), for the appellant.

L. Wethered Barroll (with whom was *Madison Brown,* on the brief), for the appellee.

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BOYD, C. J., delivered the opinion of the Court.

The question in this case is whether the Orphans' Court of Queen Anne's County had jurisdiction to appoint a guardian of Laura L. Beatty. It was decided as early as *Compton* v. *Compton,* 2 Gill, 241, that no appeal will lie from an order of the Orphans' Court appointing a guardian when it has jurisdiction to make the appointment, and JUDGE MAGRUDER said: "The Orphans' Court, in the discharge of this duty, may make an injudicious choice; but it is not probable that this Court, without any information to assist them, could exercise such a power more judiciously." Whether or not the Court had jurisdiction to appoint a guardian was dependent upon where the infant resided. Section 144 of Article 93 of the Code of 1912 provides that whenever a male under the age of 21 years or a female under the age of 18 years acquires or is entitled to property as therein described, "and the said male or female shall not have a guardian appointed by last will and testament, agreeably to law, *the Orphans' Court of the county in which such infant shall reside* shall have power to appoint a guardian to such infant until the age of twenty-one years, if a male, and until the age of eighteen, if a female, or married," etc.

On December 10th 1912, the appellee made application to the Orphans' Court of Queen Anne's County to be appointed guardian of Laura L. Beatty. Arthur E. Sudler, one of the appellants, objected to the appointment and asked for further time. The Court fixed December 18th, 1912, as the time for the determination of the matter, at which time the appellants filed their petition and protest against the appointment of the appellee on the ground that the Court had no jurisdiction to make it. They asked leave to offer testimony in support of the allegations of their petition and protest, but the Court refused to grant it and passed orders dismissing the petition and appointing the appellee such guardian. Appeals were taken from those orders.

The petition shows that Laura L. Beatty, who was fourteen years and six months of age, is the only child of Louis

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M. Beatty and Mary M. Beatty, his wife; that Louis L. and Mary M. Beatty resided during their joint lives in Queen Anne's county; that at or about the time of his death, which occurred about six years before, Mary M. Beatty removed to and took up her residence and abode in Baltimore City, where she resided until the month of May, 1912, when she removed with her daughter to her farm in Queen Anne's county, where they resided until October 23rd, 1912, when Mrs. Beatty died intestate; that Mary M. Beatty was a widow at the time of her death and there is no father or mother of either Louis L. Beatty or Mary M. Beatty surviving. The petition then alleges: "3. That on the 26th day of October, 1912, after the death of said Mary M. Beatty, the said Laura L. Beatty of her own volition and with the consent of her uncle, said Mary M. Beatty's brother, who resides in Baltimore City, Maryland, took up her residence, habitation and abode with her said uncle, said Arthur E. Sudler, and with the desire and intention of making said Baltimore City her permanent residence and domicile. The said Laura L. Beatty now lives and resides with her said uncle, Arthur E. Sudler, in Baltimore City, and the said Laura L. Beatty is going to school in Baltimore City, and it is her expectation and intention to continue to make Baltimore City her home and residence. 4. The said John W. E. Sudler and Arthur E. Sudler are the only surviving brothers of said Mary M. Beatty, administrators of her estate and are the maternal uncles as aforesaid and next of kin to said Laura L. Beatty." The petition then sets out the reasons why the appellee should not be appointed guardian.

In determining the meaning of the expression in the statute that "the Orphans' Court of the county in which such infant shall reside" it would not do to simply ascertain where the abode of an infant is, but as said in 21 *Cyc.* 24, "Although the terms 'residence' and 'domicile' are not in all respects convertible terms, the word 'residence' as used in the statutes relating to the appointment of guardians for minors

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is, according to the weight of authority, to be construed as synonomous with 'domicile.'" It is said in 21 *Cyc.* 25 that "The ward cannot himself change his domicile by removal because he is not *sui juris;* nor does the removal of the ward to another State or county by relatives or friends in any way affect his domicile." See also 15 *Am. & Eng. Ency. of Law* 35; *Woerner's Am. Law of Guardianship,* p. 80, sec. 26. That being so the fact that it is the expectation and intention of this young lady to make Baltimore City her home cannot alter the situation during her minority.

Again, in 14 *Cyc.* 843, it is said: "An infant being *non sui juris* is incapable of fixing his domicile, which therefore during his minority follows that of the father, provided such child is legitimate;" and on page 844 "If the father dies during the infant's minority the power to fix the domicile devolves upon the mother who may alter it at pleasure, provided it be without fraudulent motive respecting the succession to the estate of the infant." In 21 *Cyc.* 25, it is said: "The domicile of the minor for purposes of guardianship is that of its parents, or of those standing *in loco parentis,* even though at the time of appointment such minor may be residing in another county or in another State." In 15 *Am. & Eng. Ency. of Law* 33, the rule is thus announced: "The domicile of an infant, for the purpose of conferring jurisdiction to appoint a general guardian, primarily arises from the domicile of the father, or, if the father be dead, from his domicile at the time of death. But if, since the father's death, the mother, without fraudulent intent, has removed her residence and that of the child to another jurisdiction, the infant's domicile will be deemed to follow that of the mother." And on page 35: "Where, however, the parents are dead, or have relinquished the custody of their infant, and it is living with other relatives acting in *loco parentis,* their residence will be deemed sufficient to confer jurisdiction to appoint a guardian."

The case of *Allgood* v. *Williams,* 92 Ala. 551, is a leading case and is often referred to. The language of the statute in

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force in that State at the time that decision was made was "Guardians must be appointed for minors under the age of twenty-one years by the probate Court of the county in which such minor resides." The Court said: "Though the word '*residence*' is often used to signify a temporary abode, it is also used to signify a fixed and permanent home. Residence and domicile are not in all respects convertible terms; but when 'residence' or 'resides' is employed in a statute, relating to succession, grant of administration, and of guardianship, it is generally construed to mean the legal residence and as equivalent to domicile. *Jac. Dom.*, sec. 75." In that case the father whose domicile was in Blount county took his child to his brother in Morgan county in the fall of 1887, which was shortly before his death. The Court said: "The expression of the father of the minor to his brother, to take his child and raise her right, made three or four weeks before his death, did not constitute the residence of the brother the domicile of the minor. Therefore the domicile of the father, at the time of his death, determines the jurisdiction of the Court to appoint a guardian." The Supreme Court of Alabama having determined that Blount county was still the domicile of the father reversed the order of the Probate Court of that county which had revoked the letters of guardianship previously granted by it on the ground that the ward's residence was not in Blount county. The mother of the child died before her father, and hence there was no question as to the mother's domicile.

In *Woerner's Am. Law of Guardianship*, section 26 page 80, it is said: "The residence of infants conferring the jurisdiction in the sense of these statutes means domicile or home, as distinguished from residence, which may be temporary or for a special purpose. The domicile of an infant is that of his father, if legitimate, or of his mother, if illegitimate, or after the father's death, or of a grandparent or other person standing in *loco parentis*. The placing of a child by the father in the custody of a person residing in another county does not affect the child's domicile, nor the mother's

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right to its custody and care after the father's death; so that after her death the jurisdiction to appoint a guardian is in the county in which she was domiciled at the time, although she had been adjudged insane before the father's death and never declared restored. This domicile remains until the infant legally acquires another; and since the law conclusively disables infants from acting for themselves during minority, their domicile cannot be altered by their own acts before reaching majority * * * The authorities are substantially unanimous in according to the mother while remaining a widow, the power to alter the domicile of her infant children by changing her own,"—the latter statement of course referring to cases where there is no fraudulent motive in making the change.

In this case we understand it to be conceded—at least not denied—that the mother did change her domicile, if she had one in Baltimore, and returned to Queen Anne's county where she and her husband had formerly resided, and where she had a farm on which she resided at the time of her death. When then the mother died the child's domicile was in that county. As we have seen the child could not change her domicile, because she was not *sui juris,* and it only remains to determine whether one or both of the appellants could. It is contended that they as the next of kin of the minor are guardians by nature and that a natural guardian can change a ward's domicil. There is some conflict between the authorities as to whether any one but the father or mother can properly be said to be a natural guardian. In *Reeve's Dom. Rel.* 453, the rule is thus stated: "Guardianship by Nature. This by the common law extends only to the person; and the subject of it is only the heir apparent and not the other children * * * The father is guardian by nature, and in case of his decease, the mother, and on her death, the next of kin. Among next of kin priority of possession decides the right." But in *Schouler on Dom. Relàtions,* sec. 298, it is said: "Guardians by nature and nurture act under the authority of the law, which designates, first, the father, and after his

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death, the mother. These are the only natural guardians possible. It has been said that the infant's next of kin succeed to the natural guardianship when both parents are dead. This cannot be correct according to the sense of the term as used at this day." In *Hochheimer on Custody of Infants*, section 6, it is said: "The father, upon his death the mother, is guardian by nature of all the infant children. They are the only natural guardians. The next of kin do not succeed them." But without deeming it necessary to determine whether an uncle may after the death of both parents be a natural guardian, the provisions of our Code would seem to show that Arthur E. Sudler could not as natural guardian have changed the domicile of this young lady at the time it was contended it was changed. Section 186 of Article 93, Code of 1912, provides that "Every natural guardian or guardian appointed by last will and testament of the estate and property of minors shall settle an account of his guardianship, and shall be under the like rules and regulations hereinbefore prescribed for other guardians;" and section 155 of that article provides: "Every guardian appointed by the Court, and every guardian by a will, or natural guardian, *before he proceeds to act as such*, shall enter into bond to the State of Maryland in such penalty and with sure sureties as the Court shall approve, and to be recorded and be subject to be put in suit, and be in all respects on a footing with an administrator's bond, with the following conditions."

Whatever rights an uncle may ordinarily have to assume the duties of a natural guardian, as Mr. Sudler had not given his bond required by the last mentioned section, "before he proceeds to act as such," it cannot be said that he had the power to change the domicile of this young lady. The authorities are not uniform as to the power of a statutory guardian to change the domicile of his ward, but there would seem to be no doubt that a removal of an infant from its former domicile by a person unauthorized or by the infant's own act, without the consent of a parent or guardian, would not effect such a change. 15 *Am. & Eng. Ency. of Law* 34. And al-

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though it seems to be quite well settled, that a natural guardian may in good faith change his ward's domicile, either from one State to another, or from one county to another in the same State on the principle that "this doctrine amounts to no more than that the domicile of the parent is the domicile of the child," 21 *Cyc.* 63, our statute requiring the bond to be given "before he proceeds to act as such" would certainly require that it be given before he could exercise such a power as changing the domicile of an infant which may very seriously and sometimes injuriously affect the rights of an infant. As we have seen above "the ward himself cannot change his domicile by removal because he is not *sui juris;* nor does the removal of the ward to another State or county by relatives or friends in any way affect his domicile." 21 *Cyc.* 25. Even in case of a mother our predecessors said in *LeFever* v. *LeFever,* 6 Md. 472, "It is true, that upon the death of the husband his widow becomes the natural guardian of her infant children, and is recognized both by our statutory law and judicial decisions as having, in general, the right to the control of both their persons and property, to the exclusion of all other persons. This is nevertheless a right which the widow may exercise or not in her discretion, but it is attended with the correlative obligation or duty to qualify and get bond, as prescribed by the Act of 1816, Chapter 203. The exercise of the right therefore, depends upon the performance of the duty and unless the latter is discharged is a regular manner and in a reasonable time, it will work a forfeiture of the right or privilege. We can perceive no good reason nor discover any authority for the assumption, that the mother must make a *formal renunciation* to act as guardian for her children before another can be appointed in her stead." Such being the law even as to a mother, surely it cannot be said that an uncle who has not qualified by giving bond can change the domicile of a minor, even if it be conceded that he could become her natural guardian. It frequently happens that after the death of both parents, leaving an infant child, some kind relative will take

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the child to his or her home, but it would leave the law in great confusion if the removal of infants to another State or county would take away the right of the Orphans' Court of a county where the surviving parent lived to appoint a guardian. In this case the minor was taken to Baltimore three days after the mother's death—before letters of administration had been granted on the estate of her mother, and while it was doubtless a kind and proper act on the part of the uncle, it might not be to her financial interest to change her domicile, as without mentioning other reasons the probabilities are that the taxes on her personal estate would be heavier in Baltimore than in Queen Anne's county.

It was suggested for the appellants that under section 151 of Article 93, they were entitled "to discharge and fulfill all the duties of guardian" to the infant, but while that section does provide that where no guardian has been appointed the administrator of the deceased "shall take possession of such estate and discharge and fulfill all the duties of guardian to such infant, and shall account with the Court in like manner as guardians are required by law to account, and subject to the like control and authority of the Court, in all respects whatever," section 152 provides that no administrator shall be bound to discharge the duties of guardian "after the close of his administration, or after the end of three years from the granting of such administration, nor after a guardian shall be appointed by the Orphans' Court."

Those sections seem to us, in so far as they reflect at all upon the question, to be against the contention of the appellants. Undoubtedly under those sections, if no guardian was appointed the appellants would have been required to account as guardians in the county in which they were appointed administrators, which was Queen Anne's county. They certainly could not have accounted in Baltimore City for the acts done by them under their appointment as administrators by the Orphans' Court of that county. Those sections, however, only contemplate the care of the infant's prop-

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erty temporarily by the administrators and do not intend that an administrator shall be the permanent guardian of infants interested in the estate. In many States there are statutes prohibiting the appointment of administrators as guardians, and in the absence of statute some Courts have advised against such appointment, on the ground that the infants should have independent persons to guard their interests. In this case there is nothing to suggest that the appellants would not do full justice to their niece, but there is a great deal of force in the position taken by some of the authorities that the Courts having jurisdiction to appoint guardians should not appoint as such the administrators of estates in which the infants are interested. We have no such prohibition in this State, but as administrators settle with the guardians of infants, the fact that the appellants are administrators of the minor's mother's estate would not furnish any reason for appointing either of them her guardian.

Controversies over such appointments are not generally for the best interest of infants, and it is to be hoped that this minor will not suffer from the conclusion which our understanding of the law must lead us to. The guardian who has been appointed is not required to take her from her uncle's home or to deprive her of such educational facilities as living in the City of Baltimore may afford her and we cannot assume that he will not act for the best interests of his ward. Being of the opinion that the Orphans' Court of Queen Anne's county had the power to appoint the appellee the orders passed on December 18th, 1912, will be affirmed.

Orders affirmed, the appellants to pay the costs.

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J. JONES WILSON
vs.
MARY E. SHAW.

Voluntary conveyances: husband and wife; creditors' rights; bill to set aside fraudulent deed to wife; parties; heirs at law.

Upon a demurrer to a bill, the truth of the allegations properly pleaded is to be assumed. p. 58

A voluntary conveyance from a husband to his wife is absolutely void under the provisions of the Code, Article 45, section 1, as against existing creditors. p. 59

Where such a deed is fraudulent in fact and without consideration, the title remains in the grantee for the use of his then existing creditors. p. 60

The grantor of such a deed being dead, a creditor proceeded by a bill against the wife alone, praying that the deed be annulled and the property therein mentioned sold and that the proceeds, after payment of costs, etc., be applied to the payment of the plaintiff's claim. *Held,* that the heirs at law of the grantor should have been made parties and that the bill was demurrable. p. 60

Although the trustee of a dry legal title has no interest in the property, he is a necessary party to any proceedings whereby it is sought to convey, etc. p. 60

Decided May 10th, 1913.

Appeal from the Circuit Court for Allegany County, in Equity (HENDERSON, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON and STOCKBRIDGE, JJ.

J. W. S. Cochrane, for the appellant.

A. A. Wilson submitted a brief for the appellee.

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BURKE, J., delivered the opinion of the Court.

The appeal in this case was taken by the complainant from an order of the lower Court sustaining a demurrer to the whole bill.

The object of the suit was to secure the cancellation of a deed from Isaac Shaw to his wife, Mary E. Shaw, the appellee, dated in August, 1911, and which purported to convey to her certain real estate in Allegany county. The prayers of the bill are: first, that the deed may be declared null and void, and vacated and set aside; secondly, that the real estate mentioned in the deed may be decreed to be sold and the proceeds applied to the payment of the plaintiff's claim after deducting the costs of the proceedings.

The bill alleged that Isaac Shaw was indebted to the plaintiff at the date of the execution of the deed in the sum of fifty-eight dollars; that he was then insolvent and without means to pay the plaintiff or his other creditors apart from the property conveyed by the deed, and that said conveyance was fraudulently made, and for simulated and not valuable considerations, and was made to hinder, delay and defraud the plaintiff of his claim. The consideration expressed in the deed was five dollars and natural love and affection. The grantor died before the institution of the suit, and the grantee, Mary E. Shaw, is the only party defendant.

The ground of the demurrer is the omission to make the heirs of the grantor parties defendant,—the contention being that if the deed be decreed to be null and void the title to the land would then be in his heirs at law subject to the claims of creditors and that this title could not be divested or transferred to the purchaser at a sale made under a decree unless the heirs at law of the grantor were parties to the suit. It was this reason that induced the lower Court to sustain the demurrer.

Assuming, as we must do upon the demurrer, the truth of the allegations of the bill, the deed must be declared to be null and void.

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In *Norberg* v. *Records,* 84 Md. 568, where property had been conveyed, without consideration, by a husband to his wife with the intent to hinder and defraud his creditors, the Court declared the deed to be "absolutely null and void to all intents and purposes whatsoever," and directed that the property be sold. In that case both the grantor and the grantee were defendants. JUDGE BRISCOE, speaking for the Court, said: "The deeds then being neither *bona fide* nor for a good or valuable consideration, and fraudulent in fact, were void *ab initio* and are not to be recognized for any lawful purpose. *Zimmer* v. *Miller,* 64 Md. 300. A voluntary conveyance from a husband to a wife is void as against existing creditors. Code, Art. 45, sec. 1.

But it is urged on the part of the appellants, that the decree is erroneous because the deeds are declared to be absolutely null and void to all intents and purposes whatsoever and not merely as to existing creditors. The decree, however, simply adopts the theory of the bill as supported by the evidence, and in doing this it becomes regular and valid. In the case of *Waters* v. *Dashields,* 1 Md. 455, it was held that if the property passed to the grantee charged with an equity in favor of the then existing creditors and was void only to the extent of their claims, the grantee himself would be entitled to the surplus, after satisfying those claims. Such deeds, however, are said to be void *ab initio* and the property directed to be sold should be dealt with as if the annulled deeds had not existed. So in *Cone* v. *Cross,* 72 Md. 104, it was held that one cannot make a voluntary conveyance of his property as against the rights of subsisting creditors. In order to do full justice to all the parties in such cases a Court of Equity in setting aside the deed will allow it to stand as security for the consideration actually paid and apply the balance to the payment of the vendors debts. *Williams* v. *Banks,* 11 Md. 198. But in this case, now under consideration, no consideration was actually paid, and it being but a voluntary conveyance from the husband to the wife, was absolutely void, under the provisions of the Code, Article 45,

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section 1. But apart from this the decree directs that the proceeds arising from the sale shall be brought into Court and be distributed under the direction of the Court, thus reserving all equities in the appellants to participate in the distribution of the proceeds of sale or to assert their rights, if any, against the surplus, after satisfying creditors."

In this case it is admitted by the demurrer that the deed was fraudulent in fact and was made without consideration, and is, under the principles stated, null and void. In such a state of facts the title to the property remained in the grantor for the use of his existing creditors (*Waters* v. *Dashields,* 1 Md. 455; *Lovejoy* v. *Ireland,* 17 Md. 525), and upon his death devolved upon his heirs at law, and it is necessary that they be made parties in order that a good title may be passed to the purchaser in the event of a sale. It may well be conceded that the deed is good between the parties thereto, that the grantor could not impeach it, and that the proceeds of sale, after satisfying the claims of creditors, are payable to the grantee, as was held in *Downs* v. *Miller,* 95 Md. 602, and in *Norberg* v. *Records, supra.* This consideration does not meet the difficulty in this case. The bill not only asks that the deed be annulled, but that the property embraced in it be sold. As the title to that property was vested in the grantor for the use and benefit of his creditors, it passed upon his death to his heirs at law, and they are therefore necessary parties to the case. The necessity for making them parties was thus tersely and clearly stated by JUDGE HENDERSON in his opinion filed in the Court below: "Now if the deed is void and as if it had never existed, the *title* must be in the heirs, and if it is, it cannot be diverted without making them parties. A trustee of a dry legal title has no interest in the property, but he is a necessary party to any proceedings whereby it is sought to convey the legal title. It is in reality a question of title and not of interest in the proceeds of sale."

Order affirmed, with costs and case remanded for further proceedings.

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THE OLD TOWN NATIONAL BANK OF BALTIMORE

vs.

GEORGE E. PARKER, JR.

Bankrupt: *discharge; new promise.*

The promise of a bankrupt to pay a debt sued on, made between the date of the adjudication and the date of the discharge, will revive the debt. p. 63

Decided May 11th, 1913.

Appeal from the Baltimore City Court (STUMP, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

Edward M. Hammond (with whom was *Roger T. Gill*, on the brief), for the appellant.

E. McClure Rouzer, for the appellee.

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BURKE, J., delivered the opinion of the Court.

The appeal in this case is from a judgment of the Baltimore City Court. The record shows that the appellant sued George E. Parker, Sr., and George E. Parker, Jr., upon two overdue promissory notes executed by them aggregating the sum of $1,750.00. A judgment by default was entered against George E. Parker, Sr., and this judgment was extended for $1,778.20 on March 27th, 1912.

George E. Parker, Jr., was adjudicated a bankrupt by the United States District Court for Maryland, on the 17th of November, 1911, and was discharged as such bankrupt by that Court on May 11th, 1912. He pleaded his discharge in bankruptcy as a bar to the suit. The plaintiff replied that since the adjudication in bankruptcy the defendant promised to pay the plaintiff's claim, the cause of action in this case. A rejoinder was filed to this replication wherein the defendant denied that since his adjudication as a bankrupt on the 17th of November, 1912, he had promised to pay the claim. The case by agreement was tried before the Court, without the intervention of the jury, and resulted in a verdict and judgment for the defendant,—the Court ruling as a matter of law upon the request of the defendant, that the plaintiff had offered no evidence legally sufficient to entitle it to recover.

The promise relied on to avoid the effect of the adjudication and discharge is claimed to have been made in December, 1911.

It was admitted at the trial that the notes were signed by the defendant prior to his adjudication in bankruptcy; that they were filed in the bankruptcy proceedings, and that no dividend was paid on them.

Two questions only are presented by the record, first, is a promise made after the adjudication but prior to the discharge in bankruptcy effectual to renew the debt sued on? Secondly, is the evidence produced by the plaintiff sufficient to constitute a new promise in cases of this character?

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First.—The overwhelming weight of authority supports the proposition that the promise of a bankrupt to pay the debt sued on made between the date of the adjudication and the discharge will revive the debt. *Brix* v. *Braham,* 1 Bing. 281; *Kirkpatrick* v. *Tattersall,* 13 M. & W. 766; *Lerow* v. *Wilmarth,* 7 Allen, 463; *Wiggin* v. *Hodgdon,* 63 N. H. 39; *Moore* v. *Trounstine,* 126 Ga. 116.

In *Kirkpatrick* v. *Tattersall, supra,* BARON PARKE said: "There is no distinction in this respect between the case of a promise made before the certificate of discharge, and one made after it. Both are equally binding, though the only consideration be the old debt."

The legal effect of a new promise made in the interim between the adjudication and the discharge was determined by the Supreme Court of the United States in *Zavelo* v. *Reeves,* 227 United States, 625, in which the Court said: "It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts it has been commonly held that a promise to pay a provable debt, notwithstanding the discharge is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. *Kirkpatrick* v. *Tattersall,* 13 M. & W. 766; *Otis* v. *Gazlin,* 31 Maine, 567; *Hornthal*

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v. *McRae,* 67 Nor. Car. 21; *Fraley* v. *Kelly,* 67 Nor. Car. 78; *Hill* v. *Trainer,* 49 Wisconsin, 537; *Knapp* v. *Hoyt,* 57 Iowa, 591; 42 *Am. Rep.* 59; *Lanagin* v. *Nowland,* 44 Arkansas, 84; *Wiggin* v. *Hodgdon,* 63 N. H. 39; *Griel* v. *Solomon,* 82 Alabama, 85; *Jersey City Ins. Co.* v. *Archer,* 122 N. Y. 376.

Our attention is not called to any decision in point arising under the present bankruptcy act; but we deem it clear that the same rule should be applied."

Second.—As to the sufficiency of the new promise. The evidence of Henry O. Redue, the cashier of the Old Town Bank, tended to show that in the interval between the adjudication and the discharge, the appellee made an express and absolute promise to pay the notes sued on.

In view of this testimony, and under the principles of law applicable to the case, it was error to have granted the defendant's prayer, and, therefore, the judgment must be reversed.

Judgment reversed, with costs, and new trial awarded.

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ISIDOR CANTOR
vs.
THE BALTIMORE OVERALL MANUFACTURING COMPANY.

Insolvents: firms or corporations; creditors' rights; priority over partners or stockholders. Subscription to stock, or loan to the corporation. Presumptions.

A stockholder of an insolvent corporation, as such, or partner of an insolvent firm, can not participate in the distribution of the assets until the claims of the undisputed creditors are satisfied. p. 70

A payment of money to a corporation (in so far as the creditors were concerned), was *held,* to be an addition to its capital stock, and not to be a mere loan to the concern. p. 70

To constitute a subscription to stock, an actual subscription is not necessary. p. 70

A virtual subscription may be inferred from the acts and conduct of the party. p. 70

Decided June 24th, 1913.

Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Jacob M. Moses and *Arthur L. Jackson,* for the appellant.

Mason P. Morfit and *J. H. Mitnick* (with whom were *Willis E. Meyers, S. H. Lauchheimer, C. H. Millikin, Bartlett, Poe, Claggett & Bland,* and *Charles G. Baldwin,* on the brief), for the appellee.

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Briscoe, J., delivered the opinion of the Court.

This controversy arises upon exceptions to an auditor's account distributing the assets of the Baltimore Overall Manufacturing Company, an insolvent corporation and now in the hands of receivers, appointed by the Circuit Court of Baltimore City, to administer and wind up its affairs, under the supervision of that Court.

The auditor in the distribution of the funds in the hands of the receivers allowed the appellant a dividend of $1,419.60 on a promissory note for $3,000, drawn by the company to his order, dated April 25th, 1911, and payable four months after date without interest.

The appellees are general creditors of the company, and filed exceptions to the allowance of this dividend on the alleged claim, and state the following grounds of exceptions:

(1) That the defendant corporation is not now, and never was indebted to the appellant in the sum of three thousand dollars and is not indebted to him in any sum whatever.

(2) That the appellant is a stockholder and not a creditor of the defendant corporation, and is not entitled to participate in the distribution of the assets until all the creditors who have filed claims have been paid in full.

(3) That the appellant is indebted to the defendant corporation.

(4) And for additional reasons state, that the sum of three thousand dollars ($3,000) was by the appellant contributed or paid unto the corporation or into the business conducted and carried on under the name of the Baltimore Overall Manufacturing Company as capital, and he is not entitled to participate in the distribution of the assets of the corporation or of the business conducted under the name of the Baltimore Overall Manufacturing Company until all the creditors who have filed claims are paid in full; and,

(5) That after the sum of three thousand dollars ($3,000) was so contributed or paid in by him as capital he withdrew a part thereof.

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By an agreement as to record filed on the 25th of October, 1912, it was agreed, that the exceptions filed by the National Exchange Bank, Pereth Cohen, Collins, Ray & Company, S. Hurwitz, L. Spiegelberg & Sons, W. P. West & Sons, Standard Overall Company, McKenny, Field & Woodman, H. B. Claflin Company, The Thread Agency, and The Farrish-Stafford Company, as shown by the docket entries, are similar to and substantially the same as the exceptions and the additional exceptions filed by T. Martin and Brothers Mfg. Co. and that the claims of all the excepting creditors were duly proved and verified, and all the items on all of said claims are for charges against said corporation for merchandise sold to it after May 2, 1911, except the claim of The National Exchange Bank, which is for money advanced or loaned on a promissory note after this date.

These exceptions to the claim of the appellant were sustained by the Court below, and from the order so passed on the 18th day of July, 1912, this appeal has been taken.

The net balance in the hands of the receivers for the distribution appears to be the sum of $4 431.84 and if the appellant is to participate as a general creditor, the dividend of $1,419.60 as allowed by the auditor, will consume nearly one-third of the entire assets of the estate, and the remaining creditors who have filed their claims, will receive on or about 47.31 per cent.

A large mass of testimony was taken in open Court, covering nearly two hundred pages of the record, so we will not review it at length, but state our conclusions, and refer briefly to the facts upon which they rest.

While the evidence is somewhat conflicting and contradictory upon some of the material facts we think, it is sufficient upon the whole record, to sustain the conclusion reached by the lower Court, and its decree must be affirmed.

The questions to be determined are issues of facts, rather than of law, and come to this: Was the three thousand dollars here in controversy contributed by the appellant as an addition to the capital of the company, and to be treated as

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such, in so far as the creditors, who have filed their claims in this case, are concerned, or was it a fund so borrowed by, and loaned to the company by the appellant as to constitute him a creditor and entitling him to participate in the distribution of its assets along with the creditors of the company who became such after the obtention of the fund.

It must be borne in mind at the outset that we are dealing with a class of creditors who became such after the 25th of April, 1911. the date of the note, given to the appellant, and it is admitted, that all of the items on all of the claims are for charges against the company for merchandise sold to it after May 2nd, 1911, except the claim of the National Exchange Bank, which is for money advanced or loaned on a promissory note after that date.

The undisputed evidence shows, that on the 27th day ot April, 1911, Pelzerman, the president of the company, M. Wilenzig its secretary and treasurer, and the appellant himself, must have considered the fund as an addition to capital, because they subsequently obtained credit upon representations to this effect.

The fund was deposited in the company's bank account, and on the same day, letters were mailed to the company's creditors by the appellant, and the other members of the company to the effect, that "We have this day paid in additional capital in cash $3.000. Reference, National Exchange Bank of Baltimore." Signed Baltimore Overall Mfg. Company.

The business of the company was conducted entirely by Pelzerman, Wilenzig and the appellant, as the acting managers and directors of the company from April 27th, 1911, until a short while before the receivers were appointed.

On the 30th of June, 1911, a statement was sent to the American Woolen Company of New York, as a basis for credit, and the following item under the head of assets appears April 27, 1911, "Additional cash $3 000"—Total assets $13,000. There was no entry of "Liabilities" upon this statement.

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The witness Hurwitz testified that the appellant stated to him "He was in the business with the company" and that a check which had been given by the company "would be all right in a few days."

The witnesses Fried and Kalick testified that the appellant in the summer of 1911 employed them to do work for the company, and introduced Pelzerman to them as his partner, and stated that "he went with him in business," with the Baltimore Overall Manufacturing Company.

The character of the business was changed upon the suggestion and demand of the appellant, and the manufacture of "high grade pants" was added to the business. The goods for the manufacture of the pants were bought by the appellant, in the name of the company; they were manufactured at its plant in Baltimore, and were sold by the company, in the usual course of its business. A large part of the stock on hand, at the date of the appointment of the receivers and from which the fund for distribution among the creditors was derived, consisted of these high-grade pants.

The testimony also shows, that the appellant received twenty dollars a week out of the business, the same amount that was drawn by Pelzerman and Wilenzig, the other two managers, and stockholders of the company.

The witness Pelzerman testified that there was to be a division of the profits in equal shares and that the appellant was to participate in a share of the profits.

While the appellant denies the ownership of any interest in the company, it will be seen that his testimony is directly contradicted by Wilzenzig, Pelzerman and other witnesses upon the material facts of the case.

The conduct of the appellant in the whole transaction, we think, is absolutely inconsistent with that of a *bona fide* creditor, and he is clearly estopped from asserting a claim in competition with the creditors of the company, on the record now before us. *Thomas* v. *Green,* 30 Md. 1; *Fletcher* v. *Pullen,* 70 Md. 205.

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. While the witnesses in the case use the terms, "the business," "holding shares," "partners" and "partnership" when in fact they meant "corporation" and "stockholders" cannot affect the conclusion we have reached.

In *Pott & Co.* v. *Schmucker*, 84 Md. 552, it is said the law will not in any case suffer the corporate name, the mere shadow, to be interposed for the purpose of defeating substantial rights depending for their ultimate vindication, not upon the accidental form of a transaction, but upon its inherent equity and justice. *Bauernschmidt* v. *Bauernschmidt*, 101 Md. 162; *Seymour* v. *The Spring Forest Cemetery Ass'n*, 144 N. Y. 340; *Antony* v. *American Glucose Co.*, 146 N. Y. 407.

In *Cook on Corporations*, 5th ed., sec. 317, it is said, Courts have power to ignore corporate existence, when necessary in order to circumvent a fraud.

In the case at bar, we think the proof shows that the three thousand dollars was paid in as an addition to the capital of the company, and must be treated as in the situation of money paid for stock subscribed to, in so far as the creditors upon this record are concerned.

In *Pacific Nat. Bank* v. *Eaton*, 141 U. S. 227, it is said, an actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party. *Sanger* v. *Upton*, 91 U. S. 56; *Griswold* v. *Seligman*, 72 Mo. 110; *Machen on Corporations*, 155-156; 1 *Cook on Corporations*, 250.

It is also well settled as a general rule, upon both principle and authority, that a stockholder of an insolvent corporation, as such, or a partner of an insolvent firm, cannot participate in the distribution of its assets until the claims of undisputed creditors are paid. *Drovers Bank* v. *Roller*, 85 Md. 495; *P. T. George & Co.* v. *Morrison*, 93 Md. 132; *Potts & Co.* v. *Schmucker*, 84 Md. 535.

For the reasons stated, the order of the Court below will be affirmed and the cause remanded, with costs.

Order affirmed and cause remanded, with costs.

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EDWARD C. CARRINGTON, JR., RECEIVER OF THE HAMMOND ICE COMPANY,

vs.

THOMAS C. BASSHOR COMPANY ET ALS.

Receivers: appointment; bill and exhibits; effect of answer; appeals; what objections may not be raised; parties in interest who are not necessary parties. Wicks v. Westcott, 59 Md. 270, explained.

Courts of Equity have jurisdiction, upon proper averments, to appoint receivers for corporations. p. 75

Under sections 36 and 37 of Article 5 of the Code of 1912, on appeal from an order or decree of a Court of Equity, no objection can be made to the sufficiency of the averments of the bill, nor to the jurisdiction, unless it appears by the record that the objections were made in the Court below. p. 75

Where a receiver is appointed upon a bill alone, and an appeal is taken, under section 27 of Article 5 of the Code of 1912, the Court, in passing upon the propriety of the order, is confined to the case as made by the bill and exhibits, and can not consider the defendant's answer. p. 76

But when the order appointing a receiver is not passed until after the defendant has had notice and files his answer, the answer is considered below, and, on appeal, it may be considered by the Court of Appeals. p. 76

When the defendant, who has notice of an application for the appointment of a receiver, files his answer before the appointment and fails to object in the court below to the sufficiency of the averments of the bill, or to the jurisdiction of the Court, he can not be heard to make such objections in the Court of Appeals. p. 76

And where a person is not a necessary party to the bill, but has such an interest in the subject-matter as entitles him to defend the suit, and, upon his own application, is made a party defendant after an order appointing a receiver has been passed on a bill and answer of the defendant admitting the fact and consenting to such appointment, and he desires to question the propriety of the order, he must do so by appropriate

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proceedings in the court below; otherwise he can not question its right on appeal, unless the case is one in which no circumstances whatever could give the Court jurisdiction. p. 77

In the case of *Wicks* v. *Westcott,* 59 Md. 270, in explaining Code (1860), Art. 5, sec. 27 (now section 37), the Court did not mean to limit the application of that section to the original defendants, as distinguished from defendants who might be brought in afterwards upon the petition of the plaintiff, or who were made such upon their own application; the Court made that section applicable only to defendants in regular chancery proceedings, as distinguished from proceedings such as objections to sales. p. 78

Decided June 24th, 1913.

Appeal from the Circuit Court of Baltimore City (DUFFY, J.).

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

E. C. Carrington, Jr., and *Wm. Ewin Bonn,* filed a brief for the appellant.

E. P. Keech, Jr., Jacob France and *W. H. DeC. Wright,* filed a brief for the appellees.

THOMAS, J., delivered the opinion of the Court.

On the 23rd of November, 1912, C. Hazeltine Basshor, of Baltimore City, filed a bill in the Circuit Court of Baltimore City against the Thomas C. Basshor Company, for the appointment of a receiver or receivers for said company.

The bill, which was filed on behalf of the plaintiff and other stockholders and creditors of the Thomas C. Basshor Company, alleged that the company was a corporation of the State of Maryland, with its principal office in Baltimore City, and that it had an authorized capital stock of $150,-000.00, consisting of 3,000 shares of the par value of $50.00

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each, all of which had been issued and was outstanding; that said company was organized for the purpose of conducting the business of manufacturing and dealing in all kinds of boiler plate, iron work engines, machinery, pumps, mechanical and electrical appliances, machinists' supplies, castings, structural steel, iron, steam and water heating and plumbing, and "all forms of engineering designing and expert mechanical work," and that it was actively engaged in said business at 28 Light street, where it had a large and valuable plant, and a large and valuable stock of raw material intended for sale and to be used in the manufacture of machines and machinery of various kinds. The bill further alleged that the plaintiff was the owner of two thousand shares of the stock of the company, and, at the time of the filing of the bill, was engaged in managing its business; that the aggregate book value of the assets of the company, including its warehouse on Liberty street, was approximately $270,000.00, subject to some depreciation of the warehouse, machinery, plant and equipment if sold at a forced sale, and that the accounts receivable, amounting to about $70 000.00 consisted largely of claims which could not "be realized upon immediately," and which arose out of contracts which had to be completed before the contract price could be collected, or out of contracts concerning which there was "some dispute or other legal difficulty;" that the aggregate indebtedness of the company was approximately $130,000.00, and that the net value of its assets was more than sufficient to pay its debts. It then averred that on the 24th of July, 1912, a decree for the sum of $21,000.00 was entered by the Circuit Court No. 2 of Baltimore City against the company in favor of Edwin C. Carrington, Jr., receiver of the Hammond Ice Company; that notwithstanding the defendant was not insolvent, it was "unable by reason of the fact that it" was "not able to realize immediately upon its open accounts to pay forthwith the amount of said decree, and that if said Carrington, as such receiver, should be permitted to seize

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under an execution an amount of the assets of the defendant sufficient to yield at a sheriff's sale the amount of said decree," the great loss resulting therefrom would cause "irreparable damage" to the other creditors and to the stockholders of the defendant; that in order to obtain the full value of the assets of the defendant it would be necessary to continue the business of the company and to use the raw material it had on hand in the manufacture of machines and machinery, and that the highest price for the company's building, plant and equipment, "if a sale of the same be found necessary" could only be obtained by selling it "as a going concern," etc.

The prayer of the bill was for the appointment of a receiver or receivers to take possession of all the property of the defendant, to collect the accounts and other debts due the company, and to continue its business until the property and business of the defendant could be sold or otherwise disposed of under the order of the Court; that the Court "fully administered" the funds and assets of the defendant, and, "if necessary, direct a sale or sales" of its property, the payment of its debts, "according to their legal priority," and the balance of its assets to be turned over to the officers and directors of the defendant.

On the same day the defendant filed its answer, admitting the averments of the bill and consenting to the appointment of a receiver, and thereupon the Court passed the order of November 23rd, 1912, appointing a receiver to take possession of the goods, wares, etc., of the company, with authority to continue its business subject to the further order of the Court, which order was afterwards amended by the order of December 3rd, 1912, so as to authorize the receiver to take possession of *all* the property of the defendant.

On the 17th of January, 1913, the appellant, Edwin C. Carrington, Jr., receiver of the Hammond Ice Company, filed a petition asking to be made a party defendant in said case, and the Court below having passed an order accordingly, he filed his answer, in which, after admitting some of the allega-

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tions of the bill, demanding strict proof as to others, and avering that he had not threatened to have execution issued on his decree, and that the Light street property of the Basshor Company could "be readily converted into money, and enough accounts receivable collected to discharge" his lien, etc., he denied that it was necessary to continue the business of the company in order to obtain the full value of its assets and denied the right of the creditors and stockholders of the company to have a receiver appointed for the company under the bill filed by the plaintiff, because the bill failed to make out a "*prima facie case which would entitle*" the court to appoint a receiver, etc. The answer was filed on the 17th of January, 1913, and on the following day the appellant filed his order for this appeal from the orders of November 23rd, and December 3rd, 1912.

A motion has been made to dismiss the appeal, and it is apparent from the foregoing review of the record that the motion must prevail. Prior to the passage of the orders from which this appeal was taken, no objection was made in the Court below to the sufficiency of the averments of the bill or the jurisdiction of the Court. The orders were not passed upon the bill alone, but upon the bill and the answer of the defendant admitting the averments of the bill and consenting to the granting of the relief prayed. Section 36 of Article 5 of the Code of 1912, provides that no objection "to the sufficiency of the averments of the bill or petition * * * shall be made in the Court of Appeals, unless it shall appear by the record that such objection was made by exceptions, filed in the Court from which the appeal shall have been taken," and section 37 of the same article declares that no defendant in a suit in equity shall on appeal "make any objection to the jurisdiction of the Court below, unless it shall appear by the record that such objection was made in said Court." The jurisdiction of a Court of Equity in this State, upon proper averments, to appoint receivers for a corporation is not and cannot be questioned, and it is, therefore, obvious that had the Basshor Company appealed from the orders referred to,

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independent of the fact that it consented to the orders, it would not have been allowed to object in this Court to the sufficiency of the averments of the bill or to the jurisdiction of the Court below. *Estep* v. *Mackey,* 52 Md. 592; *Shryock* v. *Morris,* 75 Md. 72; *Miller's Equity Proc.,* secs. 334 and 340. Upon what principle can the appellant escape the requirements of the rule? He was not a necessary party to the bill, and not having been made a party, it is true, that, so far as the record shows, he did not have an opportunity to resist the relief prayed prior to the orders of which he now complains. But after these orders were passed he was, upon his own application, made a party defendant, and if he had such an interest in the subject-matter of the suit as entitled him to defend it, and he desired to make the defense stated in his answer, before taking his appeal, he should have applied to the Court below for a rescission of the orders upon those grounds. *Miller's Equity Proc.* 623 and 624; *Williamson* v. *Williams,* 1 Bland Ch. 422, 424; section 83, Article 16, Code of 1912. Had he done so, and had the lower Court adopted his view of the bill, there would have been no occasion for this appeal. To permit him to make the objections now would require this Court, in the face of the statutes and the rule stated, to consider questions that were not raised or determined in the lower Court, in a case where the orders appealed from were not passed upon the bill alone, but upon the bill and answer of the only defendant in the case admitting the facts alleged and consenting to the granting of the relief prayed.

The appellant relies upon section 27 of Article 5 of the Code of 1912, and the cases of *Pierson* v. *Trail,* 1 Md. 142, and *Preston* v. *Poe,* 116 Md. 6. Section 27 authorizes an appeal from an order appointing a receiver, after the answer of the party appealing has been filed. When a receiver is appointed upon a *bill alone,* and an appeal is taken under that section, this Court in passing upon the propriety of that order is confined to the case made by the bill and exhibits and cannot consider the defendant's answer. *Miller's Equity*

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Proc. 321, and cases cited in the notes. But where, as in this case, the order appointing a receiver is not passed until after the defendant has had notice and files his answer, a different rule applies, and the answer is considered by the Court below, and, on appeal, by this Court. *Katz* v. *Brewington,* 71 Md. 79; *Miller's Equity Proc.* 623. If a defendant who has had notice of the application for the appointment of a receiver and has filed his answer before the receiver is appointed fails to object in the Court below to the sufficiency of the averments of the bill or to the jurisdiction of the Court he cannot make the objection in this Court; and where a person, not a necessary party to the bill, but having such an interest in the subject-matter as entitles him to defend the suit, is upon his own application made a party defendant after an order appointing a receiver has been passed upon the bill and the answer of the defendant admitting the facts and consenting to an appointment, desires to question the propriety of that order upon the ground that the averments of the bill were not sufficient or that the Court was without jurisdiction he is required to do so by appropriate proceedings in the Court below before he can make such objections in this Court, unless, as was said in *Shryock* v. *Morris, supra,* the case is one "in which no circumstances whatever could give the Court jurisdiction."

In the case of *Pierson* v. *Trail, supra,* the Court held that the Act of 1841, Chapter 163 (section 37, Article 5 of the Code of 1912), only applied to defendants, and that the appellant in that case was not a defendant in the Court below, while in the case at bar the appellant was upon his own petition made a party defendant in the lower Court. That case, therefore, apart from other distinguishing features, affords no support for the position of the appellant in this case. Nor does the case of *Preston* v. *Poe, supra,* sustain his contention. There the appellant, before taking his appeal, applied to the lower Court to rescind the order of which he complained, and this Court, after stating that section 26 of Article 5 of the Code did not restrict the right to appeal to those who are

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technical parties to the suit, dismissed the appeal on the ground that the appellant did not have such an interest in the suit as entitled him to maintain the appeal. Here the question we are now considering is not whether the appellant has the right to appeal from the orders appointing the receiver, but, assuming that he has the requisite interest in the suit, whether he has the right to do so without first applying to the Court below to rescind those orders for the reasons which he now urges as grounds for their reversal.

In the case of *Wicks* v. *Westcott,* 59 Md. 270, where it was urged that an objection to a sale on the ground that the trustee was not present when the sale was made could not be made in the Court of Appeals unless there was a special exception in the Court below on that ground, the Court said: "The Code (1860), Art. 5, sec. 27 (now sec. 37), does not meet the case, for that section is applicable only to defendants in a regular chancery proceeding, who, having been brought in and submitted to the jurisdiction without question, will not be permitted to question the jurisdiction on appeal." By that statement the Court did not mean to limit the application of the section referred to, to original defendants as distinguished from defendants who might be brought in afterwards upon the petition of the plaintiff or who were made such upon their own application. There is no reason for making such a distinction, and the language and purpose of the section does not justify it. But what the Court meant was that the section only applied to defendants in regular chancery proceedings as distinguished from proceedings such as objections to sales.

It follows from what has been said that the appeal in this case was premature and must be dismissed. In this view of the case it is not necessary to consider the application for a writ of diminution.

Appeal dismissed, with costs.

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PHILIP B. FOLEY

vs.

MARTHA V. SYER,

SURVIVING EXECUTRIX OF JOHN FOLEY, DECEASED.

Wills: construction; life estates; in funds; investments; rights of legatee in remainder; distribution; duty of executor.

Where a legacy consists of money or of property whose use is its conversion into money, it is the duty of the executor to invest the same in productive funds, or put it out on adequate security, under the direction of the Orphans' Court, or of a court of equity, so that the dividends or income may be received by the legatee for life, and the principal, after the death of the legatee for life, may be received by the legatee in remainder. pp. 87-88

But where a testator indicated by his will his intention that a life tenant should take the rest and residue of the estate, with full authority to invest and re-invest the principal according to her preference, and to use the income as she pleased, a distribution of the estate made to the legatees and to the life tenant is sufficient to show a full and complete administration. pp. 85, 89

The remaindermen have the right to seek aid of a court of equity for the protection of their interest, if they are shown to be in jeopardy, provided such courts have jurisdiction over the parties or property. p. 90

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Where the life tenant in such a will is a non-resident, and the property is not within the jurisdiction of the courts of this State, such protection, even though desirable, can not be furnished by the courts of equity in this State. p. 90

Decided June 24th, 1913.

Appeal from the Orphans' Court of Baltimore City.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

Wm. Milnes Maloy (with whom were *E. O. Grimes, Jr.*, and *Maloy, Brady and Embert* on the brief), for the appellant.

H. Webster Smith (with whom were *Bond, Robinson* and *Duffy* on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from an order of the Orphans' Court of Baltimore City dismissing a petition of the appellant filed in that Court. The last will and testament of John Foley, the father of the appellant, was admitted to probate in January, 1868. and Martha V. Foley and William B. Larmour qualified as executors. The testator, after leaving two hundred and fifty shares of "Lochiel Stock" to his three sons as therein provided, left all of the rest and residue of his property to his wife, "Martha Virginia Foley, to be held and enjoyed by her together with the rents, income and profits thereof, for and during the term of her natural life and no longer, with power and full authority to her to invest and

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reinvest the principal according to her preference for any specific security, and to use and apply the income as she pleases". He then directed that after the death of his wife his estate "be applied and disposed of" as therein provided, and that, his three sons having during his lifetime and by the provisions of his will received more than $10,000.00, such of his children as may be living at the death of his wife, and who have not been thus advanced or mentioned in his will, shall each receive the sum of $10,000.00, so as to put them on an equality with their three brothers, and that the balance then remaining be equally divided among his children, share and share alike. He provided that if any one of his children die "without leaving behind it living at the death of my said wife heirs of or on its body begotten. the share of such child shall be thrown into the common stock," and then authorized and empowered his wife, "if she shall at the time deem it expedient and proper, to grant and assign any security she may hold or cash money, or both, to the amount altogether of ten thousand dollars, to either of my daughters or to each of them, at the time of the marriage of my said daughters * * * and any daughter thus provided for shall be considered equally advanced with my said three sons—as she then will already have the ten thousand dollars which upon my wife's death she would have 'first' received".

The petition alleges that William B Larmour is deceased and that Martha Virginia Foley married about two years after the death of John Foley and her present name is Martha Virginia Syer; that under orders of the Orphans' Court dated September 14th, 1868, and December 29, 1868, the executors were authorized and directed to invest the sums of $6.000 00 and $14.000.00 respectively, in such securities as the widow might desire, and that so far as the records of the Orphans' Court disclose no change had been made in those investments and they are still under the jurisdiction and authority of the Court; that under the adminis-

tration accounts passed in the estate of John Foley property and cash amounting to $44,519.67, were distributed to the widow for life—including thirteen coupon bonds of the United States of the par value of $1,000.00 each, and fifty-six shares of the Danville National Bank, of Danville, Pa., valued at $7,280.00; that no order had been passed authorizing any change in those investments and they are still within the jurisdiction and subject to the orders of the Court; that the administration of the estate of John Foley has not been completed, the orders passed not distributing the rest and residue in accordance with the terms of the will. It is then alleged that Martha Virginia Syer now resides with her husband in San Jose, California, where she has lived for many years; that she has not made any report to the Court for the past forty-four years; that during all that time property in which she only has a life estate and in which petitioner has an interest under the terms of his father's will has been completely under her control, and he has no knowledge nor means of knowing whether the money and property have been invested, and, if invested, in what it is invested.

It prays that an order be passed requiring her to file a report showing the investments representing the rest and residue of the estate, and requiring her to produce in Court the securities, etc. On May 25th, 1912, an order was passed requiring her as surviving executrix to produce in Court the rest and residue of the estate, but on September 20th, 1912, she filed a petition asking the Court to rescind the previous order, which she alleged had been passed without giving her an opportunity to answer, and to allow her to answer the allegations contained in the petition. That was done and she filed an answer as surviving executrix. It denies that the investments are still under the jurisdiction and authority of the Court, and alleges that the executors on May 22nd, 1869, filed their administration account under which they finally distributed the estate, according to the terms of the

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will, to Martha V. Foley, widow, and they received a release from her which was duly recorded. She admits that the property in which she has a life estate has been completely under her control and alleges that she as surviving executrix is not required to further report to the Court because she has stated her final administration account, distributing the assets according to the terms of the will. She alleges that acting under the terms of the will she and William B. Larmour, executors, distributed the rest and residue of the estate to Martha Virginia Foley, individually, and that it is now vested in her, in her individual capacity and not as surviving executrix; that at the time the administration accounts were passed she was advised by counsel that she, in her individual capacity, had the complete control of the funds, constituting and composing the rest and residue of the estate, and acting on that advice, she, in her individual capacity, assumed control of the same, and has ever since done so; that as surviving executrix she has no assets in her hands, and the Court has no jurisdiction in the premises.

The petition was amended by alleging that the securities on the bond of the executors had long since been dead and their estates fully distributed; that in the event of the Court determining that the estate of John Foley is still within its jurisdiction the surviving executrix be required to file a new bond; that she be required to produce in Court the corpus of the estate, and that the same be invested under the direction of the Court; that the administration accounts, which do not show a full administration and distribution, be amended and corrected and the surviving executrix be ordered to file an account distributing the rest and residue of the estate. An answer was filed denying the matters and facts set forth in the amended portion of the petition.

Testimony was taken and the petitioner testified that he is a son of the testator and was eighteen years of age when his father died; that Mrs. Syer is his step-mother; that his father had eight children by his first wife, and Mrs. Syer

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had two daughters by John Foley and one son by her second marriage. The first account of the executors charges them with $66,232.83, and they were allowed credits for payments and disbursements (including the Lochiel stock) amounting to $21,713.16, and then follows the entry: "Balance due the estate and which is retained by Martha V. Foley, the widow of the said deceased, and one of these accountants, under the terms and conditions mentioned in the will of said deceased, to be held by her during her natural life, viz: 4 shares of Susquehanna River and North and West Branch Telegraph Co. stock, incorporated by Act of Penn. Legislature, A. D. 1849, which is worthless, and so returned; 13 coupon bonds of the U. S. for $1,000 each appraised at $1,060 each, $13,780.00; 56 shares of Danville National Bank of Danville. Pennsylvania, appraised at $130.00 per share, $7,280.00; and in cash, $23,459.67; total, $44,519.67; estate accounted for, $66,232.83."

That account was passed by the Orphans' Court on May 22, 1869. On May 8th, 1871, a second account was passed, in which the executors charged themselves with cash received amounting to $1,920.00, and after being allowed $216.86, there was distributed: "Balance due the estate, being the amount to be paid to Mrs. Martha V. Syer under the will of the deceased, $1,703.14."

On May 22nd. 1869, Martha V. Foley executed a release to the executors in which she acknowledged receiving $2,522.79 in cash, $13,780.00 in U. S. bonds, $7,280.00 in Danville Bank stock, which, together with the amount of money theretofore received by her, to wit, the sum of $23,-062.83, "is the full amount coming to me, as widow and devisee of said John Foley, including the amount of my commissions as executrix, under account passed by Orphans' Court of Balto. City this day," and on May 3rd, 1871, she executed another release for $1,703.14—"said balance being due and payable to me under a clause of the said will as the widow of said deceased."

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Prior to the passage of the first account the Orphans' Court had on the petition of the executors authorized Martha V. Foley to invest $6,000.00 in mortgages upon real or leasehold property, or other securities, as she may prefer, "she being in virtue of the last will and testament of said testator the owner of the life estate in said sum of money, and entitled to apply the proceeds of the same to her own use and benefit, during her natural life," and also the sum of $14,000.00 in any securities she may prefer—the order concluding in the language of the one just quoted.

There can be no doubt that the testator only gave a life estate in the rest and residue of his estate to his widow. The terms of the will are too plain to admit of any question as to that. It is likewise clear that the testator did not intend the executors to retain in their hands the estate so left his wife. He left the rest and residue of his estate to his wife "*to be held* and enjoyed *by her* together with the rents, income and profits thereof, for and during the term of her natural life and no longer, with power and full authority *to her to invest and reinvest the principal* according to her preference for any specific security." Then by the sixth clause he authorized and empowered *his wife*—not his executors—"to grant and assign *any security she may hold or cash money,* or both" to his daughters as above mentioned. That clause would seem to conclusively show that the testator intended his wife to hold the securities and cash he left to her for life, if there could be any doubt about the other clauses.

The distributions made to the widow were in terms which are so similar to those in other cases which have been before this Court that it will be well to refer to some of them. In *Myers* v. *Safe Deposit & Trust Co.,* 73 Md. 413, Mrs. Myers, the executrix of her husband, passed an account in the Orphans' Court, in which she charged herself with the whole estate and, after receiving credit for proper charges against the estate for debts, funeral charges and costs of administra-

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tion, the account was balanced as follows: "Allowed said accountant for the residue of the estate retained by her as the widow of the deceased, for the purposes and subject to the conditions and provisions set forth in the will, consisting of," etc. This Court on page 425 said: "In her account she credits herself with the whole residue, and that account was approved by the Orphans' Court. That was a most effectual way of making the final distribution. Thereafter she held not as executrix, but as tenant for life, with the fiduciary powers conferred on her by her husband's will. The estate was entirely closed, and her administration was at an end; and unless there were other assets discovered which had never passed into her hands, as executrix, there was no occasion for an administration *de bonis non.*" The Court there referred to *Binnerman* v. *Weaver,* 8 Md. 518. The will before the Court in the latter case left the property to the testator's wife, with certain trusts in favor of the children. Her life estate was dependent upon her remaining unmarried. She passed her account in the Orphans' Court and took charge of the estate as life tenant, or during widowhood. She married again, and a petition was filed asking for the revocation of her letters and the appointment of an administrator *d. b. n.* Her letters were revoked and she was ordered to recharge herself with the amount she had retained as life tenant, and to distribute the same among those legally entitled to it. That order of the Orphans' Court was reversed on appeal and our predecessors said: "The widow was entitled to a life estate in the property mentioned in the will, subject to the trusts engrafted upon it. She cannot be required to recharge herself as directed by the order of the Orphans' Court. The settlement already made by her discharges her bond, and if she fails to perform her duty enjoined in the will the remedy is in a Court of equity."

In *Crean* v. *McMahon,* 106 Md. 507, JUDGE PEARCE referred to many of the cases in this State, and in the recent

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case of *Sydnor* v. *Graves,* 119 Md. 321, we again had occasion to consider the question. In the latter case a bill in equity was filed by the husband and children of a deceased child of William C. Smith, the testator, against two of his daughters, some children of deceased children and a son, individually and as administrator *d. b. n. c. t. a.* of William C. Smith. The property was left to the widow "for and during her natural life, to be used and enjoyed by her as she shall think proper, as fully as if the same were hers in fee simple." The widow, as executrix, settled an account in which, after charging herself with the inventory and debts collected and obtaining credit for sums paid out and her commissions, this statement was made: "Retained by this accountant the balance of estate bequeathed to her under the last will and testament of the testator, subject to the provisions therein contained, viz." Mrs. Smith having removed to Virginia, died there, and her estate was being settled in a Virginia Court. We held that the account of the executrix amounted to a distribution of the estate to the wife for life and she thereafter held as legatee and not as executrix. We were careful not to determine whether the widow only took a life interest, because her estate was then being administered by a Court of Virginia and we thought it due that Court not to express any opinion on the subject, as we concluded we had no jurisdiction over the property in question.

As we have said, there can be no doubt that Mrs. Foley (now Mrs. Syer) only took a life estate, and if she or the estate of the testator was within the jurisdiction of an equity Court of this State, there could be no difficulty in asserting its powers, if necessary for the protection of the remaindermen. The general rule established by many decisions in this State is that announced as early as *Evans* v. *Iglehart,* 6 G. & J. 196, that: "Where a legacy consists of money or property whose use is the conversion into money, it is the duty of the executor to invest the same in some productive

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fund, or it must be put out on adequate securities and most properly under the direction of the Orphans' Court, or a Court of equity, so that the dividends or income may be received by the legatees for life, and the principal, after the death of the legatee for life, may be received by the legatee in remainder". That of course depends, however, upon the terms of the will, and even when the will does not contain provisions which relieve the executor from the necessity of investing the estate under directions of the Court, whether he shall retain the securities, after the investments are made, must depend upon the provisions of the will, or in some cases upon the orders of the Court. In *Siechrist* v. *Bose,* 87 Md. 284, a sum of money was left to Margaret Siechrist for life, and after her death to be equally divided among her children then living, and the descendants of any who may have died. The executors obtained an order to invest the fund and invested part of it, under that order, in some Baltimore City stock. Some of that stock was afterwards ascertained to be a forgery, but the City authorities authorized a new certificate for the part admitted to be valid and under authority of the Orphans' Court the executors turned over that certificae to the life tenant, which was in her name subject to the terms of the will. When the stock matured the life tenant procured an order authorizing her to surrender the certificate and receive the money. The order did not require her to bring the money into Court, and the record did not show that she had ever made a report of the transaction or reinvested the fund. The children of the life tenant prayed the Orphans' Court to require the surviving executrix to show how the money was invested, if invested to bring into Court the evidence of investment, and if not, to bring the money into Court. The surviving executrix answered that the sum had been fully administered, and as surviving executrix she had no further concern therewith, and the Court was without jurisdiction. This Court said: "In this case it was the duty of the execu-

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tors to invest the fund in accordance with the directions of the Orphans' Court, and when so invested no right remained in the executors to retain it. The bequest was to Mrs. Siechrist for life; the testator intended it to be her property for that period; she therefore was entitled to have the possession of it for that period, on such terms as would protect the interests of those who were also interested in the fund. What she did with it after she received it was a matter that could not concern anyone else than those who were to take the fund at her death. If her treatment of it was such as to jeopardize its safety, a Court of Equity on proper application has full power to require such security to be given as might be needed." The opinion concludes by saying, "that after the investment of the money in compliance with the order of the Court, and the allowance in the account of the executors of the amount so invested, the administration terminated, and the executors became discharged from all further liability as to the legacy. Margaret Siechrist then held the fund as tenant for life, and the duty of protecting the fund was upon her and not upon the executors". See also, *Oesterla* v. *Gaither,* 90 Md. 40, and *Smith* v. *Michael,* 113 Md. 10, where *Siechrist* v. *Bose* is referred to at some length.

It may seem to be of some advantage to have a fund invested by the executor and then turn over the securities, and not the cash, to the life tenant, as the fund can be more readily traced, but if the life tenant can after receiving the securities realize on them (and the executor is not responsible, as shown above), it does not in fact afford much more substantial security to the remainderman than payment to the life tenant in cash would. But however this may be, as is shown by the late case of *Sydnor* v. *Graves, supra,* and others, if the testator indicates by his will that it is his intention that the life tenant takes the estate as left by him, and there is nothing to show an intention that the executor must first invest it, distributions such as were made in this estate are sufficient to show a full and complete administra-

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tion. The bulk of the estate was in fact invested before it was turned over to the life tenant, as at least $20,000.00 of the $23,459.67 mentioned in the first account as cash had been previously invested under orders of Court, and the balance distributed to her in that account was already invested, but the quotations from the will which we have made above show that the testator gave the life tenant power and full authority "to invest and reinvest the principal according to her preference for any specific security," and clause six shows that he contemplated that she could hold securities and cash.

Remaindermen have the right in this State to seek the aid of a Court of equity for the protection of their interests, if they be shown to be in jeopardy, if such courts have jurisdiction over the parties or the property. As the life tenant under this will is a non-resident and the property is not within the jurisdiction of the courts of this State, such protection, if desirable, can not be here furnished those interested in this estate, but it is not to be supposed that they cannot have such rights as they may have, fully protected in California where the life tenant resides.

Being of the opinion that the estate was fully administered, and the Orphans' Court of Baltimore City no longer has jurisdiction over it, the order will be affirmed.

Order affirmed, the appellant to pay the costs.

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WILLIAM T. HOUSTON AND JOHN O. HOUSTON

vs.

WALTER R. WILCOX AND JACKSON H. RALSTON, TRUSTEES, AND MARY I. V. WATERS.

Mortgages: prior equities; bona fide purchaser; security for money actually paid. Attorneys: implied power and authority. Trial by court without a jury. Constitutional rights: Art. 4, sec. 8; issues from Orphans' Court. Judgment: motion to strike out; time for making.

In equity, a mortgage is deemed a purchase to the extent of the debt secured thereby. p. 98

A mortgagee who takes his mortgage for value and without notice of prior equities, occupies the position of a *bona fide* purchaser, and is entitled to protection afforded to such a purchaser by a court of equity. p. 98

In such cases, where the mortgage is sought to be vacated, because of alleged equities of which he had no notice, equity will allow the instrument to stand as a security for the money actually paid by the mortgagee. p. 99

In general, whatever is done by an attorney in the scope of his duty, in the progress of the trial of a case, will, in the absence of proof to the contrary, be presumed to have been done by the authority of his principal. p. 100

Under section 8 of Article 4 of the Constitution, parties to any cause may submit the same to the Court for determination, without the aid of a jury; and issues sent by the Orphans' Court to a court of law for trial constitute "a cause" within the meaning of this section of the Constitution, where such issues are submitted or tried by the Court sitting as a jury. p. 100

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In general, an application to strike out a judgment must be made within the time allowed to take an appeal and within a reasonable time of the discovery of the facts relied on. p. 100

Decided June 24th, 1913.

Appeal from the Circuit Court of Montgomery County, sitting in equity (MOTTER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

William T. Houston, in *propria persona* (with whom were *Thomas Dawson* and *Alexander Kilgour* on the brief), for the appellants.

C. W. Prettyman and *Jackson H. Ralston* (with whom were *Frederick L. Siddons, Wm. E. Richardson* and *Harvey T. Winfield* on the brief), for the appellees.

BRISCOE, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court of Montgomery County, sitting as a Court of Equity, dissolving an injunction on a bill filed by the appellants against the appellees, and dismissing the bill.

The material facts of the case, are matters of record and are therefore practically undisputed.

The object of the proceedings was to restrain a sale of real estate under a deed of trust, made and executed on the 2nd day of February, 1909, by one Henry Warmouth Houston, of the State of New York, to the appellees, Mary I. V. Waters, as mortgagee, and Walter R. Wilcox and Jackson H. Ralston as trustees under the deed.

The prayer of the bill is not only for a perpetual injunction, but that the deed of trust be vacated, cancelled and set

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aside, as a fraud upon the appellants' rights and as a cloud upon their title to the property.

The real estate is situate in the town of Kensington, in Montgomery County, Maryland, and was owned by Mrs. Sarah Annie Gardner at the time of her death, and was by her last will and testament dated the 27th day of July, 1908, devised to Henry Warmouth Houston, the mortgagor and grantor in the deed.

The deed of trust is dated the 2nd day of February, 1909, and was executed by the grantor, the sole devisee, under the will, to secure a loan of three thousand dollars, obtained from Mrs. Mary I. V. Waters, of Washington City, D. C. The property was conveyed to Walter R. Wilcox and Jackson H. Ralston, of the District of Columbia, as trustees, in and upon certain trusts described and set out in the deed, and this deed was regularly and in due time recorded among the land records of Montgomery County.

The appellants are the only heirs at law, and next of kin of the testatrix, one a brother, and the other a nephew, the only surviving child of a pre-deceased brother, and were plaintiffs upon the trial of issues, sent by an order dated the 20th day of October, 1908, of the Orphans' Court of Montgomery County to the Circuit Court of that county upon a caveat filed by them to the will of Mrs. Gardner, which will devised the property here in question, to the defendant and caveatee in this case.

The trial of the issues on the 9th day of December, 1908, in the Circuit Court of Montgomery County resulted in findings for the defendant and caveatee on all four of the issues, transmitted for trial. These findings were duly certified back to the Orphans' Court, and on the 15th day of December, 1908, the will was admitted to probate in that Court, as the *true* and genuine last will and testament of Sarah Annie Gardner, deceased.

A certified copy of the docket entries of the case in the Circuit Court of Montgomery County, is filed in these proceedings, and is as follows:

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In the Circuit Court for Montgomery County.
No. 62 Trials—November Term, 1908.
William T. Houston and John O. Houston
vs.
Henry Warmouth Houston.

Transcript of Record from the Orphans' Court of Montgomery County, filed November 5th, 1908:

December 9th, 1908—Submitted to the Court for trial.

December 9th, 1908—The Court find for the defendant on the first issue, and on the second issue, on the third issue, and on the fourth issue.

Costs in the Circuit Court for Montgomery County, $12.95.

A copy of the order of the Orphans' Court admitting the will to probate upon the findings transmitted to it from the Circuit Court of Montgomery County, is set out in the record, and is as follows:

> "The Court, after having carefully examined the above last will and testament of Sarah Annie Gardner, late of Montgomery County, deceased, and also the evidence adduced as to its validity, orders and decrees this 15th day of December, A. D. 1908, that the same be admitted to probate in this Court as the true and genuine last will and testament of the said Sarah Annie Gardner, deceased.
>
> Geo. W. Meem,
> Remus R. Darby,
> John E. West."

The issues sent to be tried and upon which the findings were had, were in the usual form, and related to the non-execution of the will, mental capacity and undue influence exercised upon the testatrix.

There were no exceptions reserved at the trial of the case in the Circuit Court of Montgomery County, and no appeal from the findings of record in that Court. Nor was there any appeal from the order of the Orphans' Court, admitting the

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will to probate in that Court, or any objection whatever entered of record, within the statutory period of thirty days, as allowed by sec. 62 of Art. 5 of the Code.

It is admitted that Mr. Robert B. Peter, an attorney at law, of the Montgomery County Bar, who filed the original petition and caveat, in the orphans' Court was the duly authorized attorney of the caveators, and plaintiffs in both Courts, and his appearance was entered of record, upon the authority of the plaintiffs and his right to so appear as their attorney is not questioned by the appellants on this appeal.

Subsequently on the 26th of October, 1909, nearly nine months after the execution of the deed of trust here in question, and more than ten months after the will had been probated, the appellants in the record, filed a petition in the Orphans' Court of Montgomery County wherein it was prayed that the findings of the Circuit Court of Montgomery County, on the 9th of December, 1908, and the order of the Orphans' Court. of the 15th of December, 1908, admitting the will to probate, be cancelled and annulled, and the probate of the will be revoked. The petition, alleged as a basis for the action of the Court, first that the findings of the issues had been obtained by fraud; secondly, that under the Constitution of the State, the issues could not be tried by the Court without the intervention of a jury, and, thirdly, that at the trial of the case, the appellant William T. Houston, was absent from the State, did not know the case had been set for trial, and did not authorize his attorney of record to submit the issues for trial to the Court, without the aid of a jury.

On the 28th of February, 1911, the order admitting the will to probate was set aside, and the Orphans' Court passed the following order:

"A mass of testimony was taken in the case, and it was thoroughly argued by counsel on both sides and the evidence and arguments have both been carefully considered. The facts in this case clearly show that there never was a trial of the issues sent by this Court to the Circuit Court for trial, the whole proceedings were *ex parte,* and nothing more was

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done than usually takes place when a will is admitted to probate in common form. This being so, the Court is of opinion that the order admitting the will to probate and granting letters testamentary should be set aside."

It is therefore this 28th day of February, A. D. 1911, by the Orphans' Court of Montgomery County, ordered and decreed that the judgment of this Court rendered on the 15th day of December, A. D. 1908, admitting to probate the last will and testament of Sarah Annie Gardner, be and the same is hereby vacated, annulled and stricken out.

And it is further ordered and decreed that the letters testamentary granted to Henry Warmouth Houston be and the same are hereby annulled, cancelled and revoked.

And it is further ordered that the petitioners and respondent each pay their respective costs.

Afterwards upon the same caveat, issues identical in substance, and with the same caveators and caveatee were transmitted to the Circuit Court for trial, and on the 24th of May, 1911, the case was tried before a jury in that Court. The trial resulted in "findings" in favor of the caveators, on the issues transmitted by the Orphans' Court, and on August 8th, 1911, that Court refused to admit the will to probate, and declared it not to be the last will and testament of Mrs. Gardner.

This brings us to the legal propositions raised by the pleadings. and discussed at the hearing, and in the briefs of the respective counsel of record.

The legal principles applicable to the case, have been settled by numerous and recent decisions of this Court, and it will not be necessary to review them, except as we may deem it proper in support of the conclusions reached, in the determination of the case.

In the first place it will be seen, that the answer of the defendants specifically deny each and every allegation of fraud and bad faith, either actual or implied, made by the bill against them. No evidence whatever was adduced on the part of the appellants to connect the defendants in any

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manner with the fraudulent representations set up in the bill, and relied upon for relief in these proceedings. It is admitted "that the plaintiffs have no evidence that the defendants knew of the alleged fraudulent representations."

The answer avers, that the whole transaction was one made in the ordinary course of business, in absolute good faith and without any knowledge of any rights or claims of any person except the mortgagor and the owner of the property, under the will, to the property or any interest therein that they advanced their money and took the deed of trust spoken of, in reliance upon the records of the county and decrees of courts of competent jurisdiction then in existence and unreversed, and after the time for appeal from the findings had elapsed and the time for appeal from the decree of the Orphans' Court admitting the will to record in that Court had passed. The answer further avers, that the whole claim of the plaintiffs to relief in this cause is, as to these respondents, inequitable and unjust, and that both of the plaintiffs are now estopped to deny the validity and binding force and effect of the deed of trust, because as to William T. Houston the delay and neglect in asserting his pretended rights for a period of nearly a year after the probate of the will induced these respondents to part with their money upon the faith of the records as they then stood; and as to John O. Houston they aver that he is likewise estopped from asserting any rights in the premises against these respondents, not only because of the neglect and delay, but, as your respondents are informed and so aver, because he entered into a binding agreement with the said Henry Warmouth Houston, by which he surrendered and relinquished all claim of right to the estate of Sarah Annie Gardner or to any interest therein, in consideration of the sum of one thousand dollars; and that in order to secure the sum of money Henry Warmouth Houston borrowed the money represented by the deed of trust and note in these proceedings referred to and that out of the money so borrowed John O. Houston was actually paid the sum of one thousand dollars; so that your

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respondents aver that they are subrogated to all of the rights of the said John O. Houston in so far as said rights would affect the lien of the deed of trust aforesaid upon the premises. They further aver that the facts last alleged have come to their knowledge only since the said loan was made, and all of the proceedings relating thereto finally closed.

Upon the conceded facts of this case, we think it is clear that the appellees must be treated as bona fide purchasers, without notice of any equitable rights of other persons in conflict with the deed of trust, at the time they made the loan, upon the property in question, and they are entitled to the protection afforded such purchasers, by a Court of equity.

In 23 *A. & E. of Law* (2nd Ed.), 476, it is said: "It is well settled that a mortgagee who takes his mortgage for value, and without notice of prior equities, occupies the position of a bona fide purchaser and is entitled to the protection afforded to such a purchaser by a Court of equity; a mortgage being deemed a purchase to the extent of the debt secured thereby.

In *Savings Bank* v. *Gordon,* 90 Md. 504, it was said, a bona fide mortgage from a fraudulent grantee has in a number of cases been held to be entitled to protection, to the extent of the debt due him against the creditors of the fraudulent grantee, upon the ground that a mortgagee is to be treated as a purchaser to the extent of his interest within the meaning of the term purchaser as used in statutes, such as that of 13 *Eliz.*, Ch. 5, and this where the mortgage was not accompanied by a negotiable instrument.

In *Seldner* v. *McCreery,* 75 Md. 287, this Court said where a title is perfect on its face and no known circumstances exists to impeach it, or to put a purchaser on enquiry one who buys bona fide and for value occupies one of the most highly favored positions in the law. A bona fide purchaser for value without notice is protected and he cannot be adjudged to have notice of anything apparently improbable, and which diligent and reasonable enquiry would not disclose.

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In *Van Bibber* v. *Reese,* 71 Md. 608, this Court held in respect to similar proceedings that the purchaser of a title, perfect on its face, for a valuable consideration, takes it discharged of every equity of which he had no notice. And it further said under the facts of that case, that whilst a settlement in the Orphans' Court stands unimpeached and unquestioned, it imports verity and furnishes notice that the decedent's real estate is not liable to be sold to satisfy the demands of his creditors. *Bigley* v. *Jones,* 114 Pa. St. 510.

It has been expressly decided by this Court that in such cases a Court of Equity will deal with the conveyance sought to be vacated on special terms, and will allow the instrument to stand as security for the money actually paid by the grantee. *Economy Savings Bank* v. *Gordon,* 90 Md. 504; *Hinkle* v. *Wilson,* 53 Md. 287; *Cone* v. *Cross,* 72 Md. 102; *Hull* v. *Deering,* 80 Md. 432.

In the case at bar, according to the undisputed facts, the records of the Circuit Court for Montgomery County and of the Orphans' Court, disclosed on the 2nd day of February, 1909, the date of the deed of trust, that the title to the property stood in the name of the grantor, and that, too, by the adjudication of both Courts, dated in the month of December, 1908, in proceedings in which the appellants had been parties of record in those Courts.

It is admitted that neither the mortgagee or the trustees, or the attorney of either of them, had any notice or knowledge of any of the alleged rights of the appellants, or of the fraud alleged in the bill.

John O. Houston was not only present at the trial of the first caveat, but a party to the proceedings in both Courts. and it is conceded that he not only consented to the submission of the case to be tried by the Court, sitting as a jury, but it is admitted that he subsequently received the sum of $500 which was raised by the mortgage, on the real estate in question. It is difficult then to see upon what theory, under such circumstances, he can have any standing in a

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Court of equity for the relief he seeks, on the record now before us.

While it is contended that the appellant, William T. Houston, was not present at the trial, it appears that he was represented by a duly authorized attorney and the issues were submitted on behalf of both caveators and caveatee to the Court sitting as a jury for trial. Whatever was done by the attorney within the scope of his duty, in the progress of the trial of the case, in the absence of proof to the contrary, will be presumed to have been done by the authority of the appellants. *Jones* v. *Horsey*, 4 Md. 306; *Ward* v. *Hollins*, 14 Md. 158; *Dorsey* v. *Kyle*, 30 Md. 512; *Lanahan* v. *Heaver*, 77 Md. 605.

The Circuit Court undoubtedly had jurisdiction to hear and determine the case, and its findings carried with it the presumption of regularity in every respect. *Hayes* v. *Brotzman*, 46 Md. 519; *Tinges* v. *Moale*, 25 Md. 480; *League* v. *State*, 36 Md. 265; *Sheppard* v. *Willis*, 28 Md. 631.

By sec. 8, Art. 4, of the Constitution of the State, it is provided that parties to any cause may submit the same to the Court for determination, without the aid of a jury, and it has been the accepted practice in this State to regard issues sent by the Orphans' Court to a Court of law for trial as "a cause" within the meaning of the Constitution, and such issues when submitted are tried by the Court, sitting as a jury. *Dronenburg* v. *Harris*, 108 Md. 597.

But apart from this, it will be seen, that on the 2nd of February, 1909, the date of the deed of trust, a caveat had been filed to the will and the issues had been decided in favor of the caveatee by a Court of competent jurisdiction. A decree of probate had been passed by the proper Court and the judgment of both Courts stood unreversed, and unassailed.

In *McCambridge* v. *Walraven*, 88 Md. 378, Chief Judge Boyd, in delivering the opinion in that case, said, an application to strike out a judgment admitting a will to probate

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after contest on the ground of fraud must be made within a reasonable time after the discovery of the fraud. The general rule being that an application to strike out a judgment must be made within the time allowed to take an appeal after knowledge of the facts relied on. *Taylor* v. *Carroll,* 89 Md. 34; *Worthington* v. *Gittings,* 56 Md. 542; *Redman* v. *Chance,* 32 Md. 52; *Stanley* v. *Safe Deposit Co.,* 88 Md. 407; *Munnikhuysen* v. *Magraw,* 57 Md. 185.

It is inconceivable, under the facts of this record, that the appellants did not know and were not aware of the existence of the proceedings in both courts on the first caveat, before and until the 26th of October, 1909, the date when they intervened by petition, in the Orphans' Court of Montgomery County to vacate and set them aside. The appellant, John O. Houston, was not only present, but consented to all the proceedings, in both courts, and actually consented to the execution of the deed of trust itself, and received a part of the money. The petition alleges, that both of them were aware of every fact, which they rely on as fraud, on the 9th of August, 1909, even if they were not advised of it before that date.

It is difficult to see, even if we assume there was fraudulent conduct on the part of the grantor and John O. Houston, how it could bind the defendants or affect the validity of the deed, because there is no proof that the appellees were parties to it, or had any knowledge of it. *Pacy* v. *Cosgrove,* 113 Md. 315; *Van Bibber* v. *Reese,* 71 Md. 608.

So far as the validity or invalidity of the second proceedings or subsequent judgment of the Orphans' Court of Montgomery County, in setting aside the will, we express no opinion, except to hold that they must be treated as void and of no effect, in so far as the rights of the appellees are concerned, on this record.

Finding no error in the order of the Circuit Court for Montgomery County, appealed against, it will be affirmed.

Order and decree affirmed, with costs.

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GEORGE H. BEINBRINK AND FANNIE E. SCHULTZ

vs.

MARY E. FOX.

Fiduciary relations: aged parent and child; undue influence; consideration; burden of proof. Married women: power to convey land. Acts of 1898, Chapter 457.

Where an aged parent makes a conveyance to a child, the burden is cast on the grantee of establishing the fairness of the transaction, and if where confidence is reposed, it is abused, courts of equity will grant relief. p. 104

A conveyance made by an aged parent to a daughter was attacked on the ground of undue influence and absence of consideration: *Held,* that upon careful consideration of the testimony there was no evidence of any undue influence attributable to the actions of the grantee, and that the consideration named in the deed was a valid one. p. 110

Under Chapter 457 of the Acts of 1898, a married woman has the same power to dispose of her property as that enjoyed by a married man (provided she be 18 years of age); and the limitation of her capacity to convey without the joinder of her husband is removed, subject, however, to his rights which he has acquired by virtue of the marital relation. pp. 112, 113

Decided June 24th, 1913.

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Appeal from the Circuit Court for Frederick County in Equity (PETER and MOTTER, JJ.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

Alban M. Wood and *Charles Herzog*, for the appellant.

Leo Weinberg (with whom was *Frank L. Stokes* on the brief), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

The bill in this cause was filed by Barbara E. Beinbrink June 5th, 1906, against Mary E. Fox, her daughter, for the purpose of having set aside a deed for a tract of farm land in Frederick county made September 3rd, 1903, by the complainant to her daughter.

The bill alleges that when the complainant was about seventy-six years of age, and physically and mentally weak, she was induced by fraud and undue influence, practised upon her by her daughter, to convey all of her real property; that although the deed recites that a consideration of twenty-nine hundred dollars passed, in fact the consideration named was false and that none whatever passed.

During the taking of testimony before the examiner, and after the complainant had testified, she died, and George H. Beinbrink, the husband of the complainant, and Fannie E. Schultz, her only other child and half sister to the defendant, were substituted as parties plaintiff, they being the sole devisees and legatees under the last will and testament of Barbara E. Beinbrink, executed June, 1907.

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The Court below passed an order dismissing the bill, and from that order this appeal was taken.

It is firmly established as the law of this State, that where an aged parent makes a conveyance to a child, the burden is cast upon the grantee of establishing the fairness of the transaction. And if where confidence is reposed it is abused, Courts of equity will grant relief. *Highberger* v. *Stiffler*, 21 Md. 352; *Todd* v. *Grove,* 33 Md. 188; *Whitridge* v. *Whitridge,* 76 Md. 54; *Zimmerman* v. *Bitner,* 79 Md. 115; *Berger* v. *Bullock,* 85 Md. 441; *Reck* v. *Reck,* 110 Md. 497.

There is no contention that, at the time of the execution of the deed, Mrs. Beinbrink was mentally incapable of making a valid contract, and her mentality is not questioned except in so far as the exercise of the alleged undue influence might be said to question it. Therefore the only questions involved concern undue influence by the daughter over the aged mother, and the consideration named in the deed.

After a careful reading and study of all the testimony in the record we have reached the conclusion that there is no evidence of any undue influence attributable to the actions of the appellee, and that the consideration named in the deed is a valid one.

Mrs. Beinbrink and George H. Beinbrink, her husband, lived on the land in question, several miles out of Frederick. Mrs. Fox, with her children, lived in Frederick, and Mrs. Schultz lived in Baltimore City. Mr. Beinbrink was the stepfather of both Mrs. Fox and Mrs. Schultz. The father of Mrs. Fox was a previous husband of Mrs. Beinbrink, named Charles Faitz, who had died when Mrs. Fox was two years of age, and Mrs. Schultz four. Faitz was not, however, the father of Mrs. Schultz. Mr. Beinbrink did not know Mrs. Beinbrink until two years after the death of her husband, whom he did not know at all.

The deed was executed without the knowledge of Mr. Beinbrink and the first knowledge he had of it was a few days after its execution when he read of it in the county

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newspaper's account of land title transfers. This suit was not instituted until three years later, and it was a year later before Mrs. Beinbrink testified. She was then about eighty years of age and from a reading of her testimony we are compelled to agree with the lower Court that no probative force can be allowed it. From the disconnectedness of her answers, uncertainty on material points and avowed forgetfulness there is the clearest evidence of that breaking down of mentality so often seen in persons of her age. And we think injustice would be done if we allowed any of her testimony to influence us in the determination of this case.

Mrs. Fox, the appellee, testified that she was fifty-eight years of age and was married when she was twenty and lived with her mother a while afterward. Since then she had made her home apart from her, though she visited her mother, and her mother her, until shortly after the execution of the deed was known to her step-father who had turned her mother against her. Her mother for years had told her that she had gotten about fifteen or sixteen hundred dollars out of her father's estate, including sale of a house, insurance and lodge money. Her mother had said she wanted some time to give her eight or nine hundred dollars as her share of the property, and interest from the time of her father's death. "She always wanted to make me a deed for what she possessed, and I was always opposed to it, and when she would worry over it I would say just give me some writing to show what you owe me, and if you have anything left when you come to die I am satisfied to take what is left, if it is only half of what you owe me. I never asked her to make me a deed." The first time she mentioned making a deed to her was about fifteen years ago. On the day of the execution of the deed her mother came to her house in Frederick and asked her to go to the office of Frank L. Stoner, a member of the bar who had prepared the deed. She was present at its execution and "heard Mr. Stoner ask her whether she understood now what she was

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doing, and he wanted to know if she understood him aright. He said to mother, do you understand, I understood that I was to write this deed for the amount of money that you had me to add up in your will that you owed your daughter, and I heard her when she said to Mr. Stoner, that is right and that is what I wanted her to have the deed for, for the amount of money I owed her from her father. * * * He explained everything to her just as plain as he could, and she understood it all, at least, she said she did." That she had arranged with her mother that she should "live on and get her living" off the farm for the balance of her life, and that she had never attempted to disturb her after the execution of the deed.

The testimony of Mrs. Elizabeth Speck corroborates Mrs. Fox as to the intention of Mrs. Beinbrink to make a deed to Mrs. Fox. She testified that she was a friend of Mrs. Beinbrink and about twelve years before, Mrs. Beinbrink had told her "That this money belonged to Mr. Faitz, the father of Mrs. Fox, and she told me she wanted to give the home place over to her daughter, Mrs. Fox, and Mrs. Fox wouldn't let her do it. * * * She said it was eight hundred dollars."

Ella V. Shafer testified that Mrs. Beinbrink had on three or four occasions told her she wanted to pay Mrs. Fox the money that was due her from her father and which she had spent, and that the only way she could do it would be by deeding her the farm. That since the making of the deed she had told her once that she had often wanted Mrs. Fox to go with her and have it done, and now that it was done she was satisfied.

Mrs. Anna Boone testified: "I don't remember how long ago it was, but it was in the neighborhood of four or five years ago. It was in her own kitchen. I went there one morning and she (Mrs. Beinbrink) was crying, and I asked her what was the matter, and she said Mr. Beinbrink was treating her so badly. And I asked her the cause, and she

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said he had been treating her so bad since she had made this deed to Mrs. Fox. I asked her what was the idea of her making the deed to Mrs. Fox, and she told me she had made a will, that she wasn't satisfied because when she was gone Mr. Beinbrink and Mrs. Schultz would beat Mrs. Fox out of what was coming to her, that she had made the deed to Mrs. Fox so that she would be righted in her lifetime, that it was due her from her father. She said, too, that she did not expect Mr. Beinbrink to find out that she had made the deed, but that he did find it out and treated her bad. She said, too, she would rather die than appear against Mrs. Fox at the Court House. Mrs. Fox had been so good to her. She told me, too, that she never would have appeared against Mrs. Fox if she had not been forced into it. She said the money coming to Mrs. Fox, interest and all, was in the neighborhood of twenty-nine hundred dollars." She also testified that she had talked to Mrs. Beinbrink at different times about this deed and she always told her about the same thing.

Mrs. Ada Knock, a daughter of the appellee, testified that practically every time Mrs. Beinbrink came to her mother's house she would beg her mother to let her make a deed so that she would get her father's money. Mrs. Beinbrink brought the will, in which she had left her daughter twenty-nine hundred dollars, to her house for her to read and left it in charge of her (Mrs. Knock) husband until she decided to change the provision in it by a deed.

Mrs. Mary L. Secrist testified that in the fall of 1903 Mrs. Beinbrink had told her "she had made a will in Mrs. Fox's favor and she thought Mr. Beinbrink and Mrs. Schultz would cheat her out of it. And she said she had made a deed of the property to Mrs. Fox and I am now satisfied Emily will get what we spent of her's. Mr. Secrist then asked her did she understand what she was doing when she deeded her property to Mrs. Fox, and she said, it is the way I want it."

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William T. Secrist, in testifying as to the conversation just referred to, said: "She (Mrs. Beinbrink) was telling my wife about the trouble she had with Mr. Beinbrink and Mrs. Schultz, and the manner in which they treated her, and in that conversation she came to the will and deed. When she said she had made a deed to Mrs. Fox, I asked her, I says, Mrs. Beinbrink, do you know what you have done when you deed your property to Mrs. Fox? She said she did. She was satisfied and that was the way she wanted it. She was afraid Mr. Beinbrink and Mrs. Schultz would cheat Mrs. Fox out of it after she was dead. She wanted Emily (Mrs. Fox) to have what was due her by her father. In this way she knew she would get it."

The appellee filed as an exhibit a will made by Mrs. Beinbrink, May 8th, 1901, in which she provided that if her husband survived her he should have such portion of her estate as the laws of Maryland allows, and provided for Mrs. Fox as follows: "Of the residue I will, devise and bequeath to my daughter, Mary E. Fox, the sum of twenty-nine hundred dollars, this sum being the amount of money with interest to this date, to which my daughter, Mary E. Fox, was entitled, from the estate of her father, Charles Faitz, late of Baltimore City, deceased, which said sum, so due to my said daughter from said estate, was retained by me and never paid to my said daughter. The provisions of this will were confirmed by a codicil dated May 25th, 1903.

Frank L. Stoner testified that he wrote the above will and codicil, that he was present when Mrs. Beinbrink signed both, that he was an attesting witness to both. In answer to "What knowledge, if any, have you as to the provision in the will giving Mary E. Fox $2,900.00?" said: "Mrs. Barbara E. Beinbrink, when she asked me to prepare this will, stated that she wanted to protect her daughter, Mary E. Fox, to the extent of the estate or money left by her first husband, the father of Mary E. Fox. She named to me the amount of money to which Mary E. Fox was entitled from her

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father, which she claimed to have received and made use of, and asked me to calculate the interest on the amount she named, which I accordingy did, and my present recollection is that the sum named, with interest, aggregated a fraction over $2,900. Mrs. Beinbrink accepted $2,900 as the amount she would give her daughter by the will and so instructed me to prepare it."

George H. Beinbrink, one of the appellants, testified that he married Mrs. Beinbrink in 1853, about two and a half years after the death of her first husband; that he never knew her first husband; that when he married her she had no property or money; that his wife never owed Mrs. Fox a dollar that he knew of and that to his personal knowledge the $2,900 consideration mentioned in the deed was false. On cross-examination he testified that he did not have any knowledge whatever as to the financial condition of Mr. Faitz at the time of his death. "He might have left a hundred thousand dollars for all I know. I never knowed nothing. I didn't know the people." That his wife never discussed with him Mr. Faitz estate; at the time of his marriage there was a house left, which he supposed belonged to her first husband, which was sold, and the proceeds, so far as he knew, applied to the payment of debts; that all his wife had when she married him was some house furniture, and that she never told him she owed Mrs. Fox anything. He further testified that Mrs. Fox "was pretty rough towards her mother all the time" before the deed was written." That after the execution of the deed Mrs. Fox had come to their home and he had cursed her and hurled a piece of stove wood at her and ordered her never to come back.

Mrs. Fannie E. Schultz testified that at the time of her mother's marriage to Beinbrink she had no property; that the property in question was the result of the work and accumulation of her mother and step-father; that her mother had been contributing to the support of Mrs. Fox and her family for forty years. On the point of the influence Mrs.

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Fox had over her mother she testified as follows: "She certainly did have a powerful influence over mother, she gained it by pity, she would plead her poverty, that I would get more than she would, and that I had more than she had, or that I was doing better than she was doing. She worked on mother's feelings in that way." She further testified that she and Mrs. Fox had been on bad terms for fifteen or twenty years.

There were filed certified copies of the inventory and first and second administration accounts of the personal estate of Charles Faitz, from which it appears that after the payment of debts and expenses there remained a balance of $113.86, which amount was paid to the widow.

We have set out the testimony as fully as the length of this opinion would warrant in an endeavor to bring out the important features of it. Our conclusion therefrom is that this deed was the voluntary conscious and deliberate act of Mrs. Beinbrink for a valid consideration. The fact is clearly proved from the statements of Mrs. Beinbrink that she was possessed of a sum of money that rightfully belonged to her daughter. These statements made throughout such a long period of time and to such a number of people surely indicate that she had in some way, known to herself, received money from the estate of Mrs. Fox's father, which she knew belonged partly to the daughter. It is impossible to account for these statements on any other theory than their truth. Leaving out of consideration entirely the testimony of Mrs. Fox and her daughter, Mrs. Knock, on the ground that it might be colored by interest, though we do not say so, we still have the testimony of Mrs. Speck, who states that as long as 12 years ago Mrs. Beinbrink had told her that she had received $800 which belonged to Mrs. Fox from her father's estate, and on down to the date of the execution of the deed, and afterwards, five disinterested witnesses testified to the same fact. And in addition three years before the execution of the deed Mrs. Beinbrink had a statement of

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this very fact incorporated in her will. To admit that these statements were a result of any influence Mrs. Fox may have had over her mother, would be, from the facts in this case, the wildest speculation. That her act was deliberate is fully shown by the testimony of the same witnesses, and the only doubt she seems to have had was as to the safest way to secure to the daughter what was rightfully hers. This is evidenced by the fact that after she had determined upon the plan of a will she afterwards changed it to the deed, so that, as Mrs. Boone testified Mrs. Beinbrink told her, Mrs. Fox would be "righted" in her lifetime, fearing that if she relied upon the will her husband and Mrs. Schultz would cheat her out of it. That her fears were justified, seem to be borne out by these proceedings when we consider that Mrs. Schultz immediately consulted a lawyer and Mr. Beinbrink drove Mrs. Fox from her mother's home. It is significant, too, that notwithstanding their actions three years elapsed before Mrs. Beinbrink filed this bill, and that when she was called as a witness her mind was apparently that of a child.

The point is made by the appellants that the deed in question is void by reason of the non-joinder of the husband. Their contention is, that the property having been acquired prior to the passage of Ch. 457 of the Acts of 1898, and at a time when it was not possible for a married woman to convey her property without the joinder of her husband, the only mode by which a valid conveyance could be made was by following the law existing at the time of the acquisition of the property, notwithstanding the Act of 1898 gave a married woman the right to convey without her husband. The cases of *Gebb* v. *Rose*, 40 Md. 392; *Greenholtz* v. *Haeffer* 53 Md. 186, and *Preston* v. *Fryer*, 38 Md. 225, are cited as being to that effect. A reference to those cases shows, that they did not establish such a principle as contended for, but merely declared void deeds made by married women without the joinder of the husband, because the statute in effect at the time of the attempted conveyance provided that a married

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woman could only convey her separate property by her husband joining in the deed. By the Code of 1860, Art. 45, sec. 2, the control of married women over property was very much enlarged; and it was therein provided that all property acquired by a woman either before or after her marriage by "purchase, gift, grant, devise, bequest, descent or in course of distribution," should be held for her separate use, with power to her of devising it as fully as if she were a *feme sole;* or of conveying the same by a joint deed with her husband. It was provided if she died intestate, her husband surviving her with children, he was to have a life estate in all of her property, but if the husband survived her without children he was to have a life estate in the realty, but the personalty absolutely. This Court has declared that this Act, and some amendments which are not material to the present inquiry, have removed every common law disability, to which a *feme covert* was formerly subjected, with respect to making a valid will. That under it she could exclude her husband entirely from any share in her property. *Roane* v. *Hollingshead,* 76 Md. 369. This practically destroyed in Maryland the husband's estate by the curtsey in lands held by his wife under those provisions of the Code, and substituted a life estate in her inheritable real estate in her husband, conditioned upon his surviving her and her dying intestate. *Mason* v. *Johnson,* 47 Md. 347. Up and until the date when the Act of 1898 went into effect, January 1st, 1889, the only limitation upon a married woman's power over her property was this necessity of her husband joining in the deed of conveyance. The Act of 1898 removed this limitation and gave to a married woman the same power to dispose of her property as that possessed by her husband over his property, provided she is eighteen years of age.

The effect of this statute as to its retroactive operation upon property held prior to its adoption, has been passed upon in *Harris* v. *Whiteley,* 98 Md. 430. In that case judgment creditors of the husband claimed that under sec. 7,

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Art. 45 of the Code, being the Act of 1898, the husband acquired a vested estate for life in one-third of the estate of his wife, acquired prior to the passage of the Act, and that this was applicable to their judgments in the lifetime of the wife. The question was, did the Act operate to change the expectant interest that the husband took by virtue of his marriage in 1881, under the laws then in force, into a present vested estate. The Court held that the Act had no retroactive effect and that the rights of the husband and wife were not affected by it and that they must be determined according to the pre-existing law. That was a case where the result would have been, if the creditors' contention had been upheld, of diminishing the vested interest the wife had in her property and increasing the husband's interest from a mere expectancy and not a vested estate, to a present and vested one. Applying this principle to the present case, it must be that the Legislature, when it gave to marreid women the same power to dispose of their property as that enjoyed by married men, meant to remove the limitation on the capacity of the wife to convey without her husband, but subject to any rights he had acquired by reason of the marital relation. If the wife takes property the title to which is subject to the limitation to convey imposed by a statute, a conveyance by her alone pursuant to a later statute does not make her conveyance void, but merely subjects it to the conditions in effect during the existence of the prior statute.

Order affirmed, with costs to the appellee.

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AUGUSTUS C. CROTHERS, EXECUTOR OF CHARLES C. CROTHERS, DECEASED,

vs.

EMERSON R. CROTHERS AND OMAR D. CROTHERS, EXECUTORS OF AUSTIN L. CROTHERS, DECEASED.

Co-executors: deceased executor; unadministrated estate; petition for account; jurisdiction of Orphans' Court.

Co-executors are regarded in law as one individual, and the acts of one in respect to the administration of the estate are deemed to be the act of all. p. 117

Possession by one executor is possession by all, and powers and duties of executors that remain unexecuted or unfulfilled pass to the survivor. p. 117

Where an executor rests inactive for years (15) and until his co-executor dies, before making any move towards the administration of the estate, he is not in a position to recommend himself to a Court as a party injured by his co-executor. p. 117

Where such an executor makes no allegation of waste committed or assets concealed by his co-executor, a petition filed by him in the Orphans' Court against the executor of the latter, requiring him to file a full itemized and detailed statement of the assets of the deceased executor, can not be treated as an application by one executor against his co-executor upon either of these grounds. p. 117

But where such a petitioner is not only a co-executor, but is also a legatee under the will, the Orphans' Court has jurisdiction to entertain the petition and to hear and determine exceptions that may be filed to the account. p. 119

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When such a petitioner takes a position antagonistic to the deceased co-executor and denies all the payments claimed to have been made by the latter, he has no right to have all the vouchers of the deceased executor turned over to him. p. 119

Such vouchers should be retained by the executor of the deceased executor for the protection of the estate, subject, however, to be produced before the Court at any hearing upon exceptions to the account rendered by them. p. 119

While Orphans' Courts are courts of limited jurisdiction, yet, by the Code, Article 93, section 235, they are vested with power to direct the accounting of executors and administrators, superintend distribution of estates of intestates and administer justice in all matters relating to the affairs of deceased persons; the language of this section vests in them power to protect the interests of all concerned. p. 119

Decided June 25th, 1918.

Appeal from the Orphans' Court of Cecil County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

H. A. Warburton (with whom was *W. T. Warburton* on the brief), for the appellant.

W. S. Evans (with whom was *James F. Evans* on the brief), for the appellees.

STOCKBRIDGE, J., delivered the opinion of the Court.

Charles C. Crothers died in 1897 in Cecil county leaving a last will, by which he named his brothers, Augustus C. Crothers, of Harford county, and Austin L. Crothers, of Cecil county, his executors. The will was admitted to probate and letters testamentary were issued by the Orphans'

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Court for Cecil County, to the executors named, in November, 1897. No further proceedings appear to have been had in the Orphans' Court in connection with the estate until the year 1912, when a petition was filed by Augustus C. Crothers embodying the following allegations:

That no inventory of the estate had ever been returned by the executors and no account passed of their administration of the estate; that the active administration of the estate had been entirely confided by the petitioner to his co-executor, Austin L. Crothers, who died in 1912, testate, naming his nephews, Emerson R. Crothers and Omar D. Crothers as his executors, who had qualified as such; that Austin L. Crothers in his lifetime gave the petitioner little or no information concerning the estate of Charles C. Crothers. The petition then concludes with a prayer that the Court "pass an order commanding and directing the said Emerson R. Crothers and Omar D. Crothers, executors of Austin L. Crothers, deceased, to file in this Court a full, itemized and detailed statement of the assets belonging to said estate; the amount that has been distributed, and the amount or amounts still due and owing any of the devisees or legatees under the will of the late Charles C. Crothers, and also directing the executors of the said Austin L. Crothers, deceased, to pay over to this petitioner any and all sums of money remaining in the hands of their testator at the time of his death belonging to the estate of the said Charles C. Crothers, deceased, in order that your petitioner may be enabled to bring the same into this Court and distribute it under its order."

In response to this the executors of Austin L. Crothers did, in August, file an inventory and a full itemized account, which showed the estate of Charles C. Crothers overpaid to the amount of $1,874.05. Thereupon the petitioner, one of the original executors, filed exceptions *"to each and every item for payments and allowances,"* set forth in the account as rendered and excepted *"especially to the item of payment of legacy of this exceptant of thirty-five hundred dollars,*

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less collateral inheritance tax, but avers and alleges that the same has not been paid, and the other items for which credit is claimed in said account no vouchers have been presented to this Court for same."

After these exceptions had been filed the executors of Austin L. Crothers filed an amended answer in which they set up a lack of jurisdiction in the Court to entertain the petition, and apparently the Orphans' Court adopted that view, as it dismissed the petition.

It must not be lost sight of that the deceased, Austin L. Crothers and the petitioner occupied the relation to this estate of co-executors, and that "co-executors are regarded in law as an individual person, and by consequence the acts of any one of them in respect to the administration of the effects are deemed to be the acts of all; for they have joint and entire authority over the whole property," *Watkins* v. *Shaw,* 2 G. & J. 220, and the possession of one executor is the possession of all, *Montgomery* v. *Black,* 4 H. & McH. 391, and whatever powers and duties existed in the executors and remained unexecuted or unfulfilled passed to the survivor, Code (1912), Article 93, section 296. When, therefore, an executor rests inactive for a period of fifteen years and until his co-executor has died, before making any move, so far as the record discloses, to expedite the administration of an estate for which he was equally responsible with his co-executor, he is not in a position to commend himself especially to a Court as an injured party. He makes no allegation of waste committed or assets concealed by his co-executor, and for that reason the petition filed by him cannot be treated as an application by one executor against his co-executor upon either of these grounds.

Because of the fact that in law two or more executors of a deceased individual are regarded as one person, and upon the death of any, the survivors or survivor succeeds to all powers and duties theretofore exercised by all of the executors to whom letters were granted there are no express provisions

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in the Code relating exclusively to the rights of one executor against the personal representatives of his deceased co-executor. The appellant contends, however, that under the rules of construction the terms executor and administrator are virtually interchangeable, and that inasmuch as by section 72 of Article 93, Code (1912), it is made the duty of an administrator to deliver over to the administrator d. b. n. of the original decedent all assets of such decedent remaining unadministered in the hands of the deceased administrator, and by section 73 of the same article the administrator of a deceased administrator may be compelled to return under oath a list of the notes, bonds, accounts and money remaining unadministered, and by section 11 it is made the further duty of the administrator of a deceased administrator to render an account of the administration of such deceased administrator, the same right exists in favor of a surviving executor as against the executors of his deceased co-executor. The cases are far from being parallel for reasons already indicated, yet much support for the contention can be found in *Baker* v. *Bowie,* 74 Md. 467.

The question raised by this appeal is one of jurisdiction. The prayer of the petition was that the executors of Austin L. Crothers should file in the Orphans' Court for Cecil County a "full itemized and detailed statement of the assets belonging to said estate, the amount that has been distributed and the amount or amounts still due and owing to any of the devisees or legatees," and "pay over to the petitioner any and all sums of money remaining in the hands of their testator." If the appellees had desired to raise the question of the jurisdiction of the Orphans' Court to entertain such a petition, then was the time to have done so. But instead of doing so, by the filing of an inventory and rendering of an account they waived any question of jurisdiction. That was first attempted to be set up after exceptions had been filed to the account rendered, and without seeking to withdraw the inventory and account previously filed, and which were on

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their face a full and complete compliance with the petitioner's demand. Moreover, while Orphans' Courts are Courts of limited jurisdiction they are invested with the powers to direct the accounting of executors and administrators, superintend the distribution of estates of intestates and administer justice in all matters relating to the affairs of deceased persons, Code (1912), Article 93, section 235, and this language was held to vest in Orphans' Courts powers adequate to protect the interest of those concerned in the faithful performance of the duties of an administrator. *Lee* v. *Price,* 12 Md. 256; *Muncaster* v. *Muncaster,* 23 Md. 288; *Cummings* v. *Robinson,* 95 Md. 87. In the present case the petitioner was not only an executor, but a legatee as well, and under the consistent interpretation given to the statute, it must be held that the Orphans' Court had ample jurisdiction to entertain the petition and to hear and determine the exceptions filed to the account. This must not be interpreted as meaning that the petitioner had the right to have turned over to him the vouchers for the payments made by Austin L. Crothers. In many, in fact in most instances, such would be the proper course, but in this case the petitioner has taken a position antagonistic to his deceased co-executor, denying each and all of the payments claimed to have been made by him. Under such circumstances the executors of the estate of the deceased executor are entitled to have and retain the vouchers for payments actually made, as a matter of protection to their estate, subject to the right of having them produced in the Orphans' Court at any hearing upon the exceptions to the account rendered by them.

For the reasons indicated the order of the Orphans' Court for Cecil County must be reversed and the cause remanded for further proceedings.

Order reversed and cause remanded for further proceedings, with costs to the appellant.

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THOMAS J. KENNY
vs.
STATE OF MARYLAND.

Twice in jeopardy: invalid indictment; retrial for same offense. "Second offense": heavier punishment; indictment and verdict. Liquor laws: violations; by licensee or others.

Where the indictment under which a traverser is indicted is declared invalid he may be indicted and tried again for the same offense. p. 125

An indictment of a traverser for violating as licensee under section 14 of Chapter 179 of the Acts of 1908 (which section relates to the punishment of licensees found guilty a second time for violating the provisions of the liquor laws), is void, unless it alleges that the traverser was a licensee at the time of his conviction for the first offense. pp. 123, 124

A simple verdict of "guilty" in such a case does not justify the penalty provided by the statute for a second offense; to justify a sentence for a second offense it must appear from the verdict that the jury have found the party guilty of such second offense. p. 123

On an appeal, in a criminal case, where an error in the judgment or sentence itself is the only error committed by the Court below, the Court of Appeals may reverse the judgment and remand the record, in order that a proper judgment may be pronounced upon the indictment and conviction. p. 123

Decided June 24th, 1913.

Appeal from the Circuit Court for Baltimore County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

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William H. Lawrence (with whom was *Elmer J. Cook* on the brief), for the appellant.

Edgar Allan Poe, the Attorney-General, submitted the case on a brief for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The appellant was indicted on the 9th day of October, 1912, in the Circuit Court for Baltimore County as a licensee, for selling fermented liquor, to wit, beer, on Sunday, in violation of Ch. 179 of the Acts of 1908 (p. 564), regulating the sale and the granting of licenses for the sale of spirituous and fermented liquors in Baltimore County.

By section 10 of the Act, it is provided, that no person having a license under the provisions of this Act shall sell or give away any spirituous liquors on the Sabbath day, commonly called Sunday, * * * nor shall he sell or give away any spirituous or fermented liquors at his place of business between the hours of twelve o'clock midnight and five o'clock A. M. at any time.

By the 14th section it is provided, that if any person having a license under the provisions of this Act, shall violate any of its provisions, upon conviction thereof, except in the cases enumerated in the next preceding and succeeding sections, he shall pay a fine of not less than one hundred dollars, nor more than three hundred dollars, and on conviction a second time he shall pay a fine of two hundred dollars, and his license shall be suppressed.

The indictment charges, that heretofore, to wit, at the May Term of the Circuit Court for Baltimore County, in the year of our Lord, one thousand nine hundred and twelve, one Thomas J. Kenny, late of said county, was indicted by the Grand Inquest of the State of Maryland, in and for Baltimore County, for the unlawful sale of a certain quantity of spirituous and fermented liquors, to wit, beer, to a certain Ferdinand Groshans, on the Sabbath day, commonly called Sunday, to wit, on the fifth day of May, in the year of our

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Lord one thousand nine hundred and twelve; that on the twentieth day of June, in the year of our Lord, one thousand nine hundred and twelve, at a session of the said, the Circuit Court for Baltimore County, upon the indictment aforesaid the said Thomas J. Kenny was convicted and judgment was entered by the Court that the said Thomas J. Kenny pay a fine of two hundred dollars and costs; as by the record thereof will more fully and at large appear; which said judgment still remains in full force and effect, and not in the least reversed or made void.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas J. Kenny afterwards, and after he had been so convicted as aforesaid, to wit on the eighteenth day of August, in the year of our Lord one thousand nine hundred and twelve, at the county aforesaid, the same day in the year aforesaid, being the Sabbath day, commonly called Sunday, having then and there a license to sell spirituous and fermented liquors under the provisions of the Acts of the General Assembly of Maryland, of 1908, Chapter 179, unlawfully did sell a certain Harvey Baker, a certain quantity of fermented liquor, to wit, beer, contrary to the form of the Act of Assembly in such cases made and provided, and against the peace, government and dignity of the State.

A demurrer was interposed to the indictment by the traverser, but was overruled by the Court below, and the case was tried upon the plea of *non cul.* He was convicted, and upon the verdict of guilty, it appears by a certified copy of the docket entries filed herein on the 18th day of April, 1913, at the hearing of the case that the Court imposed a judgment and sentence, that the traverser pay a fine of $200 and costs and that his license be suppressed.

The learned Attorney-General very properly concedes in his brief, on behalf of the State, that the Court below committed an error in the imposition of the sentence, and in this we concur.

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The verdict in this case, it will be observed, was simply "guilty" generally, and did not justify the penalty provided by the statute for a second offense, as imposed by the Court in this case.

In *Maguire* v. *State,* 47 Md. 485, JUDGE ALVEY, in delivering the opinion of this Court, said, the authorities are clear to the effect that in order to justify a sentence for a second offense, it must appear by the verdict that the jury have found the party guilty of such second offense. *Thomas* v. *Commonwealth,* 22 Gratt. 912; 3 *Wharton,* C. L. sec. 3418; 1 *Bishop, Crim. Law,* 961.

The ruling in *Maguire's case, supra,* was followed by us in the more recent case of *Goeller* v. *State,* 119 Md. 61 (85 Atlantic Reporter, 954), involving a construction of the very statute, upon which this indictment is based. In *Goeller's case,* we said however, that nothing we have said herein is to be understood as applicable to the imposition of a penalty in any case, not arising under a statute of the character before us.

If the error in the judgment or sentence itself, was the only error committed by the Court below in this case, we should reverse the judgment and remand the record, to the Court below, in order that a proper judgment could be pronounced upon the indictment and conviction. Art. 5, sec. 81, *Code of Public General Laws; McDonald* v. *State,* 45 Md. 90; *Lynn* v. *State,* 84 Md. 83.

But, we think, there was an error committed by the Court in not sustaining the demurrer to the indictment.

The traverser was indicted as a licensee, for a second offense, under section 14 of the Acts of 1908, Chapter 179, and this section relates only to offenses committed by persons having a license under the provisions of the Act.

While the indictment charges that the traverser was a licensee at the time of the second sale, it fails altogether to allege that he was a licensee when convicted for the first offense. Hence, the indictment was defective, because it did not bring the traverser within that class of persons upon

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whom alone the provisions of the Act, under which he was indicted, were designed to operate.

It seems to be clear, that a licensee who sells on Sunday, is liable under section 10 of the Act, for the first offense, and under section 14 of the Act, for a second offense. Section 14, applies to offenses committed by persons having a license under the provisions of the Act, and to a licensee who had been convicted under section 10 of the Act, for a first offense.

In other words, a licensee who sells on Sunday is liable to the penalty prescribed by the Act, when convicted of a first offense under section 10 of the Act, and is liable under section 14 for a second offense.

Manifestly, he could not be liable as a licensee under the Act, for a second offense until he had been convicted, as a licensee, for a first offense, and the omission to charge in the indictment that he was a licensee when first convicted leaves the indictment open to this objection, and renders it defective on demurrer.

In *Bode* v. *State,* 7 Gill, 327, it is said, it is perfectly clear upon the settled principles of pleading in criminal cases, that it was incumbent on the State, to bring the party charged within the purview of the statute, by a positive averment that he belonged to that class of persons, who only were restrained from selling upon the Sabbath, and against whom alone the penalties provided by the Act, in case of its violation, were intended to be denounced. The proposition is, we think, incontrovertible that the indictment should have contained on its face a distinct allegation, that the traverser was within the class of persons thus described.

The design of the Legislature in passing Ch. 179 of the Acts of 1908, was to regulate the granting of licenses for the sale of spirituous and fermented liquors in Baltimore County, as its title indicates, and its provisions, penalties and forfeitures are applicable and relate to licensed dealers.

This Act is limited and confined to a prescribed class and only persons "having a license under the provisions of the

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Act" are liable under sections 10 and 14, and amenable to the penalties of the Act.

Chapter 179 of the Acts of 1908, however, it will be seen, does not repeal section 385 of Article 27 of the Code of Public General Laws (1904), title "Sabbath Breaking", in so far as it applies to persons, who are not licensed dealers, and who sell spirituous or fermented liquors on Sunday in violation of that section, in Baltimore County. *State* v. *Popp,* 45 Md. 432; *State* v. *Edlavitch,* 77 Md. 144; *Seick* v. *State,* 94 Md. 72.

A different punishment is provided by the Acts of 1908, Chapter 179, the Local Law, for a licensee who sells on Sunday, from that prescribed for "Any person" who sells on Sunday, under the General Law, section 385 of Article 27 of the Code (1904), and as section 28 of the Local Law repeals all Acts or parts of Acts, inconsistent therewith, we think, it is apparent, that the indictment in this case properly brought under the Local Law and not under the General Law, section 385 of Article 27 of the Code of Public General laws, 1904.

The indictment on its face charges that at the time of the second offense the traverser had a license to sell "under the provisions of the Act of the General Assembly of Maryland of 1908, Chapter 179," and he was brought into Court to answer the violation of this Act, the Local Law and not the General Law. Under this state of facts the reference to the Act of 1908, in the indictment, cannot be treated as mere surplusage, as contended for upon behalf of the State, and its contention in this respect, will be overruled.

For the reasons stated, the demurrer should have been sustained by the Court below and the indictment quashed.

The judgment, therefore, will be reversed but inasmuch as the traverser was not tried on a valid indictment he can be re-indicted and tried again. *Stearns* v. *State,* 81 Md. 346; *Kiefer* v. *State,* 87 Md. 568.

Judgment reversed and cause remanded.

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HENRY BRUNT *vs.* THE FARINHOLT-MEREDITH COMPANY.

MARY COALE DUGAN *vs.* SAME.

THE NATIONAL JUNIOR REPUBLIC *vs.* SAME.

Mechanics' liens: notice; items, furnished at different times under single contract.

In order to gratify the requirements of the mechanics' lien laws as to notice of intention to claim a lien, a notice within 60 days from the last item furnished is sufficient to cover all items furnished under a contract, although furnished at different times; but the right of a material man to a lien for furnishing materials can not be kept alive by furnishing materials outside of and in addition to those specified by the contract, after such contract has been performed. p. 133

Decided June 24th, 1913.

Three appeals from the Circuit Court of Anne Arundel County in Equity (BRASHEARS, J.).

The facts are stated in the opinion of the Court.

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The three causes were argued together before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

James M. Munroe (with whom was *Ferdinand C. Dugan* on the brief), for the appellant.

Winson G. Gott, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The three appeals of *Henry Brunt* v. *Farinholt-Meredith Company*, *Mary Coale Dugan* v. *Same*, and *The National Junior Republic of the City of Baltimore* v. *Same*, were argued together.

The firm of De Waard and Sons, contractors and builders, entered into a contract with each of the appellants for the erection of a house—those of Mr. Brunt and Miss Dugan being in Annapolis and that of the National Junior Republic being at Annapolis Junction, in Anne Arundel County. The Farinholt-Meredith Company furnished materials for the three houses at the request of the contractors, and, having filed Mechanics' Liens against the respective houses instituted proceedings in equity to enforce them. The lower Court on December 17, 1912, passed decrees in favor of the plaintiff (appellee) in each case, providing that unless the amounts named be paid within thirty days the respective properties should be sold, and containing the usual provisions in such decrees. From the respective decrees the defendants appealed, and as some of the principal questions are involved in all of them and they must be governed by the same principles of law, we will pass on the three cases in one opinion.

1. Decree against house of Henry Brunt.

This decree is for $642.94 with interest from January 23rd, 1911,—being the total amount of the plaintiff's claim. The bill of particulars contains items furnished from July 2nd 1910, to October 26th, 1910, amounting to $634.65, and

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then on October 29th there was a charge for some items amounting to $8.29. Notice of the intention of the company to file a lien claim was served on Mr. Brunt on December 21st, 1910. He concedes that the items furnished from October 5th to October 26th are properly chargeable and that the appellee is entitled to a lien for them, but he contends that the items delivered prior to that time were not furnished under the same contract or understanding between the appellee and the contractors, and hence as to them the notice was not in time. The testimony on the part of the plaintiff is not altogether clear. When Mr. Carey L. Meredith, secretary and treasurer of the appellee, testified in chief he said, in answer to the question, how they came to furnish the material on this building: "Mr. De Waard came to our office after he had put up some of the rough lumber which he furnished himself from a sawmill in the country and asked us for a bid on a small list of materials, which amounted to $252.64." That list was filed with the examiner and marked "Exhibit A." He was then asked: "Did this consist of all materials furnished on the job?" and replied, "No; he afterwards ordered a lot of materials not included in this list each day as he needed it."

"Exhibit A" is not in the record but on cross-examination of that witness it appears that it was dated October 1st, 1910, and was what the witness called an "estimate." He said the house was nearly half completed when the estimate was made, and the contractors had then already bought "approximately $350.00" from the appellee for the Brunt house. Apparently either Mr. Meredith was mistaken when he testified in chief that the contractors "afterwards" ordered the materials not included in the list, or the record does not correctly state what he testified to, for with the exception of a small difference between the amount of the estimate and the sum of the items furnished between October 5th and October 26th, the bill of particulars shows that the greater part of the bill was furnished *before* Mr. De Waard asked for a bid on the list

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of materials in the estimate, and not *afterwards*, as his evidence in chief states. On cross-examination he stated that the materials furnished before October 1st were not furnished pursuant to any agreement between them that his company was to furnish them, and he did not know from day to day that the contractors were going to buy from him for this house; that when they furnished the articles on the second of July that might have been the last order they would have gotten from the De Waard for the Brunt house. He was then asked: "Then you had no contract with De Waard to continue to furnish his material for the Brunt house or were under no obligation to continue to sell him, or for him to buy from you but when he sent his orders from day to day you furnished the things and sent them to the place that he told you to," and replied: "That is right."

The following also appears in his cross-examination:

"16 Q. These items charged in this account are widely separated, for instance on the 1st day of August you sell De Waard and Sons 1 keg of 20 penny nails, and there appears to be nothing further charged until the 16th of August, more than two weeks later, when you furnished him the 20 penny nails on the 1st of August you had no contract or agreement to furnish anything else? A. No. 17 Q. And you simply might or might not receive any further orders? A. Yes, sir. 18 Q. And does that apply all the way through to everything furnished? A. That applies until we get to the list of materials estimated from. 19 Q. The list of things of October 1st, 1910? A. Yes. 20 Q. These are the things that you had a contract with De Waard to furnish at the prices specified therein? A. Right. I want to say that the reason for the long time between deliveries was because of the fact that they put their rough lumber in from the country sawmill, and all nails and other materials from us which explains why it would be a long time between buying from us. 21 Q. In other words they were buying first from one person and then another, wherever

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they chose, and you had no contract to furnish anything except the items mentioned in Exhibit A? A. That is right." It is true he said on re-examination that all of the goods furnished for the Brunt job were furnished continuously, considered to be one bill and so charged, but while it may be true that in his dealings with the contractors he treated it as one bill, the testimony does undoubtedly show that the materials furnished after October 1st were furnished under a separate contract from those prior to that time. Mr. William G. Meredith, shipping and order clerk for appellee, testified as follows on cross-examination: "22 Q. Did he (De Waard) make any contract with you to furnish all this material, or just send in orders from time to time as he wanted stuff? A. He made a contract with C. L. Meredith and afterwards orders came to me and I would enter them on the day book and then on the wagon. 23 Q. Is the contract you refer to, is this the contract mentioned in the paper marked 'Exhibit A' which he made with C. L. Meredith? A. It is. 24 Q. That is the only contract you know anything about? A. Only one I know of. 25 Q. All the other orders came in from various parties from time to time as he wanted the things? A. Yes."

Having quoted from the testimony at some length, it would be well at this point to recall the principles of law applicable to such facts. By section 11 of Article 63 of the Code it is provided: "If the contract for furnishing such work or materials, or both, shall have been made with any architect or builder or any other person except the owner of the lot on which the building may be erected, or his agent, the person so doing work or furnishing materials, or both, shall not be entitled to a lien unless, within sixty days after furnishing the same, he or his agent shall give notice in writing to such owner or agent, if resident within the city or county, of his intention to claim such lien." In *Trustees of Ger. Luth. Church* v. *Heise & Co.,* 44 Md. 453, JUDGE ALVEY, in speaking for the Court, announced certain rules which

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have been followed in cases of this kind and which may be thus stated: (1) It is not incumbent upon a claimant who furnishes materials to a builder, or other person than the owner, to establish an *express* antecedent contract made with respect to the exact quantity of materials to be furnished by him;

(2) "In the absence of evidence of such express contract, the character of the account, the time within which * * * the materials were furnished, and the object of the * * * materials may afford proper grounds for the presumption that the * * * materials were furnished with reference to an understanding from the commencement that such * * * materials should be * * * furnished, if required by the builder;"

(3) "In such case, it is from the last item in the account that the notice, and the time within which to take the lien, should date;"

(4) "But where the materials are furnished for separate and distinct purposes, or at different times, and at considerable intervals, or under distinct contracts or orders, though to be used by the contractor or builder in executing one and the same contract with the owner, no such presumption will arise, and the right to take the lien must date from the time of furnishing the different parcels of material, and not from the last item in the account."

The evidence is not sufficient to create a presumption that there was "an understanding from the commencement that such materials should be furnished, if required by the builder" but on the contrary it does affirmatively appear that there was no such understanding. It cannot be doubted that if the estimate of October 1st had not been satisfactory to the contractors, they would have been under no obligation to purchase the material furnished in that month from the appellee. That was admitted by Mr. Meredith in his evidence. The articles delivered during the month of October were furnished under the contract of October 1st, and if it be conceded that as to those delivered prior to that month

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the presumption spoken of in paragraph (2) of what we have taken from 44 Md., *supra,* would arise, they were furnished under a different contract from that under which those in October were furnished. What is said of the claim of Myohl & Luken in *Hensel* v. *Johnson,* 94 Md. 729, is very applicable to this claim. JUDGE PAGE said on page 736 the original contract was to furnish "not such lumber as might be needed for the construction of the houses but a specific quantity, contained on a list, a copy of which is in the record. The firm agreed to furnish the builder with those specified quantities for the sum of $1 487.45. Subsequently the builder purchased more lumber, not by virtue of the original agreement, but as he needed it. The lumber furnished in addition to the kinds and quantities included in that list was as much under a separate contract as was the lumber furnished by the firm to Eckstine for other work that the latter was then conducting." Again he said: "Of the delivery on the 2nd day of September, that being the last. Mr. Luken states that it was delivered, not by virtue of any understanding entered into before the beginning of the work, but because it 'was ordered either that day or previous to that.' So that this case is clearly within the rulings in *Trustees of the German Luth. Church* v. *Heise & Co., supra,* where it was held that when the materials are furnished under separate distinct contract, the right to take the lien must date from the time of furnishing the different parcels of material and not from the last item. And this rule will prevail 'if the materials are furnished under distinct contracts, though to be used for the same purpose, or by the contractor in executing one and the same contract with the owner.' *Watts* v. *Wittington,* 48 Md. 356."

Section 11 of Article 63. requires a notice to be given by the material-man or his agent within sixty days after materials are furnished, under a contract with an architect, builder or any other person except the owner of his intention to claim the lien, in order that the owner may have the

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opportunity to protect his property against liens, in case the contractor does not pay for materials he purchases, and hence it is important that the material man should not be permitted to extend the time within which he is required to give notice in order to obtain a lien for materials furnished under one contract, by counting from a later period, when he furnished materials under a subsequent contract or order. While our decisions hold that a notice within sixty days from the last item furnished under a contract is sufficient to cover all items furnished under that contract—although they may cover quite a period of time—it would be very unreasonable and sometimes afford an opportunity to defraud an owner, if the material-man could be permitted to keep alive or revive his right to a lien by furnishing materials outside of and in addition to those contemplated by a contract after such contract had been performed. In this case there is no ground for suspecting fraud on the part of the appellee, but inasmuch as under the authorities cited and others which might be, the materials furnished in Oct. were furnished under a separate and distinct contract from the arrangement under which those delivered prior to October 5th were furnished, we are of the opinion that this decree should only have included the items delivered in October and should not have included those delivered prior thereto.

2. The decree against house of Mary Coale Dugan.

To this case much that has been said above is applicable. The notice of an intention to file a lien claim was served on Miss Dugan in Baltimore on December 21st, 1910, and on December 23rd, 1910, one was also posted on the front door of the house, but we will treat the former as sufficient. The first items in the account were one and a half pounds caps and nails and sixty bags cement on June 6th, 1910, and the last two items were 64 feet lattice on October 22nd, and 500 feet, 6 inch flooring on October 29th, 1910. The total amount of the bill was $1,168.13 with credits of $18.95, leaving a balance of $1,149.18. There is evidently an error in

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the testimony of Carey L. Meredith where he says they furnished the first mill-work on June 9th, and it was furnished continuously from that time until October 22nd, 1910. The only item in the account of June 9th is for "20 bags cement," and the contractors did not accept their bid for the supply of mill-work on the house until June 18th. Indeed the proposition by the appellee "to furnish mill-work for Miss Dugan's house, per plans and specifications, for the sum of seven hundred and thirty dollars ($730.00)" is dated June 15th. Then we find included in the bill of particulars of date of October 1st, "Mill-work per estimate, $730.00," and he testified that "The item furnished on the 22nd of October was extra. We finished as far as the estimate went on October 1st, the item on the 21st was furnished outside of the $750 estimate referred to in the acceptance by De Waard dated June 19th, 1910." There is some confusion about that, as there is no item of the "21st" and the amount is $730, but he evidently meant the "22nd" and "730." Inasmuch as the notice was not given until December 21st, it is clear that there can be no lien for any part of the bill furnished prior to October 22nd (the last item being on the 15th), unless the item furnished on that day, or the one on October 29th, can be tacked on to all or some part of the prior items. That neither of them can revive the contract for the mill-work would seem to be settled by what we have said above, and by the testimony in this case. That was undoubtedly a separate contract. It was in writing and was for the mill-work mentioned in it. It was treated by the appellee as separate. The only reference to the mill-work furnished under that contract in the bill of particulars is the entry of "Mill-work per estimate, $730.00," which was made in appellee's account on October 1st. As we have seen Mr. Meredith testified in chief, "We finished as far as the estimate went on October 1st" and in his cross-examination this appears: "11 Q. And you have stated in your examination in chief that the reason you charged all your mill-work in a lump is that all of the

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mill-work per estimate $730 had been furnished at the time it was charged for? A. I did, that is all right. * * * 20 Q. Where did that lattice work go? A. I don't know whether it went on the porch or under the porch or under the steps, it could have gone to either place. * * * 25 Q. Was this lattice work called for in the specifications of the mill-work? A. Some of it was. A lattice is always included in mill-work if shown on the plans, but in this case it was more of it than was shown and the extra was agreed upon by Mr. De Waard and Sons. 26 Q. And this particular item was an extra and not included in the specifications? A. Yes, that is right."

Manifestly then this extra lattice furnished after the contract for mill-work was completed and charged cannot bring the mill-work included in the contract within the sixty days. It is equally clear that the item of October 29th cannot have such effect. Mr. Meredith's testimony on cross examination as to that was as follows: 21 Q. What is this 500 feet of flooring charged for October 29th? A. That was some common flooring for the third floor as near as I can remember. 22 Q. That is not mill-work? A. No. I want to say that it could have been used in the cellar for coal bin or attic flooring. I remember the order distinctly, don't remember what purpose it was used for."

The whole item of "mill-work per estimate, 730.00" must therefore be rejected because it was a separate and distinct contract, and the notice was not given within sixty days from the time any part of it was furnished. We do not deem it necessary to determine whether that charge, without giving any dates, items or prices of the items, was a sufficient compliance with the requirements of the statute, but will only call attention to what is said in *Rust* v. *Chisolm,* 57 Md. 382, and to section 19 of Article 63 of the Code. It was said in that case "The object of this provision is to enable the owner, or purchaser and other lien creditors, to trace out the truth of the claim and guard against fraud and imposition." See also *Thomas* v. *Barber,* 10 Md. 380.

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The other items in the account we think are sufficiently shown to come within paragraphs (1) and (2) of what we have said about the case in 44 Md. to be allowed. The testimony of Mr. Meredith satisfies us that there was an understanding from the commencement that such materials as those included in the account from June 6th to October 22nd (excepting the mill-work, which was furnished under a special and distinct contract) should be furnished. He said they furnished all the material, except some rough framing and sheathing, which the contractors bought in the country, and they were furnished continuously between the dates named and without any unusual intervals between the dates. The item of October 29th was apparently under a separate contract from the others, but was within the sixty days. So giving the account as liberal a construction as we feel justified in doing, we think the decree should have been for $419.18 with interest.

3. Decree against house of The National Junior Republic.

This decree was for $868.21 with interest from January 23rd, 1911. The total bill was for $902.80, with credits amounting to $34.59. There are a number of items from July 15th to October 27, 1910, amounting to $148.46 and then one item of "Mill-work per estimate $750.00," which is not dated, but entered just below the $148.46, and then below $898.46 are the following, "November 12th, 2 pair blinds (cut down) $2.80, 8 lts. 10 x 12 $.64, 1lts. 24¼ x 30 $.50, 1 lts. 12 x 14 $.10, 1 lts. 18⅛ x 34 $.30," making $902.80.

The only notice of an intention to claim a lien was served on the 7th of January, 1911, on Claude E. Arnold, who is described as "Superintendent of the National Junior Republic, at Annapolis Junction, Anne Arundel County, Maryland." Without referring to the testimony we think the service on Mr. Arnold was sufficient, as we understand he was acting superintendent and was the highest officer or agent

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of the corporation at that time in Anne Arundel county. It is also claimed that it was not shown that the materials were delivered, but we are of opinion that was sufficiently proven. The serious difficulty is as to the account. The contract for mill work was made on June 18th by the same letter of acceptance as that for the Dugan house. It was for $750.00 and was a separate and distinct contract. As we have seen the only entry in the account and, as we understand the testimony, in the books of the appellee, was, "Mill-work per estimate $750.00." That was apparently entered on October 27th, as it is under that date. The first item of the account was furnished on July 15th, 1910, and from that time to October 27th other items were furnished amounting to $148.46. Amongst those were some blinds, and Mr. Marshall testified that there were some things not in the estimate and upon being asked what they were, he said, "Hardware, partitions and few extra blinds and nails." It is manifest that the item of "2 pair blinds (cut down $2.80" delivered on November 12th did not differ from the items included in $148.46 and they were treated by the appellee as different and separate from the "Mill-work per estimate," which was a separate and distinct contract. The item as to the blinds (cut down) is thus spoken of in Mr. Meredith's cross-examination; "18 Q. So I understand that it was included in the original estimate or as an extra? A. These were either extra or extra for cutting down, but it appears to me that the price covers the whole cost of the blinds and I think they were used in the third-story dormer window, and if that was the case they were not in the original estimate. 19 Q. Then according to the best of your recollection and belief these blinds furnished Nov. 12th were not in the original contract, but were used in the third-story for windows not specified in the plans? A. Yes." The other items of that date were clearly not a part of the contract for the mill-work or the other items, as is shown by the next question and answer: "20 Q. Also the lights mentioned thereunder same date, were they also extra?

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A. They were extras furnished for a dresser in the inside of house not on the original plans." Of course they cannot relate back to the other items, so as to bring them within the sixty days, as that was a separate contract—certainly as much so as the sand and lime referred to in *Hensel* v. *Johnson, supra,* under the claim of James H. Warthen, which was held to be under a separate and distinct agreement from that for plastering and pointing.

It is clear under the authorities and testimony that the two pairs of blinds furnished November 12th cannot bring the charge for mill-work included in the estimate within the sixty days, as it was a separate and distinct contract, and the only question is whether they can save the other items. We have concluded to allow them, as we think there is sufficient evidence in the record to show that those items were furnished under the terms of paragraphs (1) and (2) referred to above. That may be a somewhat liberal construction in favor of the appellee, but as among the items amounting to $148.46 blinds were furnished, and there is nothing to indicate an effort to simply extend the time within which notice could be given (the items of November 12th having been entered nearly two months before the notice was given) we feel justified in holding that the items amounting to $148.46 were included in the notice, but the mill-work in the estimate of $750.00, being a separate and distinct contract, must be excluded. Of course the $34.59 of credits must also be deducted and this decree should therefore have been for $118.21, with interest.

It follows that each of the decrees must be reversed and the causes remanded, in order that new decrees be entered in accordance with this opinion.

Decree in each of the three cases reversed, and causes remanded, the appellee to pay the costs in each case.

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CARROLL BATES BLICK

vs.

SIDNEY T. NIMMO AND CARRIE B. NIMMO.

Bankrupts: conveyances in defraud of creditors; bill in State Court, for benefit of all creditors, to set deed aside; effect of subsequent discharge; such proceedings gave no lien; not void.

The discharge of a debtor in bankruptcy is personal to him, and does not release his fraudulent grantees for liability for the formal conveyances made to them by the bankrupt. p. 142

The discharge of a bankrupt does not affect the right of the trustee in bankruptcy, or of creditors of the bankrupt, to have the bankrupt's property that was previously disposed of for the purpose of defrauding his creditors, applied to the payment of his debts. p. 142

Under the Bankrupt Act, the trustee may institute proceedings in a court of bankruptcy or in a state court, for the recovery of property fraudulently disposed of by the bankrupt. p. 143

And where a judgment creditor, more than four months prior to the filing of a petition in bankruptcy against his debtor, filed a bill in a state court to set aside a fraudulent transfer of the latter's property, and the state court acquires jurisdiction of the parties and the subject-matter of the suit, its jurisdiction is not divested by subsequent proceedings in bankruptcy against the debtor. pp. 144-145

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A bill filed in a state court by one not a judgment creditor, and filed in behalf of himself and of the other creditors, for the purpose of subjecting to the payment of his debts lands that had been fraudulently conveyed away by the debtor, gives to the creditor no lien, within the prohibition of section 67-F of the Bankrupt Act of 1898; and the proceeding was *held* not to be void, on the ground of having been instituted within four months prior to the adjudication in bankruptcy, where it did not appear from the record when such adjudication took place. pp. 145, 146

Decided June 25th, 1913.

Appeal from the Circuit Court for Baltimore County, sitting in Equity (DUNCAN, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

William Edgar Byrd, for the appellant.

C. Gus Grayson, for the appellee.

THOMAS, J., delivered the opinion of the Court.

On the 11th of May, 1908, the appellant, on behalf of himself and other creditors of Sidney T. Nimmo, one of the appellees, filed a bill of complaint in the Circuit Court for Baltimore County, sitting as a Court of Equity, against Nimmo and Carrie B. Nimmo, his wife, alleging that the said Sidney T. Nimmo, on the 3rd of January, 1898, and on the 30th of December, 1899, purchased two lots or parcels of land in Baltimore County, and caused the same to be conveyed to his said wife for the purpose of defrauding the plaintiff and his other creditors, and praying that said lots or parcels of land be declared to be the proprety of Sidney T. Nimmo and liable for the payment of his debts, etc. The defendants were summoned and on the 25th of May, 1908,

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filed their answer averring that the property referred to was purchased by and belonged to Carrie B. Nimmo.

On the 30th of April, 1912, the defendants filed a petition in the case alleging that the plaintiff filed a petition in the District Court of the United States for the District of Maryland on the 3rd of July, 1908, against Sidney T. Nimmo for the purpose of having him adjudged a bankrupt, and also filed in the District Court the claim referred to in the bill in this case; that the District Court appointed Francis J. Schorb, trustee, and that, on the 18th of August, 1911, he reported to that Court that there were no assets belonging to the estate; that Sidney T. Nimmo was finally discharged on the 30th of September, 1911, and that therefore the plaintiff had no legal claim against Carrie B. Nimmo or her property and that the bill in this case should be dismissed. The plaintiff answered this petition admitting that he had filed said petition in the District Court, and that Sidney T. Nimmo had been finally discharged, but insisting that he was entitled to prosecute the suit in the Circuit Court for Baltimore County or to have it prosecuted by the trustee in bankruptcy in order that the property described might be applied to the payment of his claim and the claims of other creditors of Sidney T. Nimmo. On the 16th of July, 1912, the trustee in bankruptcy was, upon the petition of the plaintiff made a party defendant in the case, with leave to answer the bill. The trustee did not answer the bill, but on the 25th of July, filed an answer to the petition of the plaintiff to make him a party averring that leave should have been obtained from the District Court before making him a party, and that he should have been made a party plaintiff.

The petition of the defendants and answer of the plaintiff were set down for a hearing and on the 24th of September, 1912, the Court below passed the following order from which this appeal was taken: "Ordered by the Circuit Court for Baltimore County this 24th day of September, A. D. 1912, that the bill in the above entitled case be and the same is dis-

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missed, it appearing to the Court that the claim of the plaintiff was filed in the Bankrupt Court and the defendant Sidney T. Nimmo having been discharged by said Court."

The contention of the appellee, and the theory upon which the order of the Court below appears to have been passed, is that the discharge of Sidney T. Nimmo amounted to an extinguishment of the plaintiff's claim. This is true to the extent that his claim was released so far as the personal liability of Sidney T. Nimmo was concerned, but the discharge of a bankrupt does not affect the right of the trustee in bankruptcy or his creditors to have property previously disposed of by the bankrupt for the purpose of defrauding his creditors applied to the payment of his debts. This right of the trustee is expressly conferred by sections 67E and 70E of the Bankrupt Act of 1898. 1 *Remington on Bankruptcy,* secs. 1216 and 1217; *Collier on Bankruptcy* (9th Ed.), 362 and note 337. It is said in *Remington on Bankruptcy, supra,* where many cases are cited in the notes: "Property fraudulently conveyed or held in secret trust for the debtor so far as the same would inure to the benefit of cerditors without bankruptcy, is recoverable by the trustee in bankruptcy, and the transaction may be set aside," and it is stated in the note in *Collier on Bankruptcy, supra;* "The discharge of a debtor in bankruptcy is personal to the bankrupt and does not release his fraudulent grantees from liability for the fraud committed by them and in no way precludes the trustee from recovering property of the estate thus fraudulently transferred."

The object and purpose of this suit was not to obtain a decree against Sidney T. Nimmo for the amount of the plaintiff's claim, but to subject the property claimed by his wife and alleged to have been fraudulently conveyed to her to the payment of his debts, and his discharge in bankruptcy did not inure to her benefit or release the property from liability. *Moyer* v. *Dewey,* 103 U. S. 301; *Bush on Bankruptcy,* 155.

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It follows from what has been said that unless the jurisdiction of the Circuit Court for Baltimore County was entirely divested by the proceedings in bankruptcy the Court below erred in dismissing the plaintiff's bill. Section 23B and 70E of the Bankrupt Act of 1898, as amended by the Acts of 1903 and 1910 [*Collier on Bankruptcy* (9th Ed.), 486], confer upon the Courts of bankruptcy and the State Courts jurisdiction in cases for the recovery by the trustee in bankruptcy, from an adverse claimant, of property fraudulently conveyed by the bankrupt more than four months prior to the filing of the petition in bankruptcy. Section 70E provides: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a *bona fide* holder for value. For the purpose of such recovery any Court in bankruptcy as hereinbefore defined, and any State Court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." Under these provisions a trustee in bankruptcy may institute proceedings in a Court of Bankruptcy or in a State Court for the recovery of property fraudulently disposed of by the bankrupt. And where a judgment creditor, more than four months prior to the filing of a petition in bankruptcy against his debtor, files a bill in a State Court to set aside a fraudulent transfer of his property, and the State Court acquires jurisdiction of the parties and the subject matter of the suit, its jurisdiction is not divested by subsequent proceedings in bankruptcy against the debtor. This rule is now well recognized, and is firmly established by the decisions of the Supreme Court of the United States. *Collier on Bankruptcy* (9th Ed.), 501-506; 1 *Remington on Bankruptcy,* secs. 1582, 1599; *Eyster* v. *Gaff et al.,* 91 U. S. 521;

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Metcalf v. *Barker,* 187 U. S. 165; *Pickens* v. *Roy,* 187 U. S. 177.

But in the case at bar the bill was filed in the Circuit Court for Baltimore County on the 11th of May, 1908, and the petition in bankruptcy was filed on the 3rd of July, 1908. Section 67F of the Bankrupt Act of 1898 declares, "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall, on due notice, order that the right under such levy judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon the same shall pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid, etc." Under this section any lien obtained through legal proceedings within four months prior to the filing of a petition in bankruptcy is null and void, and it is said in 1 *Remington on Bankruptcy,* sec. 1599, that the proceedings in the State Court by which the lien is obtained are also void and the Court does not retain jurisdiction. In the case of *Metcalf* v. *Barker, supra,* the Supreme Court held that the filing of a judgment creditors' bill creates a lien upon the specific property of the debtor. The doctrine of *lis pendens* has been frequently applied in this State, and a number of cases are collected in a note in *Campbell's Case,* 2 Bland, 210, and in *Venable on Real Property,* under the title "Lien of Lis Pendens." In the case of *Pickens* v. *Roy,* 187 U. S. 177, where a creditors' bill was filed in the State Court to set aside a fraudulent deed several years prior to the proceedings in bankruptcy, and where the trustee in bankruptcy became a party to the proceedings in

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the State Court, the Supreme Court said in reference to the application of the bankrupt to the District Court for an injunction restraining further proceedings in the State Court, that the Circuit Court of Appeals held "that as the Circuit Court of Barbour County had at the time of the adjudication, and had had for years, complete jurisdiction and control over the bankrupt and his property, that jurisdiction was not divested by the proceedings in bankruptcy, and it was the right and duty of that Court to proceed to final decree notwithstanding the adjudication, the rule being applicable that the Court which first obtains rightful jurisdiction over the subject matter should not be interferred with. *Frazer* v. *Southern Loan and Trust Company,* 99 Fed. Rep. 707. And GOFF, J. (45 U. S. C. C. A. 522), speaking for the Court, said: 'The Bankrupt Act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all its detail, provided the suit pending in the State Court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy.' * * * We are of opinion that the Circuit Court of Appeals was right in its rulings. The case in the one aspect comes within *Bardes* v. *Hawarden Bank*, 178 U. S. 524, and in the other within the rule applied. *Metcalf* v. *Barker* (187 U. S. 165)."

In this case, however, the plaintiff was not a judgment creditor, and the bill was filed in behalf of himself and all other creditors of Sidney T. Nimmo. By the filing of the bill in the Circuit Court for Baltimore County he did not, under the Maryland law, acquire a lien upon the property described in the bill in the sense of acquiring a preference, but only in the sense that anyone obtaining an interest in property from the defendants after the defendants were summoned in the case, would take it subject to the result of that suit. Such a lien is not within the terms of section 67F of the Bankrupt Act, nor does this case fall within the ruling

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in *Pickens* v. *Roy, supra,* requiring the suit to be instituted more than four months prior to the adjudication of bankruptcy, for it does not appear from the record in this case when the appellant was adjudged a bankrupt.

Section 70E of the Bankrupt Act of 1898, expressly authorizes the trustee in bankruptcy to proceed in the bankrupt Court or State Court to recover property fraudulently disposed of by the bankrupt, and there is no reason why he may not prosecute in a State Court a suit instituted by a creditor before the debtor is adjudged a bankrupt. If he neglects to do so a creditor may apply to the bankrupt Court to require him to prosecute the suit, or upon his refusal to do so, the creditor may, after making him a party, proceed with the suit to a final decree. This seems to come within the principle recognized in *Eyster* v. *Gaff, supra; Pickens* v. *Roy, supra; Remington on Bankruptcy,* sec. 1644; *Haugh* v. *Maulsby,* 68 Md. 423; *Griffin* v. *Mutual Life Ins. Co.,* 119 Ga. 664; *Davis* v. *Vandiver & Co.,* 143 Ala. 202.

There has been no action of the bankrupt Court to stay the proceedings in the State Court, even assuming that this record presents a case for the proper exercise of that power, and we do not think that the mere suggestion by the bankrupt that a petition was filed in the District Court to have him adjudged a bankrupt and that he was finally discharged by that Court, sufficient to stay the proceedings in the Circuit Court for Baltimore County, or to divest that Court of its jurisdiction.

For these reasons we think the Court below was wrong in dismissing the bill, the only effect of which bill, in case of a decree in favor of the plaintiff, would be to recover property for the benefit of the bankrupt estate.

Decree reversed, with costs and case remanded.

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RICHARD D. HAWKINS AND LURA A. HAWKINS, HIS WIFE, *vs.* CHARLES N. BOUIC AND ALBERT M. BOUIC, ASSIGNEES.

Equity: sales under foreclosure; enforcement of surrender to purchaser of possession of property sold. Mortgagor and mortgagee: right of former to have proceeds of sale applied to payment of debts other than one specifically secured; adjustment of consequential equities governed by findings of fact.

A writ in the nature of a *habere facias possessionem* is the appropriate remedy in equity to compel the mortgagor in possession to surrender the property sold to the purchaser thereof, after final ratification of sale under foreclosure proceedings. p. 162

Where the mortgagor is indebted to the mortgagee for loans other than the one specifically secured by the mortgagee, the mortgagee may, with the assent of the mortgagor, apply a portion of the sum realized from the sale of the property under foreclosure proceedings in partial liquidation of the unsecured debts; and if the mortgagor voluntarily assents to such application of funds, he can not afterwards be heard to complain of the attendant reduction in the value of his equity of redemption. p. 162

H., being the owner of three tracts of land, one of which was subject to a mortgage to one L. for $2,500, with the joinder of

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his wife, L. A. H., mortgaged all of said tracts to one C. to secure a loan of $3,000; thereafter H. executed a second mortgage on the same properties to secure the sum of $1,000, his wife, L. A. H., being named as mortgagee; this mortgage was shortly thereafter assigned by H. and wife to one W., who, during the next two years succeeding said assignment, loaned to H. and L. A. H., his wife, some $2,500 on five different occasions, said sums being secured by separate bills of sale on personal property of the mortgagors; the original mortgage for $3,000 to C. was subsequently acquired by W. Thereafter, one of the tracts subject to the mortgage held by W., as assignee of C., was sold by H. and his wife. W. joined in the deed and released his mortgage lien thereon, the net proceeds from which sale (some $1,500) were paid to W., who credited no part thereof to the $3,000 debt under the mortgage held by him as assignee of C.; thereafter, another tract, subject to the lien of both the original L. and C. mortgages, was sold by H. and wife; of the proceeds some $4,000 was paid in liquidation of the L. mortgage, and $1,254 to W., who credited $1,068 thereof on the debt secured by the C. mortgage held by him as assignee. In addition to this, H. thereafter paid W. $150 in cash which was not credited on the mortgage debt, W. claiming that both said payments—$150 and $1,500—were by him applied, with the knowledge and acquiescence of H. and L. A. H., his wife, to the reduction of their indebtedness to him secured by the bills of sale. Seven years later the last tract was sold under the foreclosure power contained in the C. mortgage held by W. for $3,100 and purchased by W., and the sale finally ratified and confirmed. The auditor's account stated the mortgage debt of W. to be some $3,500, and allowed the net sum realized by the foreclosure proceedings, amounting to $2,912, to W., leaving no surplus for the liquidation of L. A. H.'s second mortgage of $1,000, which had therefore been reassigned by W. to L. A. H. By exceptions and petition, H. and his wife contended: (*a*) that the mortgagors were charged with more than due interest on the debt; (*b*) that W. had purchased the property for the benefit of H. and wife, and that when a final account was stated between them, it would be found that nothing was due under the C. mortgage held by W.; (*c*) that the $1,000 mortgage of

L. A. H. had been assigned to W. as additional security for the C. mortgage, and that had proper credits been allowed by W. on the C. debt, it would have been liquidated, and therefore the $1,000 mortgage would be entitled to a proportionate part of the fund in court; or (*d*) that W., having failed to apply the amounts by him received from M. upon the C. mortgage, H. was entitled to receive out of the proceeds realized by foreclosure a sum equivalent to the total payments so made by him to W.

The lower court overruled each objection so made to the auditor's account, ratified said account, and directed H. and wife to surrender the property to W. On appeal, it was *held*:

(1) That the evidence does not sustain the contentions *a, b* and *d* of L. A. H. and H., her husband; p. 161

(2) That the testimony of H. shows that he knew, at the time of the various sales and payments, the extent of the credits to which he was entitled, and consented to the manner of their application, and that L. A. H., his wife, agreed to all transactions made by her husband; and p. 161

(3) That objection *c* was not well taken, inasmuch as both the C. mortgage for $3,000 and the L. A. H. mortgage for $1,000 covered the same property, and the C. mortgage was executed prior to the H. one, and the latter could not have been assigned as additional security for the payment of the debt secured by the former for the reason that it did not, because it could not, afford such additional security. p. 158

Decided June 25th, 1913.

Appeal from the Circuit Court for Montgomery County, in Equity (PETER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON and STOCKBRIDGE, JJ.

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Frank Higgins and *Alexander Kilgour,* for the appellant.

Albert N. Bouic, for the appellee.

Thomas, J., delivered the opinion of the Court.

The questions involved in this appeal are entirely questions of fact. The contention of the appellants, Richard D. Hawkins and Lura A. Hawkins, his wife, is that the proceeds of sales of certain property covered by a mortgage given by them, and upon which property Lura A. Hawkins held a subsequent mortgage, and certain other payments received by the assignee of the mortgage should have been applied by him to the mortgage debt, while the appellees contend that the money received from said sales was applied by the assignee of the mortgage to other debts which the appellants owed him in pursuance of an agreement with Richard D. Hawkins and with the knowledge and assent of his wife, and that the other payments made by Richard D. Hawkins were not applied by him, but were applied by the assignee of the mortgage to other claims held by him against said appellants.

The following opinion of the Court below contains a clear statement of the case and a full discussion of the evidence, and we entirely concur in the conclusion reached by the learned judge who prepared it:

"This case is now before the Court upon exceptions separately filed by the mortgagors to the ratification of the report of the auditor distributing the proceeds derived from the sale made under these proceedings, and also upon the petition of the purchaser at said sale for a writ of *habere* and the evidence taken thereunder."

"The record discloses that Richard D. Hawkins, on the twenty-fifth day of April, eighteen hundred and ninety-nine, being the owner of two adjacent parcels of land situate in Frederick county, herein called the Putnam tract, subject to a mortgage owned by Charles Levy, securing the payment of

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twenty-five hundred dollars, also of a parcel of land situate in Montgomery county, herein called the Kinder tract, and also of two adjacent parcels of land situate in Montgomery county, herein called the Bennett tract, did together with his wife, by their deed of mortgage of that date convey the same to one Noah E. Cramer to secure the payment of a promissory note bearing even date with the mortgage, for three thousand dollars, drawn by Richard D. Hawkins, as principal, and Lura A. Hawkins, William N. Thompson and Fleet Staley, as sureties, payable to the order of Noah E. Cramer one year after date with interest from date; and thereafter by his deed of mortgage dated the fourth day of May, eighteen hundred and ninety-nine, Richard D. Hawkins conveyed the same lands to his wife, Lura A. Hawkins, to secure the payment of a promissory note of even date with the mortgage for one thousand dollars, drawn by the mortgagor, payable to the order of the mortgagee one year after date with interest from date."

"On the tenth day of May, nineteen hundred, Lura A. and Richard D. Hawkins assigned the last mentioned mortgage to Horace D. Waters. By their bill of sale dated the twenty-ninth day of October, nineteen hundred, Mr. and Mrs. Hawkins, for the recited consideration of seven hundred and ten dollars and fifty-one cents, conveyed certain personal property therein described to Horace D. Waters (Exhibit B. S. 1). The evidence shows this bill of sale was given to secure the payment of a promissory note dated the nineteenth day of October, nineteen hundred, for seven hundred and ten dollars and forty-one cents, drawn by Mr. and Mrs. Hawkins, payable to the order of Mr. Waters, nine months after date with interest from date, which is filed as an exhibit herein. By assignment dated the fifth day of March, nineteen hundred and one, Mr. Waters acquired the Cramer mortgage."

"By their bill of sale, dated the tenth day of June, nineteen hundred and one Mr. and Mrs. Hawkins for the recited consideration of a debt of four hundred and fifty dollars

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owing by them to him conveyed certain personal property to Mr. Waters (Exhibit B. S. 11). It appears from the evidence, this bill of sale was given to secure the payment of a promissory note of even date therewith, for four hundred and fifty dollars drawn by Mr. and Mrs. Hawkins, payable to the order of Mr. Waters six months after date. By their bill of sale of the last-mentioned date, Mr. and Mrs. Hawkins, for the recited consideration of an indebtedness of two hundred and fifty dollars owing by them, to Mr. Waters conveyed to him certain personal property therein described (Exhibit B. S. No. 8). It appears from the evidence this bill of sale was given to secure the payment of a promissory note of even date therewith for two hundred and fifty dollars drawn by Mr. and Mrs. Hawkins, payable to the order of Mr. Waters six months after date. By their bill of sale dated the twenty-eighth day of October, nineteen hundred and one, Richard D. Hawkins and his wife for the recited consideration of an indebtedness from them to Mr. Waters amounting to four hundred and ninety dollars conveyed to him certain personal property therein described (Exhibit B. S. No. 9). The evidence shows this bill of sale was given to secure the payment of a note of even date therewith for four hundred and ninety dollars, drawn by Mr. and Mrs. Hawkins, payable to the order of Mr. Waters ten months after date. By their bill of sale dated the eleventh day of November, nineteen hundred and one, Hawkins and wife for the recited consideration of an indebtedness from them to Mr. Waters of four hundred and five dollars conveyed to him certain personal property therein described (Exhibit B. S. No. 5). The evidence shows this bill of sale was given to secure the payment of a note dated the eighteenth day of October, nineteen hundred and one, for four hundred and five dollars and fifty cents, drawn by Richard D. Hawkins, payable to the order of Mr. Waters ten months after date, with interest from date."

"On the twenty-eighth day of July, nineteen hundred and two, the Kinder tract was sold by Mr. Hawkins for twenty-

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three hundred and twenty-eight dollars, and seventy-three cents. Mrs. Hawkins was present when the sale was consummated and united with her husband in the deed to the purchaser. Mr. Waters was also present and executed and delivered to the purchaser a deed releasing the land sold from the liens existing thereon by reason of the two mortgages hereinbefore referred to. The purchase money was paid out by Messrs. Talbott and Prettyman who were supervising the sale for the party lending the money to the purchaser. According to a statement prepared by them and handed to Mr. Richard D. Hawkins at the time of the sale, after paying out the purchase price certain expenses, taxes and judgments, about which there is no dispute, there remained fourteen hundred and twenty-nine dollars and seventy-three cents, which it is conceded, should have been fifteen hundred and eight dollars and sixty-six cents, which was received and applied by Mr. Waters in accordance with a statement read from his ledger in reply to the fifth direct interrogatory propounded to him, from which it appears no part thereof was applied to the debt secured by the Cramer mortgage. The exceptants contend that this was error, and that this entire amount should have been applied on that debt. On the twenty-sixth of March, nineteen hundred and three, Mr. Hawkins with the concurrence of his wife and Mr. Waters, sold and conveyed the Putnam tract for four thousand dollars. Of the proceeds of this sale Mr. Hawkins received and retained one hundred dollars, being the amount paid by the purchaser when the contract of sale was made, and out of the remainder, thirty-nine hundred dollars, twenty-five hundred and sixty-two dollars and twenty-six cents was paid to Mr. Levy to settle the first mortgage on the property, fifty-two dollars and seventy cents was applied to the payment of taxes, twenty-five dollars and forty cents was paid to a Mr. Biser to settle a claim he had against Mr. Hawkins, and five dollars was paid to Mr. Cramer for his fee for services rendered in connection with the sale. This

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left a balance of twelve hundred and fifty-four dollars and sixty-four cents, which was paid to Mr. Waters, of which he credited as of date of the sale one thousand and sixty-eight dollars and sixty-one cents on the debt secured by the Cramer mortgage, leaving a balance of one hundred and eighty-six dollars and three cents, which the exceptants also claim should have been credited on the last mentioned debt. The exceptants further claim a credit as of the tenth day of May, nineteen hundred and six, of one hundred and fifty dollars on the debt secured by the Cramer mortgage for money it is conceded was paid on that date by Mr. Hawkins to Mr. Waters."

On the tenth day of May, nineteen hundred and ten, the Bennett tract was sold under the power contained in the Cramer mortgage by the assignees thereof for the purpose of foreclosure, at public auction, to Horace D. Waters, for thirty-one hundred dollars, which sale was reported to this Court and by an order thereof passed on the fourteenth day of June, nineteen hundred and ten, finally ratified and confirmed, and on the sixteenth day of July, nineteen hundred and ten, the auditor filed his report distributing the proceeds of sale. In the account stated by him the auditor charged the parties making the sale with thirty-one hundred dollars, being the gross amount thereof, credited them with the costs and expenses incident to the sale, amounting to one hundred and eighty-seven dollars and seventy-five cents, and distributed the balance, amounting to twenty-nine hundred and twelve dollars and twenty-five cents, on account of the mortgage debt, which he found amounted to thirty-five hundred and six dollars and fifty cents on the tenth day of May, nineteen hundred and ten, the day of the sale. In arriving at the amount of the mortgage debt as of the day of sale, two credits were allowed by the auditor thereon, one of one hundred and eighty dollars as of the twelfth day of May, nineteen hundred, the other of one thousand and sixty-eight dollars and sixty-one cents as of the twenty-sixth day of March, nineteen

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hundred and three, the latter being money received by Mr. Waters from the sale of the Putnam tract. On the sixth day of July, nineteen hundred and ten, it was ordered that the report of the auditor be ratified unless cause to the contrary be shown on or before the thirtieth day of July, following. On the last mentioned day, Richard D. Hawkins excepted to its ratification "Because the said mortgagor says that he is charged with more interest than is due on the mortgage described therein." On the tenth day of June, nineteen hundred and eleven, Mr. Waters filed his petition in this case, in which he alleged that Mr. and Mrs. Hawkins were in possession of a portion of the land purchased by him and asked that they be required to deliver possession thereof to him. On the twenty-second day of June, nineteen hundred and eleven, the defendants answered this petition, alleging in substance, that Mr. Waters had purchased the property to hold for them until a settlement could be had between him and them of all dealings between them, when he was to reconvey it to them or any person they might name, and that upon a fair settlement of all the dealings had between the petitioner and the respondents it would be found there was nothing owing him on the debt secured by the Cramer mortgage at the time of the sale made thereunder."

"On the twenty-fifth day of May, nineteen hundred and twelve, Mrs. Hawkins filed a petition herein, which, in substance, alleges that she assigned her mortgage to Mr. Waters as collateral security for the payment of the debt secured by the Cramer mortgage, which he had promised her husband to acquire; that Mr. Waters received from the Kinder tract twenty-three hundred and twenty-eight dollars and seventy-three cents and from the sale of the Putnam tract thirteen hundred and fifty-four dollars and seventy-three cents, which he ought to have applied, but did not apply, on account of the debt secured by the Cramer mortgage; that after the sales of the Kinder and Putnam tracts Mr. Waters delivered to her and she accepted from him her mortgage as a reassign-

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ment thereof to her; that the entire amount of the debt secured by her mortgage with interest thereon from the date of the mortgage remains unpaid, and she asks that the same be paid from the proceeds of the sale made under these proceedings. On the seventh day of June, nineteen hundred and twelve, Mr. Hawkins filed additional exceptions to the ratification of the auditor's report, in which he claims that he is entitled to a credit of eleven hundred and ninety-four dollars and sixty-one cents as of March fifth, nineteen hundred and three, and of sixteen hundred and five dollars and sixty cents as of July nineteen hundred and two, in addition to the credits allowed on the Cramer mortgage by the auditor. When the exceptions came on to be heard the solicitors for the exceptants were requested to furnish the Court with a specific statement of the credits they claimed in addition to those allowed by the auditor, which they have done in the paper signed by them appended to this opinion."

"All of the parties agree that the assignment of the Hawkins mortgage was not made to secure any existing debt owing by Mr. and Mrs. Hawkins to Mr. Waters and that he paid no money consideration therefor. This being so, the question arises, Why was that assignment made? The assignment is endorsed on the mortgage and it was executed by Mr. and Mrs. Hawkins and delivered by Mr. Hawkins to Mr. Waters. The assignment and affidavit thereto are dated the tenth day of May, nineteen hundred, and it was filed for record the following day. Mrs. Hawkins at no time had any conversation in regard thereto with Mr. Waters. When first called to testify in her direct testimony Mrs. Hawkins said that this assignment was made at the instance of her husband, and she understood it was made as additional security to the mortgage Mr. Waters had on all of their property. In her cross-examination, between questions 43 and 56, she reiterates that she was under the impression the assignment was made as additional security for a mortgage Mr. Waters held on their property, which she thought amounted to

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twenty-six hundred dollars, and says that it was not given as additional security to the Cramer mortgage. This testimony was given on the twenty-fourth day of October, nineteen hundred and ten. On the ninth day of August, nineteen hundred and twelve, Mrs. Hawkins was again called to testify in support of her own petition, and she then said the assignment of her mortgage was given as additional security for the Cramer mortgage. Considering all of her testimony bearing upon this subject, the Court is forced to the conclusion that she made this assignment because her husband requested her to do so without any knowledge of the purpose for which it was to be used. On the second day of November, nineteen hundred and ten, in his direct examination Mr. Hawkins was asked 'What did you receive from Mr. Waters for getting your wife to assign that mortgage to him,' and he replied, 'I didn't receive anything at all. I gave it to him to secure him in any possible way for any favor he might extend under the promise that he would take up my mortgage of three thousand dollars, and other judgments that I owed.' Yet, when cross-examined on the twenty-sixth day of February, nineteen hundred and twelve, notwithstanding the above statement, he says he is positive his wife's mortgage was assigned as additional security for the Cramer mortgage and he again testified on the ninth day of August, nineteen hundred and twelve, in support of his wife's exception to the same effect. And when asked, 'Was anything said about it being security for any other indebtedness,' he replied, 'No, sir, that wasn't mentioned. He never has mentioned the mortgage as being security for anything else, not in his life to me.' "

"Mr. Waters in his examination in chief was asked: 'Will you explain about the assignment of the one thousand dollars mortgage to you by Mrs. Richard D. Hawkins?' 'Well, Richard D. Hawkins was dealing with me, having various transactions, and he said to me his wife had a mortgage against him for one thousand dollars, and that he wanted

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to turn that over to me as additional security for the various transactions that we were having. I told him at the time I didn't see where that was any additional security. He said that it didn't make any difference, but that he would like me to hold the mortgage for the time being.' Upon this evidence the Court finds that the Hawkins mortgage was assigned to Mr. Waters for the purposes stated by him and by Mr. Hawkins when he was first interrogated in regard thereto, and that it was not made as now contended by Mrs. Hawkins, as additional security for the payment of the Cramer mortgage. In this connection I may add, that as both the Cramer and Hawkins mortgages convey the same property, and the Cramer mortgage was given prior to the Hawkins mortgage, the latter could not have been assigned as additional security for the payment of the debt secured by the former for the obvious reason that it did not, because it could not. afford such additional security."

"I further find from the uncontradicted evidence of Mr. Hawkins, given when he was called to testify in rebuttal, that on the day of the sale of the Kinder Tract, after that sale had been concluded, Mr. Waters handed the Hawkins mortgage with assignment to him endorsed thereon to Mr. Hawkins with the remark, 'That's your wife's mortgage. I release it. She can get her money now.' I also find Mr. Hawkins delivered this mortgage and assignment to his wife the same day, and that under all of the facts there was a good and sufficient equitable reassignment by Mr. Waters to Mrs. Hawkins of her mortgage on that day. The record discloses that at the time of the sale of the Kinder Tract, in addition to the debts secured by the Levy, Cramer and Hawkins mortgages, Mr. Hawkins owed large amounts of money principally to Mr. Waters on account of numerous and varied transactions had between them for payment of a large portion of which Mrs. Hawkins had become security. From the sale of the Kinder Tract, Mr. Waters received, exclusive of the amount paid him to settle certain judgments

controlled by him, one thousand five hundred and eight dollars and sixty-six cents, which was applied by him as shown by the account stated in his ledger, to which reference has hereinbefore been made, which he testifies was examined and approved as correct by Mr. Hawkins, and which testimony I believe is true, notwithstanding Mr. Hawkins' testimony to the contrary. According to this statement there was owing to Mr. Hawkins as of the first day of January, nineteen hundred and three, on matters charged in that account, a balance of seventy-seven dollars and twenty-five cents, which, according to the testimony of Mr. Waters, was included in a judgment confessed by Mr. Hawkins in his favor on the twenty-second day of April, nineteen hundred and three, for three hundred and forty-three dollars and nineteen cents. Upon an examination of this account it will be found that the amount of the notes upon which Mrs. Hawkins as surety paid therein was greater than the amount received by Mr. Waters from the sale of the Kinder Tract, as above stated."

"Mr. Waters testified that the one hundred and eighty-six dollars and three cents received by him from the sale of the Putnam tract was according to his recollection applied to the payment of a bill for fertilizer used on that farm. In his cross-examination, in reply to the fortieth interrogatory, Mr. Hawkins says that one thousand and sixty-eight dollars and sixty-one cents was all that was to be applied to the Cramer loan out of the Putnam sale, and in reply to the forty-third interrogatory, in which he was asked what was the one hundred and eighty-six dollars and three cents for, he said: 'It was open accounts standing between Mr. Waters and I. I know there was some fertilizer in it and some store goods.' By crediting the Cramer note with one hundred and eighty dollars for interest paid before it was purchased by Mr. Waters, and one hundred and sixty-eight dollars and sixty-one cents, as of the twenty-sixth day of March, nineteen hundred and three, being the day of the sale

of the Putnam Tract, it will be found that on the thirtieth day of January, nineteen hundred and four, it amounted to two thousand five hundred and seventy-two dollars and sixty-nine cents. On the last mentioned date Mr. and Mrs. Hawkins, together with John T. Hawkins, confessed a judgment in favor of Mr. Waters for six hundred dollars. It is conceded this judgment was given as additional security for the payment of the debt secured by the Cramer mortgage, and the Court has no hesitation in finding that Richard D. Hawkins at the time it was given agreed that that debt amounted to about two thousand six hundred dollars or a little less, and that he knew it amounted to that much because he knew he had received and that he was only entitled to have the two credits allowed thereon by the auditor. Did Mrs. Hawkins know and assent to the use made by Mr. Waters of the monies received by him from the sales of the Kinder and Putnam Tracts? If her testimony and that of her husband is accepted as true, she did not. Must it be so accepted? I do not think so. The sales of the Kinder and Putnam Tracts were conventional sales, and this being true, there was nothing to prevent the parties from disposing of the proceeds as they agreed. Mrs. Hawkins was present and participated in the making of each of these sales. When they were made she knew of her husband's financial embarrassments, and she was surety for the payment of a large amount of his debts. She not only occupied the most confidential of all relations, that of wife, to Mr. Hawkins, but she has testified that she left the matters of the Kinder and Putnam sales to her husband, and that she let her husband attend to all of her business for her. In addition to these facts, in nineteen hundred and four, she united with her husband and his father in furnishing additional security to stay the foreclosure of the Cramer mortgage, and six years later when it was foreclosed she attended the sale, and it was not until two years after the sale she filed her petition objecting to the ratification of the report of the auditor. From all of these

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circumstances the Court concludes that Mrs. Hawkins knew of and acquiesced in the application made by Mrs. Waters and her husband of the monies derived from the sales of the Kinder and Putnam Tracts, and having during all these years acquiesced therein, she cannot now be heard to say they must be applied on account of the Cramer mortgage, and Mr. Waters thereby be compelled to look to them for the payment of debts barred by limitations and the security for which has long since been consumed in the using. The dispute over the application of the money received by Mr. Waters from the sale of the Kinder Tract has evidently grown out of the following entry made in Mr. Talbott's statement of the distribution of that fund, 'Pd. H. D. Waters on a/c of mtgs. one thousand four hundred and twenty-nine dollars and seventy-three cents.' But when it is considered this statement was made by one who represented no one interested in this litigation, and by him handed to Mr. Hawkins, who knew that money was not to be applied to that purpose, it can be allowed no probative force in disposing of the issues here involved."

"I come next to the application of the one hundred and fifty dollars paid Mr. Waters by Mr. Hawkins on the tenth day of May, nineteen hundred and six. According to the testimony, one hundred and five dollars was paid by Mr. Hawkins' check, upon which is written, 'for interest'. When this payment was made Mr. Hawkins received from Waters a receipt for the amount which does not indicate the purpose for which the payment was made. Mr. Hawkins says it was made on account of interest on the Cramer mortgage, and the words 'for interest' were written on the check when he delivered it to Mr. Waters. On the other hand, Mr. Waters says they were not on the check when he received it, that nothing was said between him and Mr. Hawkins at the time of the payment as to how it was to be applied, and that he applied it on account of a debt secured by a bill of sale given him by Mr. Hawkins on the fourth day of May,

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nineteen hundred and four. The exceptants allege this payment was made on account of the Cramer mortgage, and this being so, the burden was upon them to prove it. It is sufficient to say they have not discharged this burden, and the application thereof made by Mr. Waters will be permitted to stand."

"The evidence wholly fails to support allegations of the answer of Mr. and Mrs. Hawkins to the petition of Mr. Waters for a writ of *habere,* and will, therefore, order the writ to issue."

In addition to what has been said by the Court below. it may be well to say that it can make no difference in this case for what purpose the mortgage to Mrs. Hawkins was assigned to Mr. Waters, or whether the assignment was valid or void. If the amounts received by Mr. Waters from the proceeds of sales of the mortgaged property were applied by him to other debts of the mortgagors with their knowledge and consent they have no grounds upon which to complain.

The appellants' exceptions to evidence, so far as they relate to the evidence referred to in the above opinion, should have been overruled, and the decree of the lower Court, ratifying the account of the auditor, granting the writ prayed for in the petition of Horace D. Waters, etc., must be affirmed.

Decree affirmed, the costs in this Court to be paid by the appellants.

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MT. VERNON-WOODBERRY COTTON DUCK COMPANY

vs.

CONTINENTAL TRUST COMPANY OF BALTIMORE, TRUSTEE; THE BALTIMORE TRUST COMPANY, TRUSTEE, AND HENRY WILLIAMS, LEMUEL T. APPOLD AND J. HENRY FERGUSON, COMMITTEE OF CERTAIN BONDHOLDER.

Corporations: deeds of trust to secure bonds; misapplication of funds; waste; jurisdiction of equity.

A manufacturing company executed a mortgage conveying all its mill property, machinery and real estate, etc., to trustees, to secure its bondholders; the mortgage provided that the machinery, tools, equipment, etc., conveyed, or intended to be thereby conveyed, should be real estate for all intents and purposes thereof, and should be used and sold therewith, and not separated therefrom, except as therein provided; the mortgage made provision for releases of such real estate and leasehold property as might no longer be necessary or expedient to retain, no such property to be released, however, unless sold, or contracted to be sold or exchanged, and provided that all proceeds from such sales, etc., be set apart and held in trust for the purchase of other property, or in betterment of, or in addition to the mortgaged premises; new property acquired in exchange for any property so released, *ipso facto,* to become and be covered by the lien of the mortgage. The mortgage also provided that the company might from time to time dispose of any part

of its machinery, equipment, etc., which might become obsolete, etc., to be replaced by other machinery, which should be subject to the lien of the mortgage. The mortgage contained a provision requiring the company to keep the mills and machinery in repair. The company dismantled and sold certain mills, receiving in payment therefor a note for $300,000, which it deposited with the trustee. Subsequently the corporation sold certain other machinery in another mill, and acquired new machinery under a leasing agreement, by which the title to the new machinery should remain in the vendors until all payments had been made. The company filed a bill to compel the trustee to apply the note to the account of the new machinery so acquired; on appeal the order of the lower Court denying such petition was affirmed. p. 172

A court of equity will always actively interfere for the purpose of preventing waste of the corpus of a trust estate. p. 171

Decided June 25th, 1913.

Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON and STOCKBRIDGE, JJ.

C. Baker Clotworthy and *J. Southgate Lemmon* (with whom was *Louis Marshall,* on the brief), for the appellant.

Charles M. Howard (with whom was *William L. Marbury,* on the brief), for Henry Williams *et als.,* Committee of Bondholders, appellee.

Nicholas P. Bond, for the Continental Trust Company, appellee.

Charles Markell (with a brief by *Gans & Haman*), for the Baltimore Trust Company, appellee.

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STOCKBRIDGE, J., delivered the opinion of the Court.

The Mt. Vernon Woodberry Cotton Duck Company was incorporated in the month of June, 1899, with a capital stock of $9,500,000.

On the 30th August, in the same year, it executed two mortgages, one to secure an issue of first mortgage 5 per cent. bonds of $8,000,000, and the other to secure an issue of first income bonds of $6,000,000. It thus began business with an aggregate capitalization of $23,500,000, of which $1,000 apparently was cash. The balance of the stock, and possibly some of the bonds were held to acquire certain cotton mills located in Maryland, Connecticut, Alabama and South Carolina, in most cases by means of securing all or the majority of the capital stock of the companies theretofore operating such mills. In some manner, just how or for what consideration is not clear, substantially all of the stock and income bonds of a face value of $5,776,000 out of the total of $6,000,000, passed into the hands of the Consolidated Cotton Duck Company, and this latter corporation in turn was under the control of the International Cotton Mills through the ownership of a majority of the stock. The property included in the two mortgages of August 30th was 237 acres occupied by the plant of the Laurel Mills, 115 acres occupied by the plant of the Franklinville Mills, and large amounts of the capital stock of the corporations owning the other mills controlled through such stock ownership by the Mt. Vernon-Woodberry Company.

Among the provisions contained in the mortgage was the following in Article IV, Section 9:

> "The machinery, tools, furniture, equipment, supplies and other like chattels conveyed, or intended to be conveyed by or pursuant to this indenture, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the said mill properties in or about which they are in use or intended for use respectively and

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part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided."

Notwithstanding this definite, positive provision in the mortgage, in or about the year 1903 the Greenwoods Mill, in Connecticut, was completely dismantled and all the machinery taken out, a portion of it was shipped to Tallassee to help supply a mill that was new and had never been fully equipped, and what was done with the balance does not appear from the record. Thereafter the Greenwoods Mill lay idle till December, 1911, when it was sold for $300,000 to a corporation known as the Draycott Mills, the trustees releasing the mortgages in compliance with a provision of the mortgages, which will be alluded to later, and the promissory note given for the purchase money was turned over to the trustees.

In the summer before this sale was consummated, those engaged in the management of the Mt. Vernon-Woodberry Company's properties, finding that a number of the mills were standing idle, and the others not being operated at a profit, and as the result of a careful examination of the conditions, came to the conclusion that an important and the most important cause lay in the fact that much of the machinery in use, was defective as the result of long years of use, or unadapted for economical production in comparison with more modern machinery, such as was in use by their competitors, and that this worn or old fashioned machinery must be replaced with adequate, up-to-date machinery. Accordingly an arrangement was made between the Mt. Vernon-Woodberry Company and the Consolidated Cotton Duck Company by which the latter was to purchase the desired machinery, have it installed in the Mt. Vernon-Woodberry Company Mills, upon a rental basis of six per cent. interest upon cost plus a proper allowance for depreciation, and with the right to the Mt. Vernon-Woodberry Company to purchase it, and a correlative right in the Consolidated Com-

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pany to remove, if the conditions of the agreement were not complied with. Just what was the total value of the machinery so purchased and installed does not clearly appear, but it is apparent that some and probably a considerable portion of it had been installed before the sale of the Greenwoods Mill had been consummated, as the final approval of the arrangement by the directors of the Mt. Vernon-Woodberry Company on February 26th, 1912, deals with it as an accomplished fact. None of this new machinery was paid for either in whole or in part, but was all included under the rental or conditional sale agreement, and all of it was tagged as the property of the Consolidated Cotton Duck Company.

After the consummation of the sale of the Greenwoods Mill, the Mt. Vernon-Woodberry Company applied to the trustees under the two mortgages to have turned over to it the $300,000 note of the Draycott Mills, in order that it might in turn pass the same to the Consolidated Company in payment to that extent for the machinery installed in certain mills to take the place of that which had become worn out or obsolete. This request was refused, and thereupon the present bill was filed to require the trustees to comply with this demand. In both the oral argument and the briefs filed the greatest stress was placed upon the question whether the new machinery did or did not upon installation become fixtures, so that the lien of the mortgages attached ahead of any claim of the lessor or conditional vendor, or whether it was covered or could be covered by the after-acquired property clause of the mortgages, without additional, independent conveyances thereof.

These are questions upon which there is a wide diversity of decision in the various Courts, and any attempt to harmonize the various decisions would be absolutely futile. The doctrine in this State will be found clearly laid down in such cases as *Dudley* v. *Hurst,* 67 Md. 44; *Central Trust Co.* v. *Arctic Ice Company,* 77 Md. 202, and *Warren Mfg. Co.* v. *M. & C. C. of Balto.,* 119 Md. 188.

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The Circuit Court of Baltimore City, in which this case was tried, did not deem the determination of that question as the controlling factor in this case, nor does this Court. The rights of the mortgagor company and the duties of the trustees are alike dependent upon the provisions contained in the mortgages. These are to be found in Sections 1 and 2 of Article 7 of the mortgages, and are as follows:

"Section 1. Upon the written request of the mortgagor Company, approved by resolution of its board of directors or executive committee, the Trustee, from time to time, while the mortgagor company is in possession of the mortgaged premises, but subject to the conditions and limitations in this section prescribed, and not otherwise, shall release from the lien and operation of this indenture any real estate or leasehold, part of the mortgaged premises then subject thereto, provided, that no part of the mortgaged real estate or leasehold property shall be released thereunder, unless at the time of such release it shall no longer be necessary or expedient to retain the same for use in the business of the Mortgagor Company.

"No such release shall be made unless the Mortgagor Company shall have sold, or shall have contracted to exchange for other property, or to sell, lease or otherwise dispose of the property so to be released; and the proceeds of any and all such sales, and all money received as compensation for any property subject to this indenture taken by exercise of the power of eminent domain, shall be set apart and held in trust and applied to the purchase of other property, real or personal, or in betterments of, or additions to the mortgaged premises. Any new property acquired by the Mortgagor Company by exchange for, or to take the place of any property released hereunder, *ipso facto,* shall become and be subject to the lien of this indenture as if specifically mortgaged or pledged thereby; but if requested by the said Trustee, the Mortgagor Company will convey the same to the Trustee,

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by appropriate deeds, upon the trusts and for the purposes of this indenture.

"Section 2. The Mortgagor Company, while in possession of the mortgaged premises, shall also have full power, in its discretion, from time to time, to dispose of any portion of the machinery, equipment, furniture and implements at any time held subject to the lien hereof, which may have become obsolete or otherwise unfit for such use, replacing the same by new machinery, equipment, furniture or implements, which shall become subject to this indenture; and shall also have full power from time to time to dispose of any manufactured goods or raw material held subject to the lien hereof, replacing the goods or material so disposed of with other goods or material of the same kind or quantity, or of equal value, which shall forthwith become subject to this indenture."

Before considering the effect of these provisions, mention must be made of two other facts. The mortgages are peculiar in that they do not contain any express covenant on the part of the mortgagor to keep its property in repair, and there is therefore no positive obligation upon the Mt. Vernon-Woodberry Company to keep up by proper care and repair any machinery which may be in any of its mills. The second fact has to do with the replacement or substitution of the new machinery for that discarded. When the old machinery was taken out it was apparently disposed of as junk, but even disposed of in this manner must have produced something, but that which was realized from its sale as junk was not applied on the purchase of the new machinery, but remains unaccounted for. It may have been added to the thousand dollars cash with which the company started to do business. It also appears that the schedules presented, upon which the demand for the $300,000 was based, were not schedules of the machinery purchased or leased, but, as was testified by Mr. Taylor, were schedules "gotten up to make a sum adequate to cover" the amount for which the

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Greenwoods Mill was sold. These facts while in some sense insignificant, throw a great deal of light upon the methods of the financial management of the company.

It remains to consider the two sections of Article 7 of the mortgage, already quoted. These provide specifically for two entirely separate and distinct matters. The first provides the method by which real or leasehold property belonging to the company and subject to the mortgage, may be sold and released from the effect and operation of the mortgage, by joint action of the mortgagor and trustee, and for the disposition of any moneys realized from any such sale or sales. The second deals with the maintenance of the plant by providing for the disposition by the company, without the intervention of the trustee, of machinery, equipment or implements, which may have become absolete or unfit for use, and the replacement of "the same by new machinery, equipment" or implements, which shall then become subject to the mortgage; and also for the sale of the manufactured products of the company. What was done by the company in disposing of the old machinery and replacing with new, therefore, came exactly within the terms of Section 2. But it is urged on behalf of the appellant that inasmuch as it is provided by Section 1 that the proceeds derived from the sale of real or leasehold property may be "applied to the purchase of other property, real or personal, or in betterments of or additions to the mortgaged premises," the use of the $300,-000 purchase money of Greenwoods Mill is authorized to be applied to the payment for the replaced machinery as a betterment of or addition to the mortgaged property. With that contention this Court can not agree. This section expressly provides that the moneys so derived *"shall be set apart and held in trust,"* and applied to the purchase of other property. If language means anything this can only mean that inasmuch as the sale of any real or leasehold property covered by the mortgage is a diminution, *pro tanto,* of the security pledged for the mortgage debt, and that the

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cestui que trustent, the bondholders, are entitled to have the money so applied as to restore the security which they had before any sale had taken place. This is not accomplished by expending the money for that, the use of which must involve its deterioration, if not its consumption, made all the more apparent by the omission from the mortgage of any covenant to repair or keep in repair. This is a familiar rule in the administration of trust funds, one of almost daily application, and no reason has been suggested why it is any the less applicable where a corporation mortgage for a large amount is involved than when dealing with the ordinary trust, when an attempt is made for some supposed pressing need to encroach on the corpus of the estate. No duty on the part of a trustee is better known than the prevention of waste of the corpus of the trust estate. A Court of equity never hesitates to actively interpose, if need be, for this purpose. In this respect the contention of the appellant is that the real value of the security for the bondholders lies, not in any particular piece or pieces of property, but in the maintenance of the mills in operation, and that the productivity of the mills will be increased, therefore the security of the bondholders increased by the sale of an idle mill and the employment of the proceeds in the improvement of the machinery of the remaining mills or mill. The right to do this is claimed under the language of Section 1, which authorizes the application of the proceeds of the sale of real or leasehold property to the purchase of other property real or personal, or in betterments of or additions to the mortgaged premises. All machinery and cotton mill machinery is no exception to the rule, is bound to become worn by use or obsolete in form, and day by day suffers some depreciation from use. When as in the present case there is no obligation imposed on the company to repair or keep in repair the machinery, waste is an inevitable result, and it becomes but a question of time when by repetitions of the process now sought to be employed the entire corpus will be consumed.

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If Section 2 of this Article had been omitted entirely from the mortgage it is difficult to see how the trustees could, with proper regard to the duties devolved on them, have done otherwise than refuse the demand of the Mt. Vernon-Woodberry Company, but when we examine Section 2, and find the very condition now presented fully covered by its provisions, all possibility of a doubt as to the correctness of the conclusion disappears.

The decree below will accordingly be affirmed. with costs to the appellee.

COURT OF APPEALS, Aug. 5th, 1913.

Upon a motion for a re-argument the following memorandum and order of modification was filed.

The appellant in the above cause has filed a motion for a reargument "to the end that the decree may be at least modified".

The bill of complaint in the case sought to require the trustees under two mortgages to deliver over to the appellants certain funds in the hands of the trustees "to be applied to the purchase of the machinery" referred to and described in the bill.

The application embodied in the present motion is in substance that in affirming the decree of the Court below in the case, it should be without prejudice to an application for some other investment of the funds in question.

The decree below dismissed the bill, and it is difficult to see how under the prayer of the bill any different application or use of the money could be authorized or made from that asked for in the bill. It may, however, well be that in an appropriate proceeding, and for a proper purpose under the terms of the mortgages, a different disposition of the proceeds derived from the sale of the Greenwood Mill should

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be made than to require it to remain permanently in the hands of the trustees, pending the life of the mortgages, and that the effect of the dismissal of the bill, with nothing further, might be misleading.

It is accordingly ordered by the Court of Appeals of Maryland this fifth day of August, 1913, *that the appellees have leave, if they so desire, to show cause by answer in writing on or before the* 15*th day of September,* 1913, *why the decree heretofore passed should not be modified by adding thereto language to the effect that the dismissal of the bill is without prejudice to a further application to the Circuit Court of Baltimore City in an appropriate form or proceeding for the use of the funds in the hands of the trustees arising from the sale of the Greenwood Mill for the acquisition of real or personal property in accordance with the terms of the mortgages, in such manner as not to impair the security of the holders of bonds issued under the said two mortgages set forth in these proceedings.*

And be it further ordered that a copy of this order be served forthwith upon the appellees in this case or their attorneys of record.

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HOPE H. BARROLL, ASSIGNEE,

vs.

WILMER E. BENTON AND ANNIE M. BENTON.

Mortgages: powers of sale; section 6 of Article 66 of Code; personal trust; assignment; corporations. Representative capacities: execution of deeds; presumptions.

The power of sale authorized by section 6 of Article 66 of the Code to be exercised by the mortgagee, or the person named in the mortgage, implies a personal trust, and is an obligation that a corporation is incapable of performing. p. 176

A power of sale in a mortgage to a corporation or its unnamed attorney or agent is inoperative and void. pp. 176-177

But if the mortgage confers the power of sale upon a mortgagee corporation, "its successors and assigns," or a designated person as attorney or agent, the assignee (and named attorney or agent) may execute the power if the mortgage so provides. p. 177

Where the power of sale is in the first instance given to a mortgagee who is a natural person, the power is regarded as incident to the mortgage security, and as such passes to the successive assigns, even in the absence of any stipulation in the mortgage to that effect. p. 177

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Syllabus.

In a mortgage a power of sale was conferred upon a corporation or H. H. B., its attorney or agent; the mortgage was transferred to another corporation, and by it assigned to the said H. H. B. for collection; he signed the advertisement as "assignee of the mortgage"; the report of sale was signed "assignee and trustee"; the bond (although referring to the assignment) was executed by him in his individual capacity; the condition of the bond was that he should well and faithfully perform "the trust reposed in him by said mortgage and any decree or order in the premises." *Held*, that a sale made by him in distinct reference to a power expressly and lawfully conferred upon him by the mortgage, was not rendered ineffective merely because the capacity in which he acts was not correctly stated.

p. 177

Where a party has various capacities and executes an authority delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the party does not profess to execute it in virtue of tha paricular power.

pp. 177-178

Decided June 25th, 1913.

Appeal from the Circuit Court for Kent County, sitting in equity (ADKINS, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Hope H. Barroll and *L. Wethered Barroll* submitted the case on brief for the appellant.

No appearance for the appellee.

URNER J., delivered the opinion of the Court.

This appeal is from an order vacating a sale of real estate reported to the Circuit Court for Kent County as having been made under a power of sale in a mortgage. The power

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was conferred upon the mortgagee, "The Second National Bank of Chestertown, Maryland, or Hope H. Barroll, its attorney or agent." The mortgage was transferred to the Third National Bank of Chestertown, and having become overdue and being in part unpaid, it was assigned for collection to Mr. Barroll, who proceeded to execute the power of sale. In his advertisement and report the power contained in the mortgage is recited as the source of his authority to make the sale, but this right is treated as being vested in him by virtue of the assignment. The advertisement was signed by him as "Assignee of Mortgage," and the report of sale as "Assignee and Trustee." The bond which he filed preliminary to the sale refers to the assignment, but it was executed by him in his individual capacity, and its condition is that he shall well and faithfully perform "the trust reposed in him by said mortgage and any decree or order in the premises." The Court below set aside the sale on the ground that no valid authority to sell had been vested in the *mortgagee or its assigns*. This action was taken upon the theory that the power of sale which the mortgage attempted to give the mortgagee corporation was void and not susceptible of being transferred by assignment, and that as the assigns of the bank were not expressly authorized to execute the power, a sale reported as being made by an assignee of the mortgage could not be sustained.

The provision in sec. 6 of Art. 66 of the Code (1912), that: "In all mortgages there may be inserted a clause authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises" has been held, in the light of other sections of the same article, to contemplate a *personal* trust and obligation which a corporation is incapable of performing. *Frostburg Mutual Building Association* v. *Lowdermilk*, 50 Md. 179; *Queen City Perpetual Building Association* v. *Price*, 53 Md. 399. It was accordingly decided in the cases just referred to that a power of sale thus sought to be given to a corporation, or its unnamed attorney or agent,

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is, by reason of the corporate disability, inoperative and void.

In *Chilton* v. *Brooks,* 71 Md. 445, the authority to sell was conferred by the mortgage upon the mortgagee corporation, "its successors and assigns," or a designated person as attorney or agent, and it was held that an assignee may execute the power if the mortgage so provides. Where, however, the mortgagee who is given the power in the first instance is a natural person, and, therefore, capable of executing the trust, it is regarded as an incident of the mortgage security and as such it passes to successive assigns even in the absence of a stipulation in the mortgage to that effect. *Maslin* v. *Marshall,* 94 Md. 484; *Barrick* v. *Horner,* 78 Md. 255; *Dill* v. *Satterfield,* 34 Md. 53; *Berry* v. *Skinner,* 30 Md. 567; *Mackubin* v. *Boarman,* 54 Md. 387.

In the case now before us there can be no doubt that the power of sale, being void as to the mortgagee corporation, and not being extended in terms to its assigns, could not be executed by the appellant if his right to make the sale depended solely upon his interest as the assignee of the mortgage. But it is apparent that regardless of the assignment the appellant had full authority, as the person named in the clause creating the power, to exercise it in his described character as attorney or agent. If he had signed the advertisement and report of sale in either of those capacities, the validity of the proceeding would have been beyond dispute. The practical inquiry, therefore, is whether the sale made by the appellant in distinct reference to a power expressly and lawfully conferred upon him by the mortgage must be held ineffectual because the capacity in which he acts is not correctly stated. This question is answered by the decisions in *Philbin* v. *Thurn,* 103 Md. 349; *State, use of Gable,* v. *Cheston and Carey,* 51 Md. 380, and *Flickinger* v. *Hull,* 5 Gill, 60. The principle applied in those cases is that: "Where a party has various capacities and executes an authority delegated to him in one of those capacities, the law

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will attribute the act to the proper authority, although he does not profess to execute it in virtue of that particular power." *Gable* v. *Cheston, supra.* In the *Philbin case* a deed was made by grantors who described themselves as executors of the will of a designated testator. They were also trustees under the will. As executors they had no power to sell and convey the property, but they were fully authorized to do so as trustees. The opinion by JUDGE MCSHERRY says: "In exercising a power which they undoubtedly possessed as trustees they inadvertently described themselves as executors; and the question is, Does this erroneous designation of the capacity to which the power belonged defeat the act done, when the act done was clearly within the scope of their authority as trustees? Former decisions of this Court answer that inquiry in the negative."

The present case is governed by the same principle, and we must hold that as the appellant was duly empowered by the mortgage to sell the property in his capacity of attorney or agent, and as the obligation of his bond includes the performance of the trust reposed in him by the mortgage, the sale he reported is not rendered invalid by the misdescription of his capacity, but is properly sustainable as an exercise of the power with which he was actually invested and to which the proceedings expressly refer.

Order reversed and cause remanded, the costs to be paid out of the proceeds of sale.

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PHILIP P. LAIRD ET AL., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION.

Public Service Commission: power over corporations; police power; stock and bond issues of corporations; Baltimore and Ohio R. R.; finances of system; charter rights.

The Baltimore and Ohio R. R. is subject to the jurisdiction of the Public Service Commission in respect to those matters which, coming under the police power of the state, have been confided to the commission; it is also subject to the control of the Public Service Commission in the matter of service, transportation, etc., and rates, as far as concerns business conducted within the State. pp. 184-185

The Public Service Commission has the right to require all corporations conducting public utilities to lay before them the facts relating to issues of stock and bonds or debentures or certificates of indebtedness, with statements including the amount of such issues, and in a general way the purposes for which such issues are to be made; and where the enterprise is one to be conducted wholly within a single state, the commission may sanction or disapprove of the proposition. p. 188

But the Public Service Commission is not and can not be invested by the legislature with supervisory powers over the expenditures of money by corporations in other states, nor the apportionment of expenditures of moneys as between different states, nor can it pass upon, approve or condemn the wisdom or unwisdom of construction work to be performed in other states. pp. 190-191

The final determination of matters of this nature must rest with the officers and directors of the corporation. p. 191

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The extent of the power of the Public Service Commission in such cases is to require that there be presented to it the price at which bonds about to be issued have been agreed to be disposed of, or have been disposed of, so that the investing public may know the value that is to go into the company for the furtherance of its operation, and the bonds, which they are being asked to purchase, represent a *bona fide* transaction for which the company has received value. pp. 188, 191

The Public Service Commission may require the B. & O. R. R. to file applications or reports with it, stating with reasonable fullness such facts as may be required to enable the Commission, and those legitimately interested therein, to decide upon the *bona fides* of any prospective issue or sale of bonds or certificates of indebtedness and the value of the same. p. 193

But the B. & O. R. R. is not subject to the jurisdiction of the Commission as to the financing of its whole system extending through a number of states, either in respect to determining the aggregate amount of its capital stock, or bonded indebtedness; this power having been given to the B. & O. R. R., in terms, by an amendment to its charter, Chapter 313 of the Act of 1845, and being one which the state has not the power to annul or take from. p. 188

Neither may the commission control the price at which its bonds or certificates of indebtedness shall be sold, nor why or how the moneys realized from the sale of them shall have been expended. p. 193

Decided June 25th, 1913.

Two appeals from Circuit Court No. 2 of Baltimore City (GORTER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Albert C. Ritchie and *Wm. Cabell Bruce,* for the Public Service Commission, appellant.

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Hugh L. Bond (with whom were *Herbert R. Preston* and *R. Marsden Smith* on the brief), for the Baltimore & Ohio R. R. Co., appellee.

Because of the importance and magnitude of the issues involved, the Court was requested at the argument of the above cases to announce its conclusions at as early a date as practicable, and having arrived at a determination upon the principles of law which control, the following opinion is filed:

PER CURIAM.

In our opinion the Baltimore and Ohio Railroad Company is subject in many respects to the jurisdiction of the Public Service Commission of Maryland as to matters done, or to be done within this State.

2d. It is proper to require the Baltimore and Ohio Railroad Company to file an application or report with the Public Service Commission, stating with reasonable fullness such facts as may be requisite to enable the Commission and those legitimately interested therein to ascertain whether any proposed issue or issues of bonds or certificates of indebtedness is or are in fact *bona fide* and for value. But beyond that it is not subject to the jurisdiction of said Commission as to the financing of the system known as the Baltimore and Ohio Railroad Company, extending through a number of States, either in respect to determining the aggregate amount of its capital stock, bonded indebtedness, the prices at which its bonds or certificates of indebtedness shall be sold, or where or how the moneys realized from the sale thereof shall be expended.

In accordance with the foregoing conclusions these cases will be remanded to the Circuit Court No. 2 of Baltimore City without either affirming or reversing the decrees appealed from, in order that the decrees entered by the said Court on the 25th day of February, 1913, and the seventh day of March, 1913, may be modified according to the terms set forth in paragraph numbered "2d;" of this *per curiam*

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opinion. The reasons for the conclusions herein contained will be set forth in an opinion hereafter to be filed.

Filed, May 9th, 1913.

Costs in this Court to be paid by the Baltimore and Ohio Railroad Company; costs below to be paid as directed by said Court.

STOCKBRIDGE, J., delivered the opinion of the Court.

Under date of January 9th, 1913, the Baltimore and Ohio Railroad Company issued a circular letter to its stockholders. From this it appeared that the company proposed to issue as of March 1st, 1913, $63,250,000 gold bonds of the company, which were to run for twenty years from their date of issue and to bear interest at the rate of four and one-half per cent. per annum. The circular further stated that these bonds so to be issued were to be convertible into common stock of the company on the basis of $110 per share at any time prior to February 28th, 1923, and that thereafter by giving ninety days previous notice, the company should be entitled to redeem the bonds on any interest date at 102½ per cent. While the circular letter was not explicit as to the property which was to be pledged by way of mortgage to secure the proposed issue, by inference it was to cover the main lines upon which there had been issued what was termed its prior lien mortgage, the Pittsburg Junction and Middle Division, the Southwestern Division, the Pittsburg, Lake Erie & West Virginia System, and all of the lines of railroad owned by any company and the stock of which is pledged or assigned under any of the mortgages already placed upon any of the above named divisions. The bonds which the company thus proposed to issue were offered to the stockholders at 95½ and accrued interest.

Prior to the issue of this circular letter no application had been made to the Public Service Commission of the State for

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its order authorizing and approving of this issue. Accordingly on February 19th, 1913, the Public Service Commission of this State, acting under the provisions of section 28 of the Public Service Act (Acts 1910, Ch. 180, p. 338), filed a bill in the Circuit Court No. 2 of Baltimore City, praying for an injunction restraining the railroad company from issuing the proposed bonds, or any of them "until such time as there shall have been secured from the Public Service Commission an order authorizing such issue."

Two days after the bill was filed the railroad company answered fully, setting up the various provisions of its charter; denying that it was a corporation subject to the provisions of the Public Service Commission Act; setting out the act of the Legislature of Virginia of 1827 confirming the act of incorporation passed by the General Assembly of this State; averring that it owned and operated 281 miles of railroad in this State, 996 in the State of West Virginia, and through the other lines forming its system and extending through a number of States, a total mileage of 4450. The answer further sets out, that the issue of the bonds was necessary for the acquisition of property, the construction, completion, extension, improvement and maintenance of its facilities and its service and the discharge and lawful refunding of its obligations, that the balance of the moneys raised by the said issue of bonds, after the refunding of such obligations as were to be refunded, was to be expended largely in West Virginia. This answer was sworn to, and the case was heard in the first instance upon the bill, answer and exhibits.

The case thus presents two questions for consideration: First whether the Baltimore and Ohio Railroad Company is subject in any respect to the jurisdiction of the Public Service Commission of Maryland; and secondly, if it is, how far does that jurisdiction extend?

It is not attempted to be denied that both before and after the passage of the Public Service Commission Act in 1910, the company was subject to the police power of the State. This might be, as was the case prior to 1910, exer-

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cised directly by the State, and in so far as the exercise of those powers was by the Act conferred upon the Public Service Commission, might be exercised by it. Many of the cases cited in the brief filed on behalf of the Commission, and especially those from Massachusetts, illustrate this aspect of the case. In addition to this power derived from the police power of the State, the Commission has conferred on it in the interest of the general public, certain other powers in connection with the conduct of public service corporations doing business within the State. These will be found collected in section 3 of the Act, and so far as this case is concerned, must come under one of the following enumerations: "(1) To railroads and street railroads lying within this State, and to the person or corporation, owning, leasing, operating or controlling the same. (3) To such portions of the lines of any other railroad as lie within this State, and to the person or corporation owning, leasing, operating and controlling the same, so far as concerns the construction, maintenance, equipment, terminal facilities and local transportation facilities and local transportation of persons or property within the State. (4) To any common carrier operating or doing business within the State." Through all of these runs the same fundamental idea, that the power and control of the Commission exists as to matters of service, transportation and rates within the State, and full power over that is expressly given to the Commission. This necessarily includes many matters which are not the subject-matter of an exercise of the police power. Thus questions of traffic or fares, or the adequacy or inadequacy of service, or facilities with regard to business conducted wholly within the State, may properly come within the jurisdiction of the Commission. In this connection the three opinions by the late CHIEF JUSTICE WAITE in the cases of the *C. B. & Q.* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & N. W. R. R.*, 94 U. S. 164, and the *C., M. & St. P.* v. *Ackley*, 94 U. S. 179, are directly in point. In the first case the C., B. & Q. R. R. was operating, as lessee, the Missouri River Railroad Company,

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which latter was operated solely within the State of Iowa. The Legislature of Iowa passed an Act establishing a maximum rate for railroads in that State. The decision held that the statute was applicable to that portion of the C., B. & Q. R. R. located in Iowa, upon the principle enunciated in *Munn* v. *Illinois*, which dealt with the rates to be charged for storage of grain in a warehouse situate in Illinois. And it is the same doctrine which is involved in the two other cases cited. It, therefore, follows, that the Baltimore and Ohio Railroad Company is subject to the jurisdiction of the Public Service Commission of this State, both in respect to those matters which, coming under the police power of the State have been confided to the Commission, and to business conducted wholly within this State.

The present bill of complaint claims for the Commission a far wider jurisdiction. By reason of the location of the home office of the company in Maryland, it claims to possess a right to control the expenditure of moneys, the creating and issue of evidence of indebtedness, the prices at which such bonds or debentures shall be marketed, the necessity and expediency of the creation of the indebtedness, in general to direct the entire physical and fiscal policy of one of the great common carriers of this country, over its entire system of 4450 miles of railroad, of which but 281 are within this State and 4169 located without the State, and one of which other States, West Virginia, might with equal propriety by reason of the confirmatory act of Virginia of 1827 and the far greater amount of mileage in that State, make a similar claim. The statement of the claim, taken with the terms of the Act of 1910 would seem to afford a conclusive answer to the proposition. When the Act is carefully limited by its very terms to operations within this State, any line of reasoning which aims to extend it beyond, is alike in flat contradiction of the Act and entirely beyond the power of the State to adopt. The Commission makes this extraordinary claim of power under the following provisions of Section 27 of the act:

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"Sec. 27. *And be it further enacted,* That a common carrier, railroad corporation, street railroad corporation, or other corporation subject to the provisions of this Act, organized or existing, or hereafter incorporated, under and by virtue of the laws of the State of Maryland, may issue stocks, bonds, notes or other evidence of indebtedness, payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service, or the discharge or lawful refunding of its obligations; provided, and not otherwise, that there shall have been secured from the commission an order authorizing such issue, and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be secured by the issue of such stocks, bonds or other evidence of indebtedness is reasonably required for the said purposes of the common carrier, railroad corporation, street railroad corporation, or such corporations, but this provision shall not apply to any lawful issue of stock, to the lawful execution and delivery of any mortgage, or to the lawful issue of bonds thereunder, before the time when this Act becomes a law. For the purpose of enabling it to determine whether it should issue such an order the commission shall make such inquiry or investigation, hold such hearings, and examine such witnesses, books, papers, documents or contracts, as it may deem of importance in enabling it to reach a determination. Such common carrier may issue notes for proper corporate purposes, and not in violation of any provision of this or any other Act, payable at periods of not more than twelve months, without such consent, but no such notes shall, in whole or in part, directly or indirectly, be refunded by any issue of stock or bonds, or by any evidence of indebtedness running for more than twelve months, without the consent of the commission."

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This section is almost a verbatim copy of section 55 of the similar act passed in New York, to regulate public service corporations. It was given its fullest effect and scope in the case of the *Binghampton L. H. & P. Co.* v. *Stevens,* 203 N. Y. 7, where all of the property to be affected by the proposed bond issue, and the expenditure of the money so raised, and the conduct of the business of the corporation were all within the State of New York, yet even there it was said, "the discretion of a Public Service Commission cannot override the discretion of the officers of a corporation in the management of its affairs or the provisions of the statute in which securities are permitted to be issued."

The evils which this section was intended to correct are perfectly well recognized and understood. That issues of stocks and bonds have been made fraudulently and palmed off on a credulous public to their ultimate serious loss is a matter of common knowledge. Facts in relation to such issues, especially with regard to local public utilities have been difficult, if not impossible to obtain, leaving it to the stimulated imagination of some broker or syndicate who, actuated by a heavy commission to be realized by creating a market until such stock or bonds could be unloaded, have reaped a reward in dollars and cents at the cost of those who were induced to give full faith and credit to their representations. The Legislatures of many States have therefore through the media of Public Service Commissions seen fit to establish a *quasi* guardianship over prospective investors. It is of course true that in such a condition many legitimate enterprises should come under the same sort of suspicion which attaches to the more hazardous schemes, devised and carried on for the improper enrichment of a few individuals. As a check upon such wild financing it is entirely proper, even upon the basis of the exercise of the police power to require all corporations conducting public utilities to lay before the local public service commission, the facts relating to any such issue of stocks and bonds or debentures or certificates of indebtedness,

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thus placing such facts where they will be readily obtainable by any one who has an interest therein other than mere idle curiosity. Such statements as indicated in the acts passed should include the amount of the issue, in a general way the purposes for which it is desired to be made, and where the enterprise is one to be conducted wholly within a single State, it may well be, as the decisions seem to indicate, that the Commission may sanction or disapprove of the proposition.

Is now the case the same when we come to deal with an interstate carrier? It may, as laid down by CHIEF JUSTICE WAITE, be made subject to the control of each State as to matters affecting the operations of the company in such State, but beyond that, State legislation is powerless without striking at the very fundamentals of rights as recognized in our government. So far as the issue of securities is concerned the State may by virtue of its police power, require such applications, reports and statements to be filed as have a tendency to show whether the proposed issues are *bona fide* and for value, but the determination of the aggregate capitalization or bonded indebtedness, is a power which was in terms conferred on the Baltimore and Ohio Railroad by its charter, by an amendment to its charter (Chapter 313 of the Act of 1845), and which the State has not the power to detract from or annul. The rules for our guidance in thus treating the charter are fully set forth in *Baltimore* v. *B. & O. R. R.*, 6 Gill, 297, and *Baltimore v. B. & O. R. R.*, 21 Md. 50. For acts fraudulent in their nature the State may intervene to the same extent and no further. In this case there is no pretense that the company either perpetrated, or contemplates the commission of, a fraud. The answer of the company distinctly alleges the purposes for which the proposed issue was intended, and they are only such as are included as proper purposes by the Act. These come mainly under two heads: the refunding of outstanding obligations of the company, or the maintenance, extension or improvement of its facilities or terminals located for the most part in other States. So far as the funds to be raised by

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the proposed bond issue are to be applied to the refunding of existing indebtedness now due or about to mature, the question of its extinguishment by payment or its extension by refunding is, in the absence of fraud, a matter calling peculiarly for the exercise of the discretion of the directors. The bill of complaint neither alleges or suggests any taint of fraud, or any equitable ground, other than the phraseology of the statute, why the determination of the fiscal policy of the railroad company should be wrenched away from the officers of the company in whom it was vested by the charter, and confided to such a body as the Public Service Commission. The case of the *D. & H. Co.* v. *Stevens,* 197 N. Y. 1, presents many points of similarity to the questions now under consideration, and in some of its aspects a far stronger case to support the jurisdiction of the Commission. In that case it was proposed to issue bonds of a railroad company for the purpose of completion of the purchase of an electric line and of a tract of coal land, but the properties thus to be purchased were not to be included in the mortgage about to be given, to secure the proposed bond issue. The Public Service Commissioners of New York had refused to sanction the issue, but upon appeal the rule to control in such cases was laid down as follows:

"The paramount purpose of the enactment of the Public Service Commission Law was the protection and enforcement of the rights of the public. * * * For a generation or more the public has been frequently imposed upon by the issue of stocks and bonds of public service corporations for improper purposes, without actual consideration therefor, by company officers seeking to enrich themselves to the expense of innocent and confiding investors. One of the legislative purposes in the enactment of this statute was to correct this evil by enabling the Commission to prevent the issue of such stock and bonds, if upon an investigation of the facts it is found that they were not for the purposes of the corporations enumerated by statute and reasonably required therefor.

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"We do not think the legislation alluded to was designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the commissioners the guardians of the public by enabling them to prevent the issue of stock and bonds for other than the statutory purposes. * * * If the purpose and intent of the statute was to substitute the commissioners for the directors as financial managers, a doubt might arise with reference to its constitutionality, for ordinarily the ownership of property carries with it the right of occupancy and management, and should a statute deprive the owner of the right to manage, it would, under ordinary circumstances, undermine his right to protect and make his property remunerative. *Lord* v. *Eq. Life,* 194 N. Y. 212. * * * It was evidently the legislative intent in the enactment of this provision that the commissioners should have supervision over the issuing of long-term bonds to the extent of determining whether they were issued under and in conformity with the provisions of the statute for the purposes mentioned therein, or whether they were issued for the discharge of actual and not fictitious debts of the company, or whether they were issued for the refunding of its actual obligations and not for the inflation of its stocks and bonds. Beyond this it appears to us that the powers of the commissioners do not extend."

It appears from the answer in the present case, which is supported by affidavit, that some or a considerable portion of the moneys now to be raised are to be expended beyond the limits of the State of Maryland, in the acquisition, extension, improvement or maintenance of the facilities or terminals of the railroad. Manifestly the Public Service Commission of this State is not and could not be invested by the Legislature of this State with any supervisory powers over the expenditure of moneys in other States, nor the apportionment of the expenditure of its moneys as between different

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States, nor could it pass upon to approve or condemn the wisdom or unwisdom of construction work to be performed in Virginia, West Virginia, Ohio, Indiana, Illinois, Missouri, Delaware and other States. These are questions upon which the most experienced engineers frequently differ—honestly differ in their judgment. The final decision of matters of this nature must rest with the officers and directors of the corporation. Nor is there any warrant to be found in the Act for the maintenance in other States of a corps of engineers and inspectors of the Public Service Commission of Maryland, assuming, *ex gratia,* that the other States would permit it.

What has been said already applies equally well to the increase of capital stock, or the convertibility of bonds into stock upon stipulated terms and conditions, and need not be further discussed.

The same general principles apply to the price at which the securities are to be marketed. The abundance or scarcity of money in the great financial centers, a prevailing public sentiment as to business conditions, act closely akin to the law of supply and demand, in regulating the rate at which a large loan can be effected. Many elements enter into such a matter, of fluctuating importance at different times. It is a condition beyond the control of legislation. What the law-making power may do, the extent of what it can do, is to say that the Public Service Commission shall have presented to it the price at which bonds about to be issued have been agreed to be disposed of, or have been disposed of, so that the investing public may know the value that has gone into the company for the furtherance of its operations, and that the bonds which they are being asked to purchase represent a bona fide, honest transaction in which the company has received value, instead of a doubtful, diluted issue not created and put forth in good faith.

It may well be that the time will come when the jurisdiction of the Interstate Commerce Commission will be so broadened as to confer upon it a power to regulate in some

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measure the fiscal management of the great interstate carriers of this country, and enable them to prevent in the future some of the ill-advised and unfortunate policies of the past. But the fact that such a power has not yet been conferred can not authorize a State to grasp a jurisdiction it was never intended it should exercise. As was well said in the *N. Y., N. H. & H. R. R.* v. *Willcox,* 200 N. Y. 431, in speaking generally of the power of Public Service Commissions:

"The commissions were given extensive powers, but they should not be extended by implication beyond what may be necessary for their just and reasonable execution. They are not without limits when directed against the management or the operations of railroads and the commissions can not enforce a provision of law unless the authority to do so can be found in the Statute."

By the decree of the Circuit Court No. 2, from which the appeal in the present case was taken, it was provided that the railroad company should file with the Public Service Commission "an application or report stating fully the facts in relation to the proposed issues of bonds and stock mentioned in the proceedings and the purposes of the same, together with such other facts as the Commission may require, so as to enable the Commission to know or ascertain whether the said issue of bonds and stock are or are not made in accordance with section 27 of the Public Service Commission Law as interpreted in said opinion herein." The form was somewhat unfortunate for the reason that it was apparently the purpose thereby to incorporate some portion or portions of the opinion in the decree, and yet what portions were not definitely indicated. For that reason in the *per curiam* opinion heretofore filled it was said:

"It is proper to require the Baltimore and Ohio Railroad Company to file an application or report with the Public Service Commission, stating with reasonable fullness such facts as may be required to enable the commission and those legitimately interested therein to ascertain whether any proposed issue or issues of bonds or certificates of indebted-

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ness is or are in fact bona fide and for value; but beyond that it is not subject to the jurisdiction of said commission as to the financing of the system known as the Baltimore and Ohio Railroad Company, extending through a number of States, either in respect to determining the aggregate amount of its capital stock, bonded indebtedness, the prices at which its bonds or certificates of indebtedness shall be sold, or where or how the moneys realized from the sale thereof shall be expended."

And by the decree of this Court, filed at the same time as the *per curiam* opinion, the case was remanded for the reforming of the decree as above indicated.

Costs in this Court to be paid by the Baltimore & Ohio Railroad Co.; costs below to be paid as directed by said Court.

PHILIP D. LAIRD ET ALS., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

AND

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION,

vs.

PHILIP D. LAIRD ET ALS., CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND.

Decided June 25th, 1913.

Two appeals from the Circuit Court of Baltimore City (GORTER, J.).

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The facts are stated in the opinion of the Court.

The causes were argued together before BOYD, C. J., BRISCOE, BURKE, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Albert C. Ritchie and *W. Cabell Bruce,* for the Public Service Corporation.

Hugh L. Bond, for the Baltimore & Ohio Railroad Company.

STOCKBRIDGE, J., delivered the opinion of the Court.

The appeals in the above entitled causes grow out of the same proposed issue of bonds as that considered by this Court in the two immediately preceding appeals. With a single exception there is no difference in the allegations set forth in the bill of complaint.

Apparently after the passage of the decree of February 25th, 1913, by the Circuit Court No. 2 of Baltimore City, in the previous case, the Baltimore and Ohio Railroad did submit for the approval of the Commission the proposed issue of $63,250,000 gold, 4½ per cent. bonds together with certain data in relation thereto, which does not appear in the record in this case. Such is at least the reasonable inference to be drawn from the fourth and sixth paragraphs of the bill, which read as follows:

"4. That Baltimore and Ohio Railroad Company in submitting for the approval of the Commission a certain issue of twenty-year four and one-half per cent. Convertile Gold Bonds stated that said company had issued its three-year four and one-half per cent. Secured Gold Notes to the amount of $50,000,000, which notes would mature June 1, 1913 and that the decision as to what part of the proceeds of said Convertible Bonds would be applied to meeting the obligations of said notes had not yet been determined.

"From statements made to them, your Orators believe and charge that said company proposes or is about to issue notes,

payable at periods of more than twelve months after the date thereof, to renew or refund said notes, maturing June 1, 1913, or some part thereof, and that said company does not intend to apply to the Commission for authority to issue such notes in accordance with the requirements of the Public Service Commission Law.

"6. That your Orators charge that it is absolutely illegal and unlawful and contrary to the public policy of this State and to the express provisions of the Public Service Commission Law for the defendant company to issue any bonds, notes or other evidences of indebtedness, payable at periods more than twelve months from the date thereof, without first securing as a condition precedent thereto, an order from the Public Service Commission in the form and to the effect prescribed by law, authorizing such issue; and that, as already shown, the defendant company is about to commit this illegal and unlawful act, and will do so unless restrained by this Honorable Court."

This does not present any question arising out of a new and additional issue of bonds to that considered in the former case, only the question is as to the disposition or application of a portion of the moneys derived therefrom. The legality of the gold notes mentioned as maturing June 1st, 1913, is not in any way involved. Those had been issued and were outstanding obligations of the railroad when the Commission was created. It is not necessary again to repeat the considerations, or authorities, regarded as controlling in the former case. They all apply, however, with equal force to the present appeal.

The form of the decree in this case is open to the same criticism as was the decree in the preceding case, and for the reasons then stated the same course must be pursued, as set forth in the *per curiam* opinion and decree heretofore filed in this case.

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THE EUREKA LIFE INSURANCE COMPANY

vs.

JOHN H. GEIS AND WALTER HOLLSTEIN, TRUSTEES.

Descent and distribution: adopted children. Equity: sale or partition of land; interest of parties.

Neither under section 74, nor section 76, of Article 16 of the Code, relating to the capacity of adopted children to inherit from the estate of those adopting them, can a child inherit property devised by a testatrix, the mother of the person who adopted the child, to the "right heirs" of said testatrix. p. 199

On a bill for a sale of land for partition, etc., a court of equity has power to decide that one of the parties defendant has no interest or title to the property in question. p. 201

Decided June 25th, 1913.

Appeal from the Circuit Court of Baltimore City (DUFFY, J.).

The facts are stated in the opinion of the Court.

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The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON and STOCKBRIDGE, JJ.

Emil Budnitz, for the appellant.

Carlyle Barton and *Randolph Barton,* for the appellee.

PATTISON, J., delivered the opinion of the Court.

Ann C. Hammond devised certain ground rents specifically mentioned in the second clause of her will, to her son Rezin W. Hammond for and during his natural life, and after his death to his children equally, share and share alike, but should no child or descendant be living at the time of his death, then the said property was to go to and vest absolutely in the "right heirs" of the testatrix.

The son survived the mother and died on the 31st day of May, 1911, leaving no natural child or descendant surviving him, but leaving one, Beulah E. B. Hammond, an infant, who by decree of the Circuit Court for Anne Arundel County, passed October 4, 1901, had been declared his adopted child.

On May 10, 1912, three daughters of the testatrix filed their bill of complaint against the widow and all the children of a deceased son of the testatrix, who, with the plaintiffs, constituted, as it is alleged, all the heirs at law of the said testatrix—and against Beulah E. B. Hammond, the said adopted child of Rezin W. Hammond, deceased, for the sale of said ground rents for the purposes of partition.

The bill, in addition to the facts we have stated, contained the essential allegations of a bill for the sale of land for partition, and denied that "said Beulah E. B. Hammond is entitled to any right or interest in any of said property, or that the said Rezin W. Hammond had any power to devise any part of said property to any one". An answer admitting the allegations of the bill was filed by all the defendants except the said Beulah E. B. Hammond and one insane

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defendant; for these defendants answers were filed by guardians *ad litem.*

Evidence showing the adoption of the infant defendant as the child of Rezin W. Hammond in the manner above stated, was taken with other evidence in support of the bill, and the counsel appointed by the Court to appear for and represent the infant defendant in these proceedings contended, and so argued to the Court below, that she, as the adopted child of Rezin W. Hammond, was entitled to the ground rents aforesaid to the exclusion of the heirs of the testatrix, the other parties to the bill.

This contention, of course, if adopted, would have resulted in the dismissal of the bill, but the learned judge below held that she, as such adopted child of the life tenant, could not take under the will of Ann C. Hammond, and decreed the sale of the property under the bill filed. The ground rents were thereafter sold, under said decree, to the appellant, and the sale was reported to the Court.

The appellant, as such purchaser, excepted to the ratification of the sale, alleging as grounds therefor that the trustee could not convey to it a marketable title, inasmuch as "there has been no judicial determination of the right *vel non* of said Beulah E. B. Hammond to said property, as against the right heirs of said Ann C. Hammond, who are plaintiffs and defendants in these proceedings and said question can not be properly determined in these proceedings."

As provided by Section 72 of Article 16 of the Code of 1912, "The several equity courts of this State, upon the application of any person residing in the city or county where such application is made, shall have power to pass a decree declaring any minor child the adopted child of the petitioner." It was by the authority of this section of the Code that Beulah E. B. Hammond was, upon the application or petition of the said Rezin W. Hammond, declared by the decree of the Court aforesaid, to be the adopted child of the petitioner.

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And as provided by section 74 of the said Article: "The effect of such decree of adoption shall be to entitle the child so adopted to the same rights of inheritance and distribution as to the petitioner's estate * * * as if born to such petitioner in lawful wedlock."

In section 76 of the same article it is provided that "The term 'child' or its equivalent in a deed, grant, will or other written instrument shall be held to include any child *adopted by the person executing the same,* unless the contrary plainly appears by the terms thereof, whether such instrument be executed before or after the adoption."

The life estate of Rezin W. Hammond in said lands was not such an estate as his adopted child could acquire from him either by inheritance or devise. The only interest claimed by her in the lands is the interest, if any, that passed to her as the "child" of R. W. Hammond under the will of Ann C. Hammond, and as she is the adopted child of R. W. Hammond, she cannot, by the provisions of the statute, take under the will of Ann C. Hammond. See the cases of *Sewall* v *Roberts et al.,* 115 Mass. 262; *Wyeth* v. *Stone,* 144 Mass. 441; *Van Derlyn* v. *Mack,* 137 Mich. 146; *Quigley* v. *Mitchell,* 41 Ohio State, 375, construing similar statutes in other states.

The learned Court below was entirely right, in our opinion, in holding that the property did not pass to Beulah E. B. Hammond, the adopted child of Rezin W. Hammond, deceased.

The plaintiff, however, as we have said, contends that this question cannot be properly determined in these proceedings, and in support of this contention refers us to the case of *Savary et al.* v. *Da Camara et al.,* 60 Md. 139. In that case, the bill was filed by parties claiming as next of kin to the decedent on the part of his mother, for the sale of his real estate for the purpose of partition among them. The bill asked for an order of publication giving notice of the object and substance of the bill to the unknown heirs of the decedent on the part of his father, and the order was granted as

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prayed. Upon the mere certificate of publication of said order and without affidavit of the existence or non-existence of the unknown heirs of the decedent, or of their non-residence, an interlocutory decree against the defendants was passed and an *ex parte* commission to take testimony was issued, and thereafter the return of the commission and the testimony taken thereunder was filed. Later a final decree was passed for the sale of the property, which was sold, and the sale finally ratified. Before a distribution of the proceeds of sale was made a bill of review was filed by the alleged heirs on the part of the father, and to this bill a demurrer was filed. The question raised upon such demurrer, as stated by the Court in its opinion, was, "Were the heirs of the decedent on the part of his father concluded by the decree for sale in that case?" The Court below overruled the demurrer and the action of the lower Court was affirmed by this Court.

It is true the Court in that case said, "A bill for partition cannot be made to serve in an action of ejectment, and is not designed to settle adverse rights, but only to subserve the convenience of those whose interests in the subject-matter are conceded."

In that case there was no will upon which the rights of the parties depended to be construed by a Court of Equity, as in this case, but there the decedent died intestate and the question was, who were entitled to his proprty by inheritance. It was not denied that if the defendant left kindred or relatives on the part of his father that they would inherit his property to the exclusion of the kindred or relatives on the part of the mother, and so alleged in the bill, that there were no such relatives on the part of his father. It was, therefore, a question of fact as to whether there were such relatives on the part of his father. If there were, they were entitled to the estate to the exclusion of those on the part of his mother. So far as the testimony in that case disclosed, there were no relatives on the part of his father, and the

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decree, as prayed, was accordingly passed, but before a distribution of the proceeds, persons claiming to be the next of kin on the part of his father, filed the above mentioned bill of review, and it was upon the facts stated, differing widely from those in this case, that the expression of the Court there found was based.

The property involved in this case is not the property of the infant defendant unless she has acquired it under the will of Ann C. Hammond, and therefore her right thereto is dependent upon a construction of said will.

The bill in this case alleges that the plaintiffs and the defendants, not including the said infant defendant, are the heirs of the said testatrix, and that as such, under the will of Ann C. Hammond, they are the owners of the property mentioned in these proceedings and sought to be sold for the purpose of partition among them, and although it alleges that the infant defendant is the adopted child of Rezin W. Hammond and asks that she be made a party defendant thereto, it denies that she has any right or interest in said property. It is apparent that this was done in order that her rights under the will, if any she had, could be determined by a construction of the will by the Court of Equity in this case.

She appeared, represented by counsel, took evidence in support of her claim and her supposed rights under the will were fully presented to and considered by the Court, who decided that she had no interest in said property, but that it was the property of the plaintiffs and the other defendants in these proceedings, and therefore passed a decree directing that it be sold for the purpose of partition among them.

In our opinion, the Court below, as a Court of Equity, had full power and authority in these proceedings to adjudicate the rights of the infant defendant under the will of the testatrix in respect to the property here involved, and in this view we are sustained by *Handy* v. *Waxter,* 75 Md. 517; *Wickes* v. *Wickes,* 98 Md. 307; *Lumpkin* v. *Lumpkin,* 108 Md. 470.

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In the first of these cases (*Handy* v. *Waxter, supra,*) a bill was filed asking for the sale of the land therein mentioned for the purpose of partition among the parties plaintiff and defendant thereto. A decree was obtained and the property sold. The purchaser excepted to the ratification of the sale upon the grounds that because of the uncertain meaning of a clause in the will there involved, there were persons who should have been, but were not made parties to the bill, and therefore a marketable title to said land could not be conveyed to him under said decree. In affirming the Court below in its rulings sustaining the exceptions filed to the ratification of the sale, this Court said: "We think the parties who may, even by possibility, be entitled under the will of Jesse T. Handy, are proper parties to these proceedings, in order that a clear marketable title may be made by the trustee to the purchasers under the decree," and suggested that a supplemental bill be filed bringing into that case the parties omitted therefrom, in order that their rights, if any they had, could be adjudicated in said proceedings.

We find no error in the Court below in overruling the exceptions filed and in ratifying the sale made under the decree. The decree below will be affirmed.

Decree affirmed, the costs to be paid out of the estate.

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JOHN W. LAWSON

vs.

McSHERRY BURGEE AND GABRIEL BURGEE, EXECUTORS OF WM. P. N. LAWSON.

Distribution: title to personal property; through administration only—; executors; death of—; administrators d. b. n. c. t. a.; powers and authority; wasted assets.

A prayer instructing the jury that there is in the case no legally sufficient evidence from which the jury could find a verdict for the plaintiff, and that their verdict must be for the defendant, amounts to a demurrer to the evidence, and admits its truth, but denies its sufficiency. p. 205

When an executor dies without having made a full distribution and delivery of the estate and assets, it is necessary to appoint an administrator *d. b. n.*, and it is not competent, as a general rule, for the executor's executor to interfere with such assets or to render an account for the deceased executor. p. 207

Title to the personal estate of a decedent can be transmitted only through the medium of letters of administration; the law vests the personal estate in the administrator who represents the deceased and the next of kin must derive their title through him. p. 208

The authority conferred upon an administrator *d. b. n.* by section 70 of Article 93 of the Code, is to administer all things, not already administered, which are described as assets and which have not been converted into money, nor distributed and delivered, nor retained by the executor or former administrator, under the Court's direction. p. 208

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Under section 72 of Article 93 of the Code, the Orphans' Court has the power on application by an administrator *d. b. n.* to order the administrator or executor of a deceased administrator or executor "to pay over to him money in his hands as such," and upon a refusal to comply with the order, the Court may order the bond of the deceased administrator to be put in the suit. p. 208

If the fund has been lost, wasted or misapplied by the deceased executor, a court of equity may, upon proper application, appoint a trustee who would be entitled to maintain an action for the recovery of the fund. p. 209

Decided June 25th, 1913.

Appeal from the Circuit Court for Frederick County (PETER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON and STOCKBRIDGE, JJ.

Leo Weinberg (with whom was *Frank L. Stoner*, on the brief), for the appellant.

H. K. DeLauter, for the appellees.

BRISCOE, J., delivered the opinion of the Court.

This is an appeal from a judgment rendered on the 10th day of January, 1913, in the Circuit Court for Frederick County, in favor of the defendants, in a suit brought by the plaintiff against the defendants, as executors of the last will and testament of William P. N. Lawson, deceased.

The declaration contains eight counts, and in addition to the money counts avers, that a certain William P. N. Lawson, late of Frederick County, deceased, died in October, 1911, leaving a last will and testament, which was duly

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admitted to probate in the Orphans' Court for Frederick County, and appointing in the will the defendants, McSherry Burgee and Gabriel Burgee, executors, who have duly qualified as such in the Orphans' Court for Frederick County; and that William P. N. Lawson, the defendants' testator, was at the time of his death indebted to the plaintiff for money held by the said William P. N. Lawson and belonging to the plaintiff.

Upon the defendants' demand for the particulars of the plaintiff's claim, the following bill of particulars was filed in the case, as showing the cause of action of the suit, to wit, "the amount of trust funds held by William P. N. Lawson, the defendants' testator, who was the surviving executor of the last will and testament of Gabriel L. Lawson, late of Frederick County, Maryland, deceased, and due and owing to John W. Lawson, the plaintiff, as the son and only heir at law and next of kin of Gabriel L. Lawson, deceased, as well as under the last will and testament of Gabriel L. Lawson, as the same (said fund) is shown by the 3rd account, being the last account of John H. and William P. N. Lawson, executors of Gabriel L. Lawson, stated and approved in the Orphans' Court for Frederick County, November 30, 1885, and recorded in administration accounts, H. L. No. 1, folio 40, one of the records in the office of the register of wills for Frederick County, $1,177.57, with interest thereon from November 30, 1885."

At the close of the testimony upon the part of the plaintiff, the Court below granted the defendants' prayer, which instructed the jury, that there was no legally sufficient evidence from which the jury could find a verdict for the plaintiff and that their verdict must be for the defendants.

The action of the Court, in granting this prayer forms the basis of the plaintiff's single exception, and as the prayer amounts to a demurrer to the evidence, it thereby admits the truth of the plaintiff's evidence as contained in the record.

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The suit was brought, it will be seen by the plaintiff, an only son of Gabriel L. Lawson, and Sarah W. Lawson, late of Frederick county, deceased, against the defendants as executors of the last will and testament of William P. N. Lawson to recover the sum of $1,177.57, with interest from the 30th of November, 1885. This sum ($1,177.57) appears by the third account of the executors of Gabriel L. Lawson, deceased, as passed the Orphans' Court of Frederick County, on the 30th of November, 1885, to be the balance due the estate for distribution, after all debts, funeral expenses, and the cost of administration were paid. And it further appears that the fund was distributed in the third account to the executors themselves as follows: "To John H. Lawson and William P. N. Lawson, executors, for the use of Sarah W. Lawson and John W. Lawson as expressed by the will."

Gabriel L. Lawson, the husband of Sarah W. Lawson, and the father of the plaintiff, died in the year 1881, leaving a last will and testament which was duly admitted to probate in the Orphans' Court of Frederick County. He left surviving him a widow, Sarah W. Lawson, and an only son, the the plaintiff in this case. Mrs. Lawson, the widow, died in the year 1910. John H. Lawson, one of the executors of Gabriel, died some time in the year 1888, and William P. N. Lawson, the remaining executor of Gabriel, died in October, 1911.

By the last will and testament of Gabriel L. Lawson it appears that he devised and bequeathed his property as follows:

> "I give and bequeath unto my dear wife, Sarah W. Lawson, my bay horse Lawrence. I also give and bequeath unto my wife, Sarah W. Lawson, for the support of her and my son, John W. Lawson, the net proceeds of the income of my entire estate during her widowhood, and if she marries again she is to have one thousand dollars out of my estate, and the balance is to go to my son, John W. Lawson; and if the net proceeds of the income of my estate does not or is

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> not sufficient for the support of my wife, Sarah W. Lawson, and my son, John W. Lawson, and also to school, he is to have out of my estate two hundred dollars annually after he is fifteen years of age until he is twenty-one years of age for the use of schooling him. I also leave my real estate to be disposed of according to the best judgment of my executors, either to be rented or sold or disposed of in any way according as they think best, and, lastly, I do hereby constitute and appoint my brothers, John H. Lawson and William P. N. Lawson, to be sole executors of this my last will and testament, revoking and annulling all former wills by me heretofore made, ratifying and confirming this and none other to be my last will and testament."

No account or distribution of the fund in question, appears to have been passed, or made by the executors of Gabriel L. Lawson after their third account stated in the Orphans' Court, on the 30th of November, 1885, and the executors appear to have held the fund in trust, or as continuing executors, under the provisions of the testator's will.

The evidence shows that the surviving executor, Wm. P. N. Lawson, admitted as late as the summer of 1911, shortly before his death, that he was going to Frederick to straighten up Willie's business (meaning the plaintiff's business) so that he would not have any trouble, that he had attended to his business since his father died, and he had not made a permanent settlement with him.

Upon the state of the record now before us, there can be no question that this suit was improperly brought by the plaintiff against these defendants.

It is well settled that if an executor dies without having made a full distribution and delivery of the assets of the estate, it is necessary to have an administrator *de bonis non* appointed. The executor's executor is not competent as a general rule, to interfere with such assets or to render an account for the deceased executor. *Code,* Art. 93, secs. 70,

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71, 72 and 73; *Alexander* v. *Stewart,* 8 G. & J. 226; *Cecil* v. *Clarke,* 17 Md. 520.

It is also well settled as a general rule that title to the personal estate of a decedent can be transmitted only through the medium of letters of administration, and as the law vests the personal estate in the administrator who represents the deceased, the next of kin must derive their title through him. *Rockwell* v. *Young,* 60 Md. 566.

In *Smith* v. *Dennis,* 33 Md. 443, it was held until distribution of the residium of the estate to the next of kin, there was not full and complete administration, for without distribution according to law, the next of kin could neither claim nor sue for any specific property of the estate. It is only through distribution, that the title of the distributees to possession and actual enjoyment can be shown, though they have an interest in the property, subject to distribution. before the distribution is actually made.

In *Woelfel* v. *Evans,* 74 Md. 346, this Court held, that until there was a complete distribution to those entitled, the Orphans' Court had jurisdiction for purposes of final distribution, and to that end had power to grant letters of administration *de bonis non*, upon the estate after the death of the administrator.

By section 70 of Article 93 of the Code, the authority conferred upon an administrator *de bonis non,* is to administer all things not already administered, described by the Act as assets, not converted into money, and not distributed and delivered or retained by the executor or former administrator under the Court's direction.

The Orphans' Court would have power under section 72 of Article 93 of the Code on application by the administrator *de bonis non,* to order the administrator or executor of the deceased administrator, or executor, "to pay over to him the money in his hands as such" and upon a refusal to comply with the order, the Court could order the bond of the deceased administrator or both of them to be put in suit.

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If on the other hand, the fund has been lost, wasted or misapplied by the deceased executors, a Court of Equity under the facts of the case, would upon proper application, appoint a trustee who would be entitled to maintain an action for the recovery of the fund. *Morrow* v. *Fidelity Co.,* 100 Md. 256; *Coates* v. *Mackie,* 43 Md. 127; *Kent* v. *Somervell,* 7 G. & J. 265; *Constable* v. *Camp,* 87 Md. 173; *Donaldson* v. *Raborg,* 28 Md. 47.

So if it be conceded as contended for by the appellant, that under a proper construction of the will, the plaintiff on the death of Sarah W. Lawson in 1910 took the entire estate under the will, he would undoubtedly be entitled to the fund in a proper suit against the person or persons in whose hands it may be traced.

On the other hand, if there was a partial intestacy as to this fund, and it passed to no one under the will, the plaintiff, on the death of Mrs. Lawson, in 1910, would also be entitled to it as next of kin of the testator, under the statute.

If it be assumed that Mrs. Lawson took the entire fund, absolutely, under the language of the will, the plaintiff being her only heir at law, and next of kin in the absence of the rights of creditors on this record, would be entitled to the whole fund.

For the reasons stated, we think this suit was improperly brought, and cannot be maintained against these defendants, on the evidence set out in the record now before us.

It is very apparent however, that the plaintiff being the only heir at law, and next of kin, of both Gabriel L. and Sarah W. Lawson, is clearly entitled on the facts disclosed by the record, to the fund in question.

The judgment will be affirmed, but without prejudice to the appellant taking such further proceedings as may be proper, according to the facts of the case, to protect his interest, and to recover the fund.

Judgment affirmed, without prejudice as stated, the costs to be paid by the appellant.

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WHITING-MIDDLETON CONSTRUCTION COMPANY, A CORPORATION,

vs.

EDWARD D. PRESTON.

Reversionary interests: owner of ground rents; injuries to property; claim for damages. Evidence: condition of place after act complained of. Experts: evidence of—.

The landlord's interest in the land, out of which an irredeemable ground rent issues, is but a money investment analogous to that secured by a mortgage. p. 216

For the owner of the reversion in a lot of land, leased for 99 years, renewable forever, under an irredeemable ground rent, to be able to recover damages for an injury to a building thereon, he must show that his reversionary interest was damaged in consequence of the injury or partial destruction of the house. p. 216

Where it is a question of the condition at the time of the accident, evidence of the condition of the place after considerable time has elapsed, is not, in general, admissible, unless accompanied by evidence that such conditions had not changed since the accident. p. 220

Suit was brought for damages to a building claimed to have been occasioned by the digging of a sewer near it without the precaution having been taken to prevent the sinking of the land, etc. To prove what precautions had been taken, a considerable time after the accident the cobblestone pavement was taken up and boards which had been driven in the ground for the purpose of shoring it up, and left in the ground after the sewer was con-

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structed, were drawn out so as to show the depth and character of the soil. *Held,* that, under such circumstances, as the depth to which the boards had been driven had not been changed since the accident, the evidence was admissible. p. 219

In an action for damages because of the careless digging of a trench near the wall of the plaintiff's house, by reason of which the wall and house were injured, a person who, although not there the day the trench was dug, was there the day following when the trench had not been filled up, and while he could still see in the trench and see what had been done, and who had been an inspector of buildings, was *held* to be qualified to testify as an expert. p. 218

Such a witness should not be allowed to testify that the work had been negligently done, without first having told the jury how it had been done. p. 218

Decided June 24th, 1913.

Appeal from the Superior Court of Baltimore City (DOBLER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Jesse N. Bowen and *Wm. Fell Johnson, Jr.,* (with whom was *John E. Semmes, Jr.,* on the brief), for the appellant.

Edward N. Rich, for the appellee.

PATTISON, J., delivered the opinion of the Court.

This action was brought by the appellee, Edward D. Preston, described in the declaration as the owner of the rever-

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sion in fee and the annual ground rent of ninety-three dollars issuing out of a certain lot of ground known as 1704 Barclay street, located between Lanvale street and Lafayette avenue, in the City of Baltimore, under a lease for ninety-nine years, renewable from time to time forever, to recover for damages to his "said reversion and annual ground rent" resulting from injury to the dwelling house thereon, caused by excavations made by the appellant company in a private alley along and immediately adjacent to said dwelling, in the construction of a sewer in said alley for the Mayor and City Council of Baltimore.

The *narr.* alleges that by reason of the said injury to the dwelling house, it became unfit and unsafe for use as a dwelling and was, by the order of the Building Inspector of said city, torn down and destroyed.

In the trial of the case thirteen exceptions were taken to the rulings on the evidence. At the conclusion of the testimony the plaintiff offered one prayer, which was granted. The defendant offered six prayers; the fourth and fifth were granted, while the first, second, third and sixth were refused. To the granting of the plaintiff's prayer and the overruling of the defendant's exceptions thereto, and to the refusal of the defendant's first, second, third and sixth prayers the defendant excepted, which constitutes the fourteenth exception.

The case was tried by jury and a verdict was rendered by them for the sum of $1,690.90, upon which verdict a judgment was entered. It is from that judgment that this appeal is taken.

By the plaintiff's prayer the jury were instructed that if they found "that the excavations so made were carelessly and negligently made by the defendants, and that by reason of the careless and negligent manner in which said execavations were made, the aforesaid ground and improvements were damaged, and that by reason of such damage, if any, so done to the said ground and improvements, the plaintiff as the

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owner of the aforesaid irredeemable ground rent sustained loss and damage, then the plaintiff is entitled to recover the amount, if any, of the loss and damage so sustained by him as the owner of the aforesaid ground rent." To the granting of this prayer the defendant specially excepted, the reason given therefor being that there was no evidence to support it.

By the defendant's first prayer, which was refused, the Court was asked to instruct the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and by its second prayer, which was likewise refused, the Court was asked to instruct the jury that "as it appears from the undisputed evidence that the plaintiff was the owner of the reversionary interest and the annual rent of ninety-three dollars issuing out of the lot in question, and that there is no evidence to show any injury or damage to the lot itself." We will consider the aforesaid two prayers of the defendant in connection with the special exception to the plaintiff's prayer.

The plaintiff testified that he was the owner of the irredeemable ground rent of ninety-three dollars a year issuing out of a lot of ground mentioned in the declaration, and that the said lot, binding on the north side of an alley eight feet and four inches wide, in which the excavation was made, has a width of fifteen feet and five inches and a depth of ninety feet. The sewer was laid in the center of the alley, by the defendant, for the City of Baltimore, in March, 1911. He was not present when the excavations were made, but saw the trench upon the second day after a part of it had been partially filled. The trench ran parallel with the south side of the house and at a distance of two feet and nine inches therefrom. He was at the time Inspector of Buildings in the City of Baltimore, and received a message from the defendant company that the house was giving way and falling; that he could not, upon the receipt of the message, go at once to the scene of trouble, but sent an inspector, Mr. Schultz. Later in the day he went himself and found the "house was

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not quite completely down—there were some temporary props there which Mr. Stockhausen was putting up but the house had settled over, being a party wall between this house and the next door house, it settled over so as to pull the second and third floor joists out of the wall and had gone over towards this alley and settled down so as to get the fronts broken and the steps all out of gear." The props ran from the extreme south side of the alley over against the wall of the house to keep it from falling. "The house was taken down, the side walls taken down to the first floor and part down to the second floor, almost all taken down, by order of the City." It was a three-story house, covering the entire width of the lot, with pressed brick front, brown stone steps and sills, and in fair condition before the excavations were made. He did not know the number of rooms in the house. It was idle at the time of the injury complained of and had been idle for some time. In his testimony he also spoke of the character of the excavations and the want of precaution taken by the defendant company to prevent injury to the building, but nothing was said by him, more than what we have stated, in relation to the damages sustained, resulting, as he alleges, from such excavations, and this, so far as the record discloses, is all that was said in relation to the injury or damage resulting from the defendant's acts.

As we have said, this action was brought by the plaintiff to recover for damage to his reversionary interest in consequence of the injury to, or partial destruction of the building or improvements upon the lot mentioned, resulting from the aforesaid excavations. Assuming, although we are not to be understood as so deciding, that the injury to the building resulted from the negligent and careless manner in which the excavations were made in the construction of the sewer in the alley, what evidence is there that such injury to the building resulted in damage to his reversionary interest in the property? It is not only necessary that it should be shown that the injury to the building was the result of the

negligent and careless manner in which the excavations were made in the construction of the sewer by the defendant, but to entitle him to recover it must also be shown that the plaintiff's reversionary interest was damaged in consequence of the injury to, or partial destruction of said dwelling house.

It is not disclosed by the record whether or not the holder of the leasehold interest, the substantial owner of the property (*Baltimore City* v. *Latrobe,* 101 Md. 632), has brought any suit or action to recover damages that might have been sustained by him in the partial destruction of said dwelling house. It may be that such action has been brought and that he has recovered damages therefor, or if not, it may be that he will yet bring an action to recover the same.

The plaintiff here is the owner of the reversion in the lot of land mentioned, leased for ninety-nine years, renewable forever, with the irredeemable ground rent incident thereto.

As was said in *Banks* v. *Haskie,* 45 Md. 218, "This character of tenure is, so far as we know, among the States, peculiar to Maryland. It has not been generally adopted, so far as we are informed, in any other State. * * * It is a peculiar description of tenure which has been sustained by our Courts, and approved and fostered by our people. While the ground rents from their nature are usually of a fixed value, the leasehold interests are more or less fluctuating." And JUDGE MILLER, in discussing the nature of the lease in that case, which was similar to the one in this case, said: "It seems to us quite clear that the intention was on the part of the lessor to secure the prompt payment in perpetuity of the interest on a sum of money equivalent to the value of the property in fee at the time the lease was made; and on the part of the lessee to acquire a perpetual interest in the leased premises which would justify his making permanent improvements thereon, and enable him to avail himself of the value of the property thus enhanced, as well as of its increase in value arising from other causes. * * * Instead of selling the property in fee for its then value. and investing

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the proceeds in other securities, (the owner) resorts to this method of deriving an income from it, and making a secure and permanent investment of its value in the land itself."

And this Court in the case of *Baltimore* v. *Canton Co.,* 63 Md. 236, after quoting from *Banks* v. *Haskie* as we have done, said: "The landlord is not affected by the rise or fall in value of the fee; any enhancement in its value remains fixed in amount, and the lessor is really interested in the subsequent value of the land and the erection of improvements thereon, only *as furnishing a sufficient pledge or security for the sum certain to be annually* paid to him. * * * The landlord's interest in the land is but a money investment analagous to that secured by mortgage."

Neither the land in this case nor its value is shown to have been lessened by the acts complained of. The injury is to the building alone, and the plaintiff is not injured thereby, unless it be shown that by reason of such injury to the building his pledge or security for the annual payment of his rent is impaired to the extent of lessening the value of his reversionary interest in said property. As the record discloses, there was no evidence before the jury upon which they could have found that such pledge or security was impaired to the extent of lessening the value of his reversionary interest, or if so, no sufficient evidence to enable them to arrive at the amount to which he was entitled as damages therefor.

Moreover, if it be found that there was an impairment of the pledge or security for the payment of the rent at the time of the injury complained of, to the extent of lessening the value of his reversionary interest, it may have been but a temporary impairment, for when the building is replaced or rebuilt by the holder of the leasehold interest, the pledge or security of the plaintiff is fully restored. There is no evidence that the impairment of the pledge or security, if any, was likely to continue and become permanent in its character. In fact, so far as the record discloses, the building may have been restored even at the time of the trial of the case below.

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It may also be said that if the building be not restored, the holder of the leasehold interest, an assignee of the lease, by reason of his privity of estate, is liable for the payment of the rent so reserved, and to him the plaintiff could at least temporarily look for the payment of such rent. *Hintze* v. *Thomas,* 7 Md. 346; *Baltimore* v. *Latrobe*, 101 Md. 632, and other cases. It is true that although liable, such lessee may be financially irresponsible and from whom the rent could not be recovered, but this is not shown by the record.

The verdict of the jury was for $1,690.90. How this verdict was reached it is difficult to understand, unless the actual injury or damage to the building was estimated by them to be the amount of their verdict. There is, however, no evidence in the record upon which they could arrive at this amount as being the sum required to restore the building to its former condition. If the amount of the verdict was arrived at in the manner stated, it did not represent the amount of damages to which the plaintiff was entitled. It was not the damage to the building to which the plaintiff was entitled, but it was the damage to his reversionary interest, if any, occasioned or resulting from the injury or damage to the building, and we are unable to find any evidence in the record tending to show that the reversionary interest of the plaintiff was damaged, or if so, any evidence upon which the jury could estimate such damage.

The prayer of the plaintiff should have been refused, and the first and second prayers of the defendant should have been granted.

The first, second, third and fourth exceptions are to the admission of answers to questions propounded to Edward D. Preston, the plaintiff.

In the first of these he was asked, "From what you saw, what precautions, if any, had been taken by the defendant to prevent, or taken by anyone to prevent the house being damaged by this excavation?" To which he replied, "None". The witness was undoubtedly qualified to speak as an expert

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in relation to the matters to which this question was directed, but was he sufficiently familiar with the facts to enable him to answer the question? He had testified that he was there, though not on the day the trench was dug, but only upon the succeeding day when the trench was but partially filed, and when he could see in the trench and see what had been done, and also could and did see what had been done towards supporting the building as a prevention to injury resulting from the excavation. This, we think, would enable him to answer the question.

In the second exception he was asked: "Did you see any lagging there?" To which he replied, "There was some lagging, but the lagging was improperly put in." The question was a proper one, but the witness should not have been permitted to say "the lagging was improperly put in" without having first informed the jury how it was put in; this they were entitled to know.

The third exeception will be hereafter considered with the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth exceptions.

In the fourth exception the witness was asked: "Is there any usual ordinary method commonly adopted to prevent the falling of houses by the giving way of ground underneath the foundation when the trenches are dug in the immediate vicinity of them?" To which he answered, "There is usually in addition to the lagging of trenches, propping or needling done." The witness here was testifying as an expert, and as the precautions required to be taken vary with the conditions existing, the question should have been so framed as to have made it applicable to the facts of this case, as disclosed by the testimony. The question we think is too general in that respect.

The testimony admitted under the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth exceptions is based upon the knowledge acquired by the witnesses from an examination of the premises and alley in

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which the sewer had been placed, made by such witnesses on the day of the trial, more than one year after the excavations had been made. The objection to the admission of this testimony is upon the ground that it is not affirmatively shown that the conditions had not changed since the acts complained of and the injury resulting therefrom.

The evidence was that in excavating in the alley, lagging, consisting of pieces of lumber two inches thick and eight inches wide, were driven in the earth and formed the sides of the excavation. That after the sewer was constructed and the trench filled, the top ends of the lagging were cut off below the surface of the ground and the balance of it was permitted to remain in the ground, and the alley paved where the trench had been dug. Upon the day of the trial, nineteen months after the excavation and construction of the sewer, the witnesses, whose testimony was objected to, went upon the premises, removed the cobble-stones, examined the soil and pulled up two pieces of the lagging, with a view of ascertaining the character of the soil and the depth to which the lagging had been driven. One of these pieces measured four feet and six inches and the other about five feet. They also testified that these two pieces were one-half inch apart.

This evidence was offered to show not only that the lagging did not go to the bottom of the trench, which the plaintiff's witnesses said was eight or nine feet deep, but also to show that the lagging was not placed side by side with no intervening space between it. This testimony was objected to by the defendant because of the lapse of time intervening between the excavation and the date of the examination, without any evidence showing that the conditions as to this lagging had in the meantime remained the same.

As a general rule, such evidence is not admissible where considerable time has elapsed, unless accompanied by evidence that the condition has not changed. 29 *Cyc.* 614; *Annapolis Gas Co.* v. *Fredericks,* 112 Md. 455. But to this rule there are certain well recognized qualifications and excep-

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tions. *Annapolis Gas Co.* v. *Fredericks, supra.* And whether this rule is to be followed depends largely upon the character, nature and condition of the place or thing of which evidence of its condition is sought to be given, for where it may be reasonably presumed that during a given interval after an accident there has been no material change in the condition of the place or thing, evidence of its condition after that interval is admissible to show its condition at the time of the accident, especially where at the latter date its condition is such as to negative any correct inference of recent changes. *Ency. of Evidence,* vol. 8, page 905.

In this case we are to consider the probability, and susceptibility of change in the condition of the place or thing sought to be given in evidence. The lagging here mentioned when once driven in the earth, and over which cobble-stones were thereafter placed, in all probability remained in its position in respect to the depth to which it extended, at least it never came nearer to the surface of the ground, nor was there any change in the character of the soil. Therefore, in our opinion, the evidence was admissible at least to show the nature of the soil at the place of examination and the depth to which the lagging that was removed, extended. The lagging may have been forced apart, considering the fact that when examined it was only one-half inch apart, either in laying the cobble-stones or in the use of the alley thereafter.

We are passing upon the weight of this testimony only so far as it is necessary to determine whether it has a tendency to show the facts attempted to be proven. The other lagging was not examined, either in respect to the distance to which it was driven or as to the space, if any, between it, and the examination of the soil at this time, as disclosed by the testimony, was made immediately following a heavy rain. Nevertheless, we think the testimony should have been admitted, the force and weight of which was to be left to the jury.

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The defendant's third prayer asked the Court to instruct the jury that there was no evidence in the case legally sufficient to put the burden of propping, shoring and needling the building alleged to have been damaged, upon the defendant. This prayer we think was properly refused. Propping, shoring and needling a building are some of the methods used or precautions taken when excavations are made near to a building as in this case, to prevent injury to the building. It may, or it may not, have been necessary in this case to have adopted these particular methods or precautions in protecting the building from injury, if some other method was used, such as lagging, for instance, but with nothing said in the prayer as to the employment of other methods or precautions, we think it might be misleading to the jury to be told that such precautionary methods were not necessary in this case.

We think the defendant's sixth prayer was properly refused.

There was a demurrer to the declaration, but it was overruled and the general issue was pleaded, and no notice of the demurrer was taken in the argument, and we shall therefore not advert to it, but treat it as waived.

The judgment of the Court below will be reversed.

Judgment reversed, new trial awarded, with costs to the appellant.

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STATE OF MARYLAND, TO THE USE OF GEORGE WASHINGTON WILLIAMS, ROBERT H. SIMPSON AND THOMAS B. HULL, TRUSTEES, THE GEORGE LONG CONTRACTING COMPANY, AND THE JOHNS HOPKINS HOSPITAL, A BODY CORPORATE.

vs.

ANTON J. ALBERT AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A BODY CORPORATE.

Trustees: appointed by Court to make sales; title; mere hand of Court; no interest in proceeds; injunction to restrain sale; suit on injunction bond. Pleading at law: declarations; too many, or too few parties; when ground for demurrer.

Where a trustee is appointed by decree of a court of equity to make a sale of property, the sale is a transaction between the Court and the purchaser. p. 225

The Court in such a case is the vendor, and the trustee is merely the Court's agent to carry the order into effect. p. 225

The trustee has no title, by virtue of his office, to the property decreed to be sold, and no interest as to the proceeds of the sale. p. 225

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And in order for the Court to stop such a trustee from making the sale, it is not necessary for the Court to issue an injunction. p. 225

Trustees were appointed by a decree of a court of equity to sell property for the purpose of enforcing a mechanics' lien: An injunction was issued to prevent the sale, but on appeal the order for the injunction was reversed; and suit on the injunction bond was filed by the trustees for damages suffered by them because of the injunction proceedings and for the deterioration of the property, and for the expenses, etc.; it was *held,* that the trustees were not entitled to recover. p. 227

The trustees were not joint obligees with the other equitable plaintiffs on the bond. p. 227

The interest of such trustees to the commissions is not a joint interest with that of the other equitable plaintiffs in the suit on the bond. p. 227

Where trustees have title to the property to be sold and it is their duty to sue, etc., other principles apply. pp. 227-228

A declaration filed against defendants with interests so diverse that it is impossible for them to file pleas which would be able to stand the test of a demurrer or which would bring the case to issue, is demurrable. p. 228

In an action *ex contractu* where there are too many, or too few, parties, and the effect is apparent on the face of the declaration, a demurrer will lie. p. 228

Decided June 25th, 1913.

Appeal from the Superior Court of Baltimore City (Heuisler, J.).

The facts are stated in the opinion of the Court.

The cause was argued before Boyd, C. J., Briscoe, Burke, Thomas, Pattison and Stockbridge, JJ.

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George Washington Williams and *Robert H. Simpson* (with whom were *John Holt Richardson* and *Thomas B. Hull* on the brief), for the appellants.

Washington Bowie, Jr., (with whom was *Charles Herzog* on the brief), for the appellee.

Boyd, C. J., delivered the opinion of the Court.

This is a suit on an injunction bond given by the appellee in a proceeding instituted by him against those who are now the equitable plaintiffs to prevent the sale of some lots in Highlandtown, Baltimore County. An injunction was issued and on an appeal from an order overruling the demurrer to the bill of complaint filed in that case, the decree was reversed and the bill dismissed, as is shown by the case of *Long Contracting Co.* v. *Albert,* 116 Md. 111. A demurrer to an amended declaration filed in this case was sustained, and upon the plaintiffs declining to amend, a judgment for the defendants for costs was entered, and from that judgment this appeal was taken.

The declaration alleges that Messrs. Williams, Simpson and Hull were appointed trustees by the Circuit Court of Baltimore County to sell the property, which was advertised for sale by them; that the said Albert filed his bill of complaint against them, the George Long Contracting Company and The Johns Hopkins Hospital, asking that they be enjoined and restrained from selling six pieces of said property, to which bill the plaintiffs in this case demurred and the demurrer being overruled, upon appeal the order was reversed and the bill dismissed. After stating the conditions of the bond, which was given to the State of Maryland, it is alleged: "That the said writ of injunction was not prosecuted with effect nor did the said Anton J. Albert satisfy and save harmless, nor did the said Anton J. Albert pay all costs and damages that were occasioned by the issuing of said writ of in-

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junction, whereby this case was brought. That by reason of the issuing of said injunction these plaintiffs suffered loss and damages in the depreciation of all of said properties; and suffered damages by reason of the legal complications in and notoriety of the said property and title, and the accumulating expenses upon said property—taxes water rents and ground rents, and other expenses incidental thereto."

The appellees have suggested several grounds for the demurrer, but in the view we take of the case it will not be necessary to refer to all of them. We cannot understand upon what principle trustees appointed by a decree of a Court of Equity to sell property can recover such damages as are set out in the *narr.*, and are quoted above. So far as the *narr.* discloses, these trustees were simply appointed to sell the property, and we are informed by our own records (116 Md. 111, *supra*), that they were so appointed under a decree to enforce mechanics' liens, but regardless of that there is nothing to suggest that the title to the property was in any way vested in them. As is well known, "In the ordinary case of a trustee appointed by decree to make sale of property, the sale is a transaction between the Court and the purchaser; the Court being the vendor, and the trustee merely the Court's agent to carry its orders into effect. The trustee has not, by virtue of his office, any title to the property decreed to be sold, or any interest in it, or in the proceeds of sale." *Miller's Eq. Proc.* 430. It was not necessary for the Court to issue an injunction to stop its trustees from selling, but it could have done so without an injunction. One of the grounds upon which the case in 116 Md. was decided was that the decree had not been enrolled and was subject to the control of the Court.

But the appellants cite authorities outside of this State and *Wallis* v. *Dilley,* 7 Md. 237, to show that as joint obligees they were required to unite in the suit. It is not necessary to refer to authorities out of the State, as these trustees were not joint obligees, together with the other

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equitable plaintiffs in the bond. In *Wallis* v. *Dilley,* the bond was given to the appellees—not to the State and hence it was said by the Court: "It must be observed, that the cause of action here is joint; and that if all the plaintiffs had not united, the declaration would have been subject to demurrer. The obligation is for the payment of one sum to three parties, and they were properly joined as plaintiffs. Had they not been, the defendants might even have availed themselves of the non-joinder upon proof at the trial." The report of the case sufficiently shows that the plaintiffs in that case were the obligees, but to avoid any possible question about it we have examined the record and find that they were, and that the State was not an obligee.

Section 175 of Article 16, Code of 1912, provides that. "When a Court of Equity shall require bond, with or without security, to be given in any case, and the parties concerned therein shall be numerous, or if it shall appear for other reasons proper, the Court may take such bond in the name of the State as obligee, and the same may be sued on by any person interested, as public bonds may; and a copy, certified by the clerk of the Court, under the seal thereof, shall be received in evidence, and have the same effect as certified copies of public bonds." In *Le Strange* v. *State, use of Roche,* 58 Md. 26, JUDGE ALVEY, in speaking for the Court, of that section of the Code of 1860 corresponding with the one cited by us, in an action on an injunction bond, said: "Upon a bond thus taken, suit must be brought in the name of the State, as legal plaintiff. But the State in fact has no interest in the bond. and no cause of action can arise thereon until there be a breach of the condition affecting the interest or right of some party legally concerned; and it is only those having an interest in the subject matter of the condition, and for whose benefit the bond is taken, that can put the bond in suit. The name of such party must appear in assigning the breach, and also the right and interest in respect of which he sues; and this not only that an opportunity may

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be afforded to the defendants of meeting and resisting the claim of the equitable plaintiff, but that the bond may not be twice subjected to suit for one and the same cause." In that case Mr. and Mrs. Roche were both enjoined, but the suit on the bond was brought in the name of the State, for the use of Mrs. Roche, by her husband and next friend.

Manifestly there was no necessity for the trustees to unite in the suit as the plaintiffs were not obligees, and suit could be maintained on the bond by any person interested. There is nothing in the *narr.* to suggest that all of the equitable plaintiffs had any joint interest in such damages as are claimed, if it be conceded that they are sufficiently alleged. The only possible way that the trustees might have been affected "by the depreciation of all of said properties" or "by reason of the legal complications in and notoriety of the said property and title" was that they might have received less commissions if the properties did not bring as much as they would have done, had not the injunction been issued, but, without holding that they could sue this bond for that reason, the other equitable plaintiffs had no interest in the trustees' commissions, unless it be to have them as small as possible and thereby get more for themselves. Even if all of the equitable plaintiffs, including the trustees, were equally interested in the costs (although it is not likely that the costs or any part thereof would be imposed on the trustees) there are other grounds for damages alleged that could not possibly have applied to all of them.

The appellants cited *Moale* v. *Buchanan,* 11 G. & J. 314, and *Denton* v. *Denton,* 17 Md. 403, to show that trustees have such an interest in the subject-matter of the trust as entitles them to maintain an action for the protection of the same. but those were not cases of trustees merely appointed to sell by courts of equity, but the titles were in them. Of course there are cases in which it is not only the right, but may be the duty of trustees to sue, but they are not such

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trustees as these appellants, who had no title in the property and were simply the agents of the Court.

To show that the objection of misjoinder of parties plaintiff can be raised by demurrer it is only necessary to refer to 1 *Poe,* section 322, where it is said: "It may be stated, as the result of the authorities upon this branch of the law, that wherever there are too many or too few plaintiffs in actions *ex contractu,* the defendant, if the objection is apparent upon the face of the declaration, may demur," etc. Assuming that the breaches were sufficiently set out in this *narr.* as to some of the equitable plaintiffs, it would have been impossible for the defendants to have filed pleas that could have stood the test of demurrer, and would have brought the case to an issue, so that the claims of the several parties could have been properly litigated in the one case.

Without deeming it necessary to prolong this opinion by more particularly discussing the breaches assigned, or referring to other questions, for the reasons given we will affirm the judgment.

Judgment affirmed, the equitable plaintiffs to pay the costs.

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S. DeLEON AVERY

vs.

STATE OF MARYLAND.

Abortion: evidence; criminal connection with prosecutrix and others. Hypothetical question: omission of any material fact. Appeals: immaterial errors; no reversal for—.

In a trial on a charge of having committed an abortion upon the prosecuting witness, the State may offer evidence tending to prove that the traverser had had connection with her prior to the alleged commission of the offense; but it is error for the State to show that the traverser had had connection with other women, either by the testimony of the prosecuting witness, or by that of the women themselves. p. 231

Evidence in regard to the general character of the prosecutrix for truth and veracity, or for chastity, is admissible; but not proof of specific acts which tend to show that she is an immoral person. p. 237

There can be no reversal, on appeal, for error without injury; and the Court of Appeals can not determine whether the appellant was injured by answers to improper questions, where the answers are not set out in the record. p. 232

In propounding a hypothetical question to a witness who is offered as an expert, it is error to omit any of the material facts which might affect the opinion of the witness. p. 236

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There can be no reversal because of the refusal of the trial court to permit certain questions to be asked, where it appears that the evidence thereby sought to be introduced was ultimately admitted. **p. 234**

Decided June 25th, 1913.

Appeal from the Criminal Court of Baltimore City (ELLIOTT, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON and STOCKBRIDGE, JJ.

T. C. Ruddell and *Wm. C. Smith*, for the appellant.

Edgar Allan Poe, the *Attorney General* (with whom were *Wm. F. Broening* and *Roland B. Marchant* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

The appellant in this case was convicted in the Criminal Court of Baltimore City of having committed an abortion upon Rose Gaffey, and was sentenced to confinement in the Maryland Penitentiary for the period of ten years. From that judgment he has appealed on the ground of alleged errors in the rulings of the trial Court on the evidence and in its instruction to the jury.

The first, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth exceptions are to questions asked and evidence offered for the purpose of showing that the accused had connection with another girl. In the case of *Lamb* v. *State*, 66 Md. 285, the Court quotes with

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approval the statement of BAYLY, J., in *Rex* v. *Ellis,* 6 B. & C. 145, that "Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony, by proving him guilty of another unconnected felony; but where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other," and in the very recent case of *Meno* v. *State,* 117 Md. 435, JUDGE STOCKBRIDGE, speaking for this Court, said: "The State attempted to prove by the witness Ludi, that the accused had told him that he had performed operations on or treated other girls as showing a familiarity on the part of the traverser with what could be done to rid a woman of a child. This evidence was admitted over the objection of counsel, and this ruling of the Court was made the subject of the eighth exception. This evidence was inadmissible and should have been excluded. There is a class of cases in which evidence may be given of other similar acts done by the accused, but this class of cases is restricted to where the several acts are connected together and form part of one entire scheme or transaction, so that one of the acts forms a basis for a reasonable and proper inference as to the purpose and intent with which the particular act was performed for which the accused was then on trial." In the case at bar the appellant was charged with having committed an abortion upon the prosecuting witness, and the State had proved, or offered evidence tending to prove, that he had connection with her prior to the commission of the alleged offense, but it was error to permit the State to show, either by the prosecuting witness or the girl herself, that he had connection with another girl. The answers to the questions in the sixth and seventh exceptions, however, are not in the record; the answer to the question in the eleventh exception relates to the conduct of the accused with reference to the prosecuting witness, and the twelfth exception is to the refusal of the Court to strike out the answer to the question in the eleventh exception. There was,

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therefore, no reversible error in the rulings complained of in the four exceptions last referred to. There can be no reversal for error without injury, and this Court can not determine whether the appellant was injured by answers to improper questions unless the answers are set out in the record. The answer to the question in the eleventh exception being admissible, the rulings in the eleventh and twelfth exceptions do not constitute ground for reversal.

Counsel for the State concede in their brief that there was error in admitting the evidence referred to in the other exceptions we have mentioned, but urge that the judgment should not be reversed on that ground because the prosecuting witness stated on *cross-examination* that the accused had connection with the girl referred to in said exceptions. In her examination in chief, the prosecuting witness, when asked by the State's Attorney to state why she went to the office of the accused on a particular occasion, said she went there to have her teeth fixed, and that after he had fixed her teeth "he took Frances in another room and had connection with her." This answer was objected to by counsel for the accused and the Court ordered all after "he took Frances into another room" to be stricken out. The State's Attorney then said to the witness: "Don't tell us anything but what you know of your own knowledge—what you saw. You did not see that," and she replied, "No, sir." On cross-examination, this witness, having stated that she was at the office of the traverser about a week before Thanksgiving, she was asked by counsel for the accused, "Now, that is the time you say the doctor first had anything to do with you," and she replied, "Well, that was the first time, yes, sir; that was the first time. The first time I went up there he had something to do with Frances." Counsel for the accused interrupted her by saying, "Never mind about Frances. The Court told you not to talk about that." This is the testimony relied upon by the State to show that the admission of the evidence conceded to be inadmissible was not reversible

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error. We cannot adopt that view. The prosecuting witness said that she did not see the accused have connection with Frances, and the Court, therefore, directed her statement to be stricken out, and when she repeated the statement on cross-examination, counsel for the accused cautioned her not to speak of Frances because the Court had told her not to do so. Under such circumstances it is not probable that the jury was influenced by the statement of the witness on *cross-examination,* and it cannot be held to relieve the positive and affirmative testimony of Frances herself that the accused had connection with her of its objectionable character or to deprive the accused of the benefit of the exceptions referred to.

In the course of the cross-examination, the prosecuting witness further testified that after she told her aunt that the accused had connection with her, and her aunt whipped her, he came down to her aunt's house to see the witness and her aunt. She was then asked by counsel for the accused the following questions, referred to in the second, third, fourth and fifth exceptions, to which the Court sustained the objections of the counsel for the State: "Can you tell us what the doctor said to you on that occasion?" "Didn't the doctor tell you—say something like this to you, 'Look here, Rose, I understand that you have made a statement in which you have charged me with doing something to you, and have charged me with ruining you. I want you to tell who ruined you.'" "And then when the doctor asked you that, didn't you name another person?" Having stated that she appeared "at the station house against the doctor," she was asked: "Now, you were there on Saturday, the 29th of July; what did you say about the doctor having anything to do with you to the magistrate, while you were living there employed by the family?" These questions were asked for the purpose of showing that the witness had made statements contrary to her testimony in the case, and there is no reason why she should not have been permitted to answer them. But the record shows that she did afterwards answer the questions

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without objection. When asked if she did not say to the magistrate that while she was living at the doctor's house she was employed by his wife, and that during that time "the doctor didn't do anything to her at all," she replied that she did not remember. In answer to the question, "Didn't you testify to the magistrate that he hadn't anything to do with you," she said, "I told the magistrate of course, that he had something to do with me, that he ruined me," and in reply to the question, "Did you have any other conversation with 'the doctor' concerning your testimony to be given in this case," she stated that after she got the whipping her aunt gave her, the next time she went up to the doctor's she told him that she had written the paper making charges against him and that he got very angry and said to her, "I will come down to your house, and you be at home, he said; and you tell me before your aunt I never ruined you; and if they give you the paper in Court, you tear it up, and swear that Harry Deal ruined you; and I said all right; and I plead with him; and he came down to my house and I told my aunt it was not him, but Harry Deal, and that is when he talked to my aunt." As the accused ultimately secured the answers of the witness to the questions referred to in said exceptions. he was not injured by the refusal of the Court to allow them to be answered in the first instance.

The nineteenth, twentieth, twenty-first and twenty-second exceptions are to the refusal of the Court below to allow Dr. Simms and Dr. Grant to answer the following questions: "It is in evidence here on the part of a girl, Rose Gaffey, eighteen years of age—August, 1911, she was eighteen years of age—that sometime in the middle of May, 1911, nine days after she had missed, and that was the first time she had missed—a catheter was inserted by Dr. Avery. Now, assuming that that is the first time she had ever missed, could you predicate pregnancy upon the fact that she had missed and had missed her menstrual period for a period of nine days?" "The mere fact that a woman misses and has missed for a

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period of nine days, can you predicate pregnancy upon the mere fact that a woman has missed for nine days?" Substantially the same questions were asked in the twenty-first and twenty-second exceptions, and the purpose of the traverser was to obtain from the witnesses their opinion whether the fact that the prosecuting witness had, for the first time "missed her menstrual period," and the further fact that she remained in that condition for nine days would indicate that she was pregnant. In addition to the facts referred to in the questions, the witness had testified that the traverser had previously had connection with her, and that on the day after he performed the operation referred to she passed a clot of blood. As no reference was made to those facts in the questions, they fall directly within the ruling of this Court in *Miller* v. *Leib,* 109 Md. 414. In that case the questions were: "Suppose a lady sixty-one years of age, rather slight, falls and sustains a fracture of the neck of the femur; suppose it were an impacted fracture; what would be the treatment which would be required on the part of a reasonably skillful physician, using reasonable care?" "How long usually would reasonable care require that the Hamilton and Long (splint) or the plaster cast and the mild extension should remain before the doctor took it off to examine the condition of the fracture?" "Suppose a lady sixty-one years of age fell and sustained an intra capsular fracture of the neck of the femur and called in her regular physician, how often would reasonable care require that he should see his patient after his first visit?" In disposing of the exceptions to these questions, the Court said: "Under these circumstances, the entire suppression of the existence of the plaintiff's tubercular trouble in the hypothetical questions to which we have referred, put to her medical expert for the purpose of proving professional ignorance or neglect of the defendant in treating her broken hip, and which elicited answers tending to such proof, was improper and the defendant's exceptions thereto should have been sustained. The sub-

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sequent testimony as to the serious character of her tuberculous trouble and the important bearing which such a state of health has upon the proper treatment to be adopted with persons in her condition when suffering from fractured bones, emphasizes the importance of requiring hypothetical questions put to medical experts to be so framed as not to give a wrong coloring or undue importance to some of the facts in evidence by the omission or suppression of others." What was there said by the Court applies with equal force to this case. The omission of any reference to the fact that the traverser, prior to the time mentioned, had had connection with the witness, and the further fact that after the operation was said to have been performed she passed a clot of blood, rendered the questions misleading and fatally defective.

The remaining exceptions are to the rulings of the Court below in permitting counsel for the State, over the objection of the traverser, to ask the wife of the traverser on cross-examination the following questions: "Did you ever take Frances to a house 932 Bond Street, a house kept by Nannie Lewis?" "Now—isn't it a fact that you and a man whose name I will not now disclose, in company with Frances Rowley, went to 932 Bond Street and were refused admission to that house because of the age of Frances Rowley?" The witness answered "No" to the first question and consequently there was no injury to the traverser. The Court having advised the witness that if her answer to the second question would tend to humiliate her or subject her "to prosecution" she could refuse to answer, she declined to answer. It is urged in this Court on behalf of the State that these questions were properly allowed because the evidence elicited was admissible for the purpose of reflecting upon the credibility of the witness. The extent to which this method of impeaching a witness should be allowed is a question in regard to which there is a great diversity of opinion, and the conclusion reached in *Greenleaf on Evidence* and *Wig-*

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more on Evidence, after a careful review of the numerous cases, apparently favors the rule, now adopted in some of the States, excluding it altogether. It is said in 1 *Greenleaf on Evidence* (16th Ed.), 585: "A few courts, with courage and wisdom, have taken the step forbidding entirely such cross-examination to character," and in 2 *Wigmore on Evidence*, section 983, page 1117, the author says: "There is much to be said in favor of the rule that now obtains in several jurisdictions by which such misconduct is forbidden to be inquired into at all—the rule of total prohibition of cross-examination, as well as extrinsic testimony, on these matters, has thus received sanction, and may be said to be the one most consonant with our best sentiments and with the needs of the time." In this State it has been repeatedly held that a witness may be asked on cross-examination, for the purpose of affecting his credibility, if he has been in jail, etc. (*Smith* v. *State,* 64 Md. 25; *McLoughlin* v. *Mencke,* 80 Md. 83) and in the late case of *Mattingly* v. *Montgomery* 106 Md. 461, where the witness drove over the plaintiff and injured her, the Court, in a suit against his master for damages, held that he could be asked on cross-examination, if he had been arrested and paid a fine for fast driving, for the purpose of impairing the weight of his testimony in the case. But in the case of *Shartzer* v. *State,* 63 Md. 149, the Court said that the prosecuting witness in the trial of the accused for rape could not be asked whether she had previously had connection with a man other than the prisoner, and JUDGE ROBINSON said: "Evidence in regard to general character of the prosecutrix for truth and veracity, or for chastity, was admissible, but not proof of *specific acts* which tended to show that she was an immoral person." In the case of *Brown* v. *State*, 72 Md. 468, where the traverser was on trial for enticing a young girl from her home for the purpose of prostitution, the Court held that the lower Court properly refused to allow the traverser to ask the prosecuting witness if she did not have connection with a certain man

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before she went to the house of the traverser, and in disposing of another exception, the Court said that the character for veracity of a female witness can not as a general rule be impeached by evidence of her character for chastity. In the case at bar the questions objected to in the exceptions we are now considering do not disclose the character of the house referred to, for what purpose the witness took Frances with her, or that she enticed or induced Frances to go there. So far, then, as the record shows, the questions related to an entirely irrelevant matter that did not tend to discredit the witness and was not admissible for any purpose.

The record contains what purports to be the instructions of the trial judge to the jury, and below the instructions there is a note that counsel for the traverser reserved an exception "to the ruling of the Court". The instructions are not included in the bill of exceptions; there is no certificate of the presiding judge that they are the instructions given by him, and that counsel for the traverser reserved an exception to them, and it does not appear by whom the memorandum of the exception was made. Under these circumstances the exception can not be considered by this Court.

Because of the errors referred to in the first, eighth, ninth, tenth, thirteenth, fourteenth, fifteenth and eighteenth exceptions the judgment of the Court below must be reversed.

Judgment reversed and case remanded for a new trial.

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EDWIN M. WILMER

vs.

JOSEPH MANN, Trading as The Mann Piano Company, Garnishee.

Attachment proceedings: amendments liberally construed; interrogatories to garnishees; answers under oath; signed by attorney; right to correct—; exemptions; wages of employees not actually due; salesmen.

Neither section 13 nor section 15 of Article 9 of the Code requires the answers of the garnishees, to the interrogatories filed in attachment proceedings, to be made under oath. p. 244

The statute in regard to amending attachment proceedings is liberal; and answers signed by the garnishee, which were previously signed and filed for him by his attorney, were *held* to be admissible, even though the twenty days in which the garnishee is required to file such answers had passed (the answers, however, having been signed by the attorney within that time). p. 244

A salesman for a piano dealer is an employee, within the meaning of section 33 of Article 9 of the Code, exempting from attachment the wages or hire of any employee or laborer in the hands of the employer, unless actually due at the date of the attachment. p. 248

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In such a case, where an attachment is laid in the hands of the employer, if no wages were due at the time of bringing the attachment, the employer may plead *"nulla bona,"* although wages may have become due and have been paid at the date of the trial. p. 248

Statutes exempting wages from attachment are to be given liberal interpretation. p. 248

Decided June 25th, 1913.

Appeal from the Superior Court of Baltimore City (AMBLER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON and STOCKBRIDGE, JJ.

David Ash, for the appellant.

L. Edwin Goldman, for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appellant, Edwin M. Wilmer, plaintiff below, on the 8th day of February, 1905, recovered, before a justice of the peace, a judgment against one Leopold Ehrlich for the sum of $60.60 with interest and costs. On the 10th day of May, 1912, he caused to be issued out of the Superior Court of Baltimore City an attachment upon said judgment, which was laid in the hands of the appellee, Joseph M. Mann, trading as the Mann Piano Company, by whom the judgment debtor at such time was employed.

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The garnishee appeared and filed the plea of *nulla bona.* Thereafter a replication was filed, upon which issue was joined. On the 7th of June interrogatories were filed, to which answers were filed June 24th, 1912, signed by L. Edwin Goldman, attorney for the garnishee. A motion was filed September 13, 1912, asking that the answers be not received and "that said paper be stricken from the files of the Court"; the reasons assigned therefor being, first, that the paper containing the answers was not signed by the garnishee, and, second, that it was not sworn to by him. This motion was heard and overruled on the 5th day of October following, but on the second day thereafter, in response to a suggestion of the Court made at the hearing of the motion, the identical answers signed and sworn to by the garnishee were filed. To this action of the Court four exceptions were taken—the first, to the overruling of the motion not to receive the answers first filed; the second, in permitting to be filed the answers signed and sworn to by the garnishee; the third, to the failure of the Court to rule on the motion to strike the original answers from the "files of the Court"; and the fourth, a general exception which seems to cover all the preceding exceptions.

Thereafter, on October 24th, 1912, upon leave of the Court, he filed a second motion *ne recipiatur* asking that the answers signed and sworn to by the garnishee be not received. This motion was likewise overruled.

Following this action of the Court, as disclosed by the record, the plaintiff on the 18th day of December, 1912, took two other and further exceptions to the action of the Court of October 5th, in overruling the motion *ne recipiatur,* which exceptions, so far as we are able to discover, raised practically the same questions as were raised by the exceptions previously taken.

On Deecmber 18th the plaintiff moved for a judgment of condemnation for failure on the part of the garnishee to make answers to the interrogatories, and his motion being

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overruled, he excepted thereto, it being his seventh exception.

The case was then tried by a jury, which rendered a verdict in favor of the garnishee and a judgment for his costs was entered thereon.

In the trial of the case only two witnesses, the plaintiff and the garnihsee, were placed upon the stand; both of these were called by the plaintiff. By the first of these witnesses the answers to the first and fifth interrogatories filed were put in evidence. In the first of these interrogatories he was asked, in substance, if, at the time the attachment was laid in his hands, he was indebted to Leopold Ehrlich, the judgment debtor, or had he since become indebted to him, or was he then indebted to him or to any other person for his use or benefit; if so, the amount of such indebtedness, the consideration therefor, the time when contracted, and when it was or will be due or payable; and if payable to any other person for his use, to whom. The answer thereto was, "No. Mr. Ehrlich is employed from week to week as a salesman, and his wages are thirty dollars per week."

By the fifth interrogatory he was asked, "Was Mr. Ehrlich in your service at the date of the laying of the attachment? If so. how long prior thereto and in what capacity and under what compensation, salary or commssion, or both. State the contract for such services, the date thereof and whether written or verbal, and how much was due him at the time the attachment was laid and how much has since become due and owing to him." To this he answered that Ehrlich was and had been in his employ for three years and his weekly wages were thirty dollars; that the contract was oral, his employment from week to week; and at the time the attachment was laid he had overdrawn his weekly wages. and that since such time "his weekly wages have regularly been due and regularly paid."

The garnishee, when called by the plaintiff, testified that the judgment debtor was indebted to him at the time the

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attachment was laid; that thereafter he was paid his salary, thirty dollars a week; that his salary for twenty-two weeks thereafter amounted to six hundred and sixty dollars. He was then asked "Had he earned that amount of wages between the 13th day of May and the 7th day of October, 1912, in your employment?" Ans. "He was in my employment and entitled to his wages." Mr. Ash, counsel for plaintiff, then said "That is all I have to ask him." Counsel for defendant then announced that he had no questions to ask him. It was then that the attorney for plaintiff asked that the part of the last answer of the witness that was irresponsive to the question be stricken out. This was refused and the eighth exception is to this ruling.

This being all the testimony of the plaintiff, a prayer was offered by the garnishee that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, which was granted; to the granting of which the plaintiff excepted.

The first seven exceptions will be considered and passed upon together.

The plaintiff has attacked the legal sufficiency of the answers to the interrogatories filed. The chief reasons therefor, as we have said, are: first, that they were not signed by the garnishee but by his attorney; and second, that they were not sworn to. It is provided in section 13 of Article 9 of the Code of 1912, "That in all cases in which a garnishee has been summoned, at any time after the return of the writ, the plaintiff may file interrogatories in the cause, which shall be served by the sheriff upon the garnishee, within ten days thereafter; * * * and if the garnishee shall fail to answer said interrogatories within twenty days after the service of the interrogatories upon him, then, upon proof of such service, the plaintiff shall be entitled to judgment against the garnishee for the amount of the claim of the plaintiff for which the attachment was issued." And in section 15 of said article we find there enacted that "If such garnishee shall neglect or refuse to do so (that is, answer said interroga-

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tories), as provided in section 13, the Court is hereby directed to adjudge that such garnishee hath in his possession property of the defendant, or is indebted to such defendant to an amount and value sufficient to pay the debt, damage and interest of said plaintiff. and costs."

This is practically all that is said, in the statute, of interrogatories in such cases, and it will be seen that there is no requirement that such interrogatories shall be answered under oath. Therefore, in the absence of such requirement, it being purely a statutory provision, the garnishee cannot be required to answer under oath.

Although the answers to the interrogatories were first signed by the attorney and not by the garnishee, the identical answers were thereafter not only signed but sworn to by the garnishee, and therefore we do not feel called upon to decide the question raised as to the legal sufficiency of the answers signed by the attorney.

The contention, however, is made by the plaintiff that as the period of time, twenty days, in which the garnishee under the statute was to file his answers to the interrogatories had passed when the interrogatories signed by the garnishee were filed, that the garnishee should not have been permitted to file such answers, insisting that the original answers not signed by him were a nullity and should have been treated as such, and that as a result thereof the Court should have entered judgment upon his motion, because of the failure of the garnishee to answer.

In this we cannot agree with him, but think it was clearly within the power of the Court to permit the garnishee thereafter to sign and file the answers that had been previously signed for him by his attorney. The statute in respect to amendments in attachment proceedings is liberal, and the signing by the garishee of the answers previously filed by his attorney was permissible under this statute.

It was also argued as an objection to the answers that the interrogatories were not thereby fully answered, but upon

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examination of the answers we find no ground for such an objection.

This disposes of the first seven exceptions, and we find no error in the ruling of the Court in the eighth exception.

This brings us to the exception to the ruling of the Court in granting the plaintiff's prayer taking the case from the jury.

It is contended by the plaintiff that Ehrlich was not an employee of the garnishee within the meaning of section 33 of Article 9 of the Code of 1912, which provides that "No attachment of the wages or hire of any *laborer or employee* in the hands of the employer, whether private individual or body corporate, shall affect any salary or wages of the debtor which are not actually due at the date of the attachment, and the sum of one hundred dollars of such wages or hire due to any laborer or employee by any employer or corporation shall always be exempted from attachment by any process whatever."

The Act of 1854, Chapter 23, an Act very similar to the section that we have just quoted, was before our predecessors for construction in the case of *Moore* v. *Heaney,* 14 Md. 558. That statute provided that "No attachment of the wages or hire of a *laborer or other employee,* in the hands of the employers, whether private individuals or bodies corporate, shall affect any salary or wages of the debtor, which are not actually due at the date of the attachment."

In that case one Quinlan agreed, for the conisderation of five per cent. on the entire amount of the cost of building, to erect, superintend and otherwise direct the erection of a certain warehouse for Robert Moore & Bros., the other parties thereto. Thereafter John Heaney, a judgment creditor of Quinlan, had an attachment issued upon his judgment, which was laid in the hands of Robert Moore & Bros. In that case, as in this case, the plea of *nulla bona* was interposed, and it was contended by the plaintiff that Quinlan was not an em-

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ployee within the meaning of the statute. The Court, however, held that he was such an employee.

In the adoption of the Code of 1860, as shown by section 36 of Article 10, the word "other" was omitted, and it read "laborer or employee," and although the statute has since been amended several times the word "other" has not been restored.

It is urged by the counsel for the appellant that it was largely owing to the existence of the word "other" in the statute of 1854 that this Court in the case of *Moore* v. *Heaney, supra*, reached the conclusion that Quinlan was an employee under that Act and that the word was probably omitted from the Code of 1860 so that thereafter a different construction should be placed thereon. But long after this statute was amended and had gone into effect, the appellant in the case of *House* v. *B. & O. R. R. Co.*, 48 Md. 134, decided in 1878, issued an attachment, on a judgment which he held against one J. B. McNeil, and laid it in the hands of the B. & O. R. R. Co. as garnishee, the said McNeil being at the time in the employment of the railroad company receiving a salary of one hundred and twenty-five dollars per month. It was contended in that case that McNeil was not an employee under the terms of the statute, which are identical, in respect to the words here construed, with the statute now in force. The question there was as to the effect of Chapter 45 of the Acts of 1874 upon the section of the Code as to debts and judgments existing prior to the enactment of that Act. It was there held that the atachment did not lie, notwithstanding the garnishee had paid to McNeil since the laying of the attachment fifteen hundred dollars, and this was because of the exemption under the statute to laborers and employees.

And again, in the case of the *First Nat. Bank of Hagerstown* v. *Weckler*, 52 Md. 30, the judgment debtor was employed by the garnishee bank at a salary of one thousand dollars per annum, and in that case it was not contended

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that he was not an employee within the meaning of the statute.

And in the case of *Shryock* v. *B. & O. R. R. Co.*, 56 Md. 519, JUDGE ALVEY, delivering the opinion of the Court, said: "The case, in all of its essential facts, is precisely similar to the case of *House* v. *B. & O. R. R. Co.*, 48 Md. 130, and the principle of construction applied in that case equally applies here." In that case the judgment debtor was in the employment of the garnishee company and was receiving a salary of three thousand dollars per annum. Nothing was due defendant Tregoe at the time of the laying of the attachment, but between that time and the time of the trial he had been paid twenty-two hundred and fifty dollars. It was there held that under the statute exempting the wages of laborers and employees from the operation of the attachment law, the attachment would not lie.

Our attention has been called by the counsel for the appellant to the decision of this Court delivered by JUDGE MCSHERRY, in the case of *Lewis* v. *Fisher*, 80 Md. 139, in which the Court was called upon to construe the Insolvent Law (Code of 1888, Art. 47, sec. 15). In that case this Court held that an attorney, as therein employed, was not an employee within the meaning of that statute. But later, in the *Casualty Ins. Company's case*, 82 Md. 567, and in the case of *Roberts* v. *Eddie*, 85 Md. 186, where Article 47, section 15, was again being construed, JUDGE MCSHERRY, again speaking for the Court, in both of these cases, distinguished the case of *Lewis* v. *Fisher* from the *Moore case*. In the first of the cases the Court said: "It was insisted that the conclusions reached by this Court in *Lewis* v. *Fisher et als.*, *supra*. are in conflict with the decision in *Moore* v. *Heaney*, 14 Md. 558. Such is not, however, the fact. Two entirely different statutes, relating to different subjects were construed in the two cases. In *Moore's case* the Act of 1854, Ch. 23, relating to the exemption of the wages of hire of 'a laborer or other employee' from attachment, was interpreted; whilst in *Lewis'*

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case the identical statute now involved—the Act of 1888, Ch. 383, Article 47, sec. 15 of the Code of 1888—was before us. In *Moore's case,* this Court gave a wide and liberal meaning to the word 'employee,' so as to bring as large a class of persons as possible within the provision which created an exemption in favor of laborers and other employees, from the stringent terms of the attachment law and from the equally harsh effects of an attachment levied by way of execution on wages."

The statute creating an exemption in favor of a class of persons least able to protect themselves and largely dependent on their wages for the support of themselves and others dependent upon them, should be given a liberal and not a technical construction.

Following the line of authorities from which we have quoted, we have no difficulty in reaching the conclusion that in this case Ehrlich was an employee within the meaning of the statute exempting wages of laborers and employees from the operation of the attachment law.

The right of the garnishee to make the defense here made is sustained by the authorities to which we have referred. *Moore* v. *Heaney; First Nat. Bank of Hagerstown* v. *Weckler; House* v. *B. & O. R. R. Co.; Shryock* v. *B. & O. R. R. Co.*

The prayer of the garnishee was properly granted, and finding no error in the ruling of the Court below, the judgment will be affirmed.

Judgment affirmed, with costs to the appellee.

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WILLIAM M. TOBIN, INDIVIDUALLY, AND AS ADMINISTRATOR, &c.

vs.

JOHN G. ROGERS, MORTGAGEE.

Mortgages: sales under second mortgage; effect of prior mortgage filed in the case. Equity. Remanding causes for further proceedings: Code, Art. 5, *sec.* 38.

A sale under a second mortgage is subject to the effects of a prior mortgage, unless the mortgagee in such prior mortgage assents to a sale free and clear of his lien or voluntarily releases the same, or unless he intervenes in the proceedings and subjects himself and his mortgage to the jurisdiction of the Court. p. 252

Where the mortgagee under a first mortgage was not made party to foreclosure proceedings under a second mortgage and did not release his mortgage, but simply filed a claim for its amount and interest, an account allowing such claim should not be ratified, without proof of the payment and release of the first mortgage, or unless the first mortgagee by apt proceedings has been made a party, so as to be bound thereby. p. 252

He who seeks equity must do equity. p. 253

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Under section 38 of Article 5 of the Code of 1912, the Court of Appeals, upon reversing an order, may, without any final decree, remand the cause for such further evidence and proceedings as will advance the cause of justice and equity between the parties. p. 253

Decided June 25th, 1913.

Appeal from the Circuit Court for Baltimore County, sitting in equity (DUNCAN, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON and STOCKBRIDGE, JJ.

Edward H. Burke, for the appellant.

John G. Rogers, for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

On the 19th of July, 1887, Lawrence Tobin executed a mortgage to John G. Rogers to secure the payment of the sum of $3,000, on certain property described in the mortgage. Two years later, on June 20th, 1889, a second mortgage was placed on the same property by Mr. Tobin to Mr. Rogers to secure an additional amount of $1,000. By virtue of *mesne* conveyances the first of the above mortgages became vested in Reuben Dorsey Rogers as trustee on May 6th, 1890. Default having been made on the second mortgage, in October, 1892, John G. Rogers instituted proceedings for foreclosure of that mortgage, in the Circuit Court for Baltimore County in Equity. The land was surveyed, divided into eleven lots and offered for sale and sold as lots in November of the

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same year. In the advertisement no mention was made of the first mortgage, to show whether the sale was to be made free of, or subject to, that mortgage, nor was the first mortgagee a party to this foreclosure proceeding. Mr. Rogers, who made the sales, testified that the property was offered in fee. At the sale the first five lots were bid in by the mortgagee at prices aggregating $1,600—the eleventh lot by Lidia Tobin, wife of William M. Tobin, who was a son of the mortgagor, for the sum of $1,710, two other lots were sold to a Mrs. Davis for $180, and the three remaining lots to C. R. and Frederick Faulstick for prices amounting to $460, or a total for all of the sales of $3,950.

These sales were finally ratified and confirmed in the month of December. In the early part of 1896 the re-sale of the lots sold to Mrs. Davis was ordered and made, and there the proceedings rested until 1912, when Lawrence Tobin having died, his son, William M. Tobin, individually and as administrator of his father, filed a petition to require Mr. Rogers as trustee to state an account. Following this there was filed, what purports to be the mortgagee's claim. This is in form a claim for the amount due under the first mortgage, $3,000, with interest thereon to November 10th, 1892, the day of the sale. At the time of the institution of the proceedings the second mortgage and note intended to be secured thereby, had been filed, though not in the usual form of a claim. An auditor's account was then stated in which the auditor charged Mr. Rogers as trustee with the amount of the sales, $3,950, and after allowing the usual expenses incident to the sale, allowed the trustee for both the first and second mortgage debts, and interest on them to the date of the sale of the property. To this account William M. Tobin filed exceptions, setting forth various grounds, which it is not now necessary to repeat, and it is from the order of the Circuit Court overruling the exceptions that this appeal is taken.

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It must be premised that these foreclosure proceedings have been conducted with but scant regard for anything like orderly procedure, and with regard to some matters there is only a vague reference to subjects of no little importance in their bearing on the case. Thus it is alleged in the exceptions that proceedings were instituted for the foreclosure of the first mortgage prior to the making of the second, but whether such proceedings, if instituted, were dismissed, or have been entered satisfied or the property sold thereunder, nowhere appears.

The proceedings in the present case arose out of the second mortgage, and its foreclosure. The first mortgagee not having been made a party, any sale under the second mortgage must necessarily have been subject to the operation of the first mortgage, unless the first mortgagee assented to a sale free and clear of his mortgage or voluntarily released his mortgage, or intervened in this proceeding, subjecting himself and his mortgage to the jurisdiction of the Court. This it was perfectly competent for him to do, *Tome* v. *King,* 64 Md. 166, but he did not do it. All that he did, or that was done in his name, was to file a claim for the amount of his mortgage and certain interest thereon, and without asking to become or being made a party to the proceeding, so as to be bound thereby. Nor does it clearly appear that he has ever released his mortgage. That he has done so, is alleged in his answer, but no evidence was adduced to support this allegation, either by way of a duly certified copy of such release, or is there any testimony given to that effect by Mr. Rogers in his evidence. Before ratifying the account making this allowance to the trustee there should either have been satisfactory proof of the payment and release of the first mortgage, or R. Dorsey Rogers, trustee and mortgagee should by apt proceedings have been made a party to the cause in such a manner as to bind him, and give the Court jurisdiction in this proceeding over the first mortgage.

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But while it is necessary to reverse the order of the lower Court, it by no means follows that William M. Tobin has any standing to assert a claim to any moneys arising or claimed to arise out of the sales made of the mortgaged premises. It it a familiar maxim that he who seeks the relief of equity must do equity. The evidence fails to show what amount of money did actually go into the hands of the trustee. Presumptively, of course, he received and collected the amounts shown in the report of sales. As against this there is the positive testimony that he did not receive the $1,710 purchase price of the property reported as sold to Lidia Tobin, and that the said Lidia Tobin and her husband, William M. Tobin, this exceptant, have been in the occupancy of the premises from the time of the sale in 1892 down to the present or nearly so. If now in addition to these facts the trustee has in fact paid off and discharged the first mortgage, he should be entitled to show that fact. It may well be that after the real facts in regard to these matters now clouded in doubt shall have been shown, the present exceptant will not have any such interest as will entitle him to intervene. *Miller's Equity,* section 77.

While, therefore, it is necessary to reverse the order appealed from, instead of passing any final decree herein, the case will be remanded to the Circuit Court for Baltimore County in Equity, in accordance with Article 5, section 38, Code (1912), that such further evidence may be taken and proceedings had as shall advance the purposes of justice and do full equity as between the exceptant and the trustee.

Order reversed and cause remanded for further proceedings, with costs to the appellant.

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BALTIMORE AND OHIO RAILROAD COMPANY

vs.

MARRIE HARRIS, BY HER NEXT FRIEND, ELIAS GATEHOUSE.

Railroads: crossings; whistle and escaping steam; fright to pedestrians; invitation from engineer to cross. Evidence: admissibility and sufficiency; province of court and jury.

An engine and train of the defendant corporation were blocking a street crossing, and the plaintiff in order to pass on her way from her work, at the direction of the engineer and brakeman, walked around in front of the engine in full view of the engineer; when directly in front of the engine, the engineer suddenly blew an unusually long and unnecessarily loud blast from the engine's whistle, and allowed an unusual and unnecessary amount of steam to escape from the engine; the sudden noise caused the plaintiff such fear that she fell to the ground and in so doing received severe injuries. *Held,* that under such circumstances, the plaintiff was as much entitled to recover for the injuries sustained as a direct result of fright caused by such conduct on the part of the servants of the defendant, as she would have been had the servants, in disregard of her position, suddenly moved the train forward and injured her. pp. 269-270

The plaintiff was entitled to no greater caution on the part of the servants of the defendant, than she would have been entitled to had she crossed the tracks of the defendant on the street crossing while the engine was standing near, and if the engineer

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in answer to the signals of the brakeman, had blown only an ordinary blast from the whistle, as required by the rules of the defendant, and in the usual manner had permitted only the usual amount of steam to escape, the plaintiff would not be entitled to recover. p. 270

In such a case, it was incumbent upon the plaintiff to show that she was frightened and that her fall was the result of the fright, and any evidence tending to support her statement that fright caused her fall was admissible. p. 272

Courts may pass upon the admissibility and legal sufficiency of the evidence, but in so doing must assume the truth of the statements offered or made, and can not undertake to determine their weight. p. 270

Decided June 25th, 1913.

Appeal from the Circuit Court for Washington County (KEEDY and HENDERSON, JJ.).

The facts are stated in the opinion of the Court.

The following are the prayers of the plaintiff and defendant and the action of the lower Court thereon:

Plaintiff's First Instruction.—The plaintiff prays the Court to instruct the jury that if they find from the evidence in this case that on the 20th day of October, 1911, she was traveling along and upon the Williams street crossing of the defendant company in the City of Cumberland, Maryland; that said Williams street crossing was then and there a public crossing of said city, and that the said crossing was at said time and place blocked by an engine and train of the said defendant company, standing over the whole of said crossing; that the plaintiff waited several minutes for the said train to move off of said crossing so she could pass over the same. and that while so waiting for said train and engine to

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move off of said crossing the agents and servants of the defendant then and there in charge of said train requested and invited the plaintiff to pass around the front of said engine; and further find that the plaintiff and her companion, in pursuance of said request and invitation, if the jury find the same, started to cross around in front of said engine, and that while the plaintiff was crossing over the track upon which said train and engine was then and there standing, and about five feet in front of said engine, the said agents and servants of the defendant company caused the whistle of said engine to be blown in an unusual and unnecessary manner, and at the same time caused an unusual and unnecessary amount of steam to escape from the cylinder cocks of said engine, and if the jury further find that as a result of the blowing of said whistle in such manner or the escape of the steam in such amount, the plaintiff was then and there greatly frightened, and if they further find that the plaintiff then and there fell upon one of the rails of said track as a natural and probable consequence of said fright and was thereby injured, the plaintiff is entitled to recover. Provided, the jury further find that in passing around in front of said engine and at the time of the alleged injury the plaintiff was in the exercise of due care and caution on her part. (*Granted.*)

Plaintiff's Second Instruction.—If the jury find for the plaintiff in this case, then in estimating the damages they are entitled to take into consideration the expense to which the plaintiff has been subjected by reason of her injuries and they are also entitled to take into consideration the plaintiff's state of health and physical condition prior to her injuries in consequence thereof; and they may also consider the question as to whether the injuries will be permanent in their effect, and they may also consider the physical and mental anguish which the plaintiff has suffered in the past or is likely to continue to suffer in the future as a consequence of said

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injuries, and may award her such sum as in their judgment will be an adequate compensation for the injuries which she has sustained and the expenses to which she has been subjected. (*Granted.*)

Defendant's First Prayer.—The Court instructs the jury that under the pleadings in this case there is no legally sufficient evidence to entitle the plaintiff to recover, and their verdict must be for the defendant. (*Rejected.*)

Defendant's Second Prayer.—The defendant prays the Court to instruct the jury that even if they find that the train of the defendant mentioned in the evidence was blocking the crossing at Williams street in the City of Cumberland for such time as is prohibited by the ordinance of the said city offered in evidence, and that the plaintiff was told by an employee of the defendant to go around in front of the engine of said train, and that the plaintiff by reason of said directing did go around in front of the said engine of said train, and that while the plaintiff was crossing the tracks upon which the said train was standing, about five (5) or six (6) feet in front of the engine thereof, if the jury so find, the employees of the defendant in charge of the said engine blew the whistle and opened the cylinder cocks thereof, thereby causing a large amount of steam to be transmitted therefrom, if the jury so find, and that by reason thereof the plaintiff was frightened, and by reason of said fright, fell and struck her face upon the rail of the said track, and thereby suffered the injury complained of, still the plaintiff is not entitled to recover, unless the jury shall further find that the blowing of the whistle in the manner in which the same was blown, as found by the jury, was unnecessary and not in accordance with the rules and regulations of the defendant, if the jury find that the defendant had prescribed rules and regulations in reference thereto, or that said whistle was blown in an unusual or negligent manner, or that the opening of the cylinder cocks and letting off of steam at said time was not reasonably necessary for the proper conduct of the business of the defendant. (*Granted as modified.*)

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Defendant's Third Prayer.—The jury is instructed that the plaintiff is not entitled to recover unless they shall believe from the evidence that the blowing of the whistle in the manner the jury may find the same was blown, or the letting off of steam spoken of in the evidence was unusual, or negligent and not reasonably necessary in the conduct of the business of the defendant, and is further instructed that the burden is upon the plaintiff to satisfy them by a preponderance of the evidence that the said blowing of the whistle and said blowing off of the steam was unusual, or negligent and not reasonably necessary in the conduct of the business of the defendant. (*Granted as modified.*)

Defendant's Fourth Prayer.—The jury is instructed that even if they find that the blowing of the whistle and letting off steam spoken of in the evidence was unusual, negligent and not reasonably necessary in the conduct of the business of the defendant, and that the plaintiff was frightened thereby, and that by reason of said fright, the plaintiff fell and sustained the injury complained of, still the plaintiff is not entitled to recover unless they believe from the evidence that the said fright of the plaintiff and the said injury was natural and probable results of the said blowing of the said whistle, or the said letting off of steam or both of them together; and is further instructed that the burden is upon the plaintiff to show by a preponderance of the evidence that the said fright and injury were natural and probable results of the said blowing of the said whistle or the said letting off of steam, or both together, as aforesaid. (*Granted.*)

Defendant's Fifth Prayer.—The defendant prays the Court to instruct the jury that if they believe that at the time of the accident the plaintiff was nineteen years of age and in good health, and had been for about eight (8) months previous thereto accustomed to pass over the Williams street crossing of the defendant nearly every day, and had frequently heard the engines of the defendant whistle when in close proximity thereto, and had frequently heard and seen

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the said engine blow off steam when in close proximity thereto, even if they find that the employees of the defendant, on the day of the injury complained of, told the plaintiff to go around in front of the engine of the train of the defendant, which train was then and there blocking the said Williams street crossing, if the jury shall so find, and that while the plaintiff was passing in front of the said engine and was about five (5) or six (6) feet in front thereof, if the jury so find, the employees of the defendant blew the whistle of the said engine and opened the cylinder cocks thereof, thereby letting off steam, if the jury so find, and further find that by reason thereof the plaintiff was frightened, and that by reason of said fright the plaintiff fell and thereby sustained the injury complained of, that the injury so sustained by the plaintiff was not a reasonable and natural result of the said blowing of the said whistle, or the blowing off the said steam, and the plaintiff is not entitled to recover, even if the jury should find that the said blowing of the whistle and the said blowing off of steam, or either of them, were unusual, unnecessary, or negligent, unless the jury should further find that the said blowing of the said whistle or the blowing off of steam were done by the agents or employees of the defendant for the purpose of frightening the plaintiff, and to further instruct the jury that there is no evidence in this case legally sufficient to enable them to find either that the said whistle was blown or that the said steam was let off for such purpose. (*Rejected.*)

Defendant's Sixth Prayer.—The defendant by its attorneys prays the Court to instruct the jury that if they believe from the evidence that the plaintiff, Marie Harris, while walking over Williams street crossing of the Baltimore and Ohio Railroad in Cumberland, found the crossing blocked and obstructed by the cars of the defendant, and that she waited for five minutes, or more, and that then the agents or servants of the defendant told her to go around in front of the engine, if the jury so find, and that she then left the board

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crossing of said Williams street, and with her companion, Miss Trieber, walked along the right of way of said railroad, off of the said crossing between the train of the defendant and other cars, if the jury so find, the length of a car or two and the tender and engine of said train, around in front of said engine, if the jury shall so find, and that when she neared a point on the track of the defendant's railroad on which the engine of said train stood, the engineer of said engine blew two blasts of the whistle of said engine in regular acknowledgment of a proper signal of the brakeman of said train to go forward, to cut the said train, to permit travelers on said crossing to pass over the same, if the jury shall so find, and that the engineer prepared to start said engine forward in the regular, proper performance of his duty to cut said train, if the jury shall so find, and that the said blowing of the whistle and the expulsion of steam was not done in an unusual, or unnecessary manner, but in the usual, necessary way to properly perform his duties as the servant of the defendant, and that the plaintiff while so crossing in front of said engine became frightened by the said blast of the whistle and the expulsion of the steam from said engine, if the jury shall so find, and fell and was injured, if the jury shall so find, she cannot recover in this case, and their verdict must be for the defendant. (*Rejected.*)

Defendant's Seventh Prayer.—The jury is instructed that if they find from the evidence that when the plaintiff attempted to walk over Williams street crossing of the defendant in Cumberland, she found the said crossing blocked by a train of the defendant, extending west of said crossing with an engine attached, a distance of eighty (80) or one hundred (100) feet, if the jury so find, and that the defendant's agents told her to go around in front of said engine, if the jury shall find that they told her, and that while she was doing so and was in front of said engine on the same track on which it stood, the agents or servants of the defendant

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blew the whistle of said engine and caused the steam to be expelled from the cylinders thereof, and that the plaintiff was frightened thereby, and caused to fall and be injured, yet the plaintiff cannot recover unless they further find that the blowing of said whistle and the expulsion of said steam was done in such an unusual and unnecessary way as to show a reckless disregard of the effect thereof upon the plaintiff. (*Rejected.*)

Defendant's Eighth Prayer.—The jury is instructed that if they find from the evidence that the plaintiff was in a place of safety on the Williams street crossing of the defendant's railroad, before the injury complained of, and that she left said crossing without any invitation or direction of defendant's servants or agents, and went upon the right of way of defendant around in front of the said engine, and was frightened by the blast of the whistle and the escape of steam caused her to fall and suffer injury, then she directly contributed to her own injury by her own negligence and their verdict must be for the defendant, even if they further find that the whistle was blown in an unnecessarily loud way and the steam permitted to escape from the engine in unnecessarily large quantities. (*Granted.*)

Defendant's Ninth Prayer.—The jury is instructed that if they find from the evidence that when the plaintiff attempted to pass over the Williams street crossing of the defendant in Cumberland she found the same blocked by a train of defendant's cars, if the jury shall so find, and she waited there for five minutes or more, and that one of the servants of the defendant then told her to go around in front of the engine, if the jury shall so find, and that she then left the crossing, walking between said train and other cars on the next track for 40 feet or more, if the jury shall so find, and proceed to go around in front of said engine, if the jury shall so find, and that when she was crossing the track on which said engine stood, the engineer blew a blast or blasts of the whistle of said engine and opened the steam

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cocks of the cylinders thereof, from which large amounts of steam were expelled and that the plaintiff was frightened thereby and fell and was injured, yet their verdict must be for the defendant, if they further believe that the use of the whistle and the steam by the engineer was a reasonable and proper use thereof, and necessary in the proper operation of the said engine, in the conduct of defendant's business. (*Rejected.*)

Defendant's Tenth Prayer.—The defendant prays the Court to instruct the jury that there is no evidence in this case legally sufficient to enable them to find that either the blowing of the whistle or the letting off of steam spoken of in the evidence was done by the employees of the defendant for the purpose of frightening the plaintiff. (*Granted.*)

Defendant's Eleventh Prayer.—The jury is instructed that the burden of proof is upon the plaintiff in this case to show by preponderance of the evidence that the negligence of the defendant was the direct and proximate cause of the injury. (*Conceded.*)

The cause was argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Geo. A. Pearre (with whom were *J. Clarence Lane* and *H. H. Keedy* on the brief), for the appellant.

Walter C. Capper (with whom were *J. Philip Roman* and *Frank G. Wagaman* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

The declaration in this case charges that the defendant maintained a number of tracks across Williams street, one of the public streets of Cumberland, Maryland, and that on or about the 20th day of October, 1911, the equitable plain-

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tiff "was lawfully traveling along said Williams street, and using due care and caution, and approached the crossing of the defendant over said" street, which crossing "at that time, was partially occupied by an engine of the defendant company, in charge of an engineer and fireman of the defendant, who were then and there acting as its servants and agents; that the plaintiff stopped at said crossing and waited for a long time" for the "defendant, its servants and agents, to remove said engine off said crossing so that she might pursue her way over said crossing to her work at the Footer's Dye Works, in Cumberland; that after she had waited for more than five minutes for the said engine to be taken off of the said crossing, the engineer and fireman of the defendant, in charge of said engine, called to her, and told her to pass around in front of said engine, and cross on over the crossing, and that thereupon the plaintiff, using every care and caution on her part, started across the said crossing, upon the solicitation and invitation of the agents and servants of the defendant so in charge of said engine,—and had proceeded so far as to be upon the track upon which said engine was then and there standing, and directly in front of said engine, when, without any notice or warning of any kind" from the agents of the defendant in charge of the engine, or any other person, "the whistle of said engine was suddenly blown by the said engineer or fireman in charge of the same, in an entirely unreasonable manner, causing a loud and shrill sound, while the plaintiff was directly in front of said engine, and at the same time the said agents and servants of the defendant—in charge of said engine, and knowing the position of the plaintiff directly in front of said engine, unlawfully, negligently and carelessly, without any warning whatever to the plaintiff, opened the cylinder cocks on said engine, and then and there permitted an unusual and unnecessary quantity of steam to escape from the said engine, and an unusual and unnecessary noise to be made by the escape of said steam, and that by reason of the said careless and

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negligent, unusual and unnecessary whistling, noise and escape of steam," caused by the agents of the defendant, "in charge of said engine and acting in the line of their employment, while the plaintiff was directly in front of said engine, the plaintiff became shocked with fear, so that she became and was unconscious, and lost control over her actions, which caused her to fall down upon the railroad track in front of said engine, and that as she fell, her mouth struck one of the rails of the track upon which said engine was standing, and her front teeth were broken and injured, and her jawbone was broken and splintered, etc." It further charges that the injuries complained of were directly caused by the negligence of the servants of the defendant "in blowing the whistle of said engine on said crossing at said time and place, in an unlawful, unusual and unnecessary manner, and in negligently and carelessly causing an unusual and unnecessary amount of steam and noise to escape from said engine," while she, without any notice to the plaintiff and to the knowledge of the said servants of the defendant, was passing in front of said engine; that "the said escape of steam and the said blowing of the whistle were such as were calculated to frighten a woman crossing a railroad track directly in front of the engine and that these facts were well known" to the servants of the defendant in charge of said train," and that her said injuries ought to have been foreseen "by said servants, agents of the defendant" as a natural and probable consequence of the negligence of the defendant—in so negligently and carelessly blowing the whistle of said engine, and allowing steam and noise to escape in an unnecessary and unusual manner as aforesaid."

At the trial the plaintiff testified that she was twenty years of age, lived with her aunt in Cumberland and was employed as a presser at Footer's Dye Works; that she went home to dinner on the 20th of October, 1911, and that on her way back to work, she and her companion, Miss Margaret Trieber, went down Williams street; that when they reached the

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crossing a train was on the crossing, and after waiting there over five minutes, a brakeman, who was on the same side the train she was, and below the crossing, told the engineer, who was in the cab and on the same side of the train, to cut the train, and that the engineer hollowed back to the brakeman, "If there are only two let them walk around," and that the brakeman then motioned to them to walk around; that when the brakeman told her that, she thought it perfectly safe, and she and her companion then walked up the track between the engine and some cars standing on the next track the distance of the length of a car, the cab and engine, and as she was crossing in front of the engine, and was on the track the engine was on, about five or six feet in front of the engine, "the engineer blew an extremely loud whistle and blew steam from the cylinder cocks, and it covered the front of the engine and so scared me that I just thought the engine was going to run over me and I fell unconscious on the track, my upper jaw striking the track, and I laid there unconscious until Miss Trieber picked me up." She also stated that the engineer saw them as they passed the cab, and further testified: "I have seen steam coming out of engines and heard whistles blow at this same crossing. I see them every day;" that she had heard engines "blow lots of times" when she was five feet away from them, and that the whistles she had previously heard were not near so loud as the whistle blown when she passed around the engine at the time of the accident, and which she described as "one loud shrill blast, an extremely loud whistle, louder than I ever heard before."

The statement of the plaintiff as to what occurred when she reached the crossing and when they started to cross the track in front of the engine is corroborated by the testimony of Miss Trieber, who further stated: "When the whistle blew and the steam exhausted it frightened her (the plaintiff) and she fell with her face downward, striking her face against the rail towards Footer's Dye Works. The engine blew one real loud blast. I had used that crossing nearly a

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year and have heard engines blow on that crossing quite often, about five times a week, probably oftener. I would be about five or six feet from them when they blew." When asked to tell the jury "the sound made by the blowing of that particular engine compared with the other blasts" she had heard "as to loudness," she replied, "Well, it was much stronger than any other; like a toy cornet or horn to that of larger cornets or horns," and said further, "A large quantity of steam came from around the bottom of the engine; it came from about the cylinders. It made a great noise." Bernard Griminger, who was near the crossing and saw the plaintiff fall as she was crossing the track in front of the engine, says "then for a minute I couldn't see either of them because the steam enveloped them the blowing of the whistle caused me to look that way, it blew once, an awful shrill long blast, there was a great deal of steam." The plaintiff produced further evidence to show that the natural and probable effect of suddenly subjecting a woman twenty years of age to a loud noise that frightened her would be, to some extent, to impair her nervous system and her control of her muscular movements, and to show the extent of plaintiff's injuries, and then offered in evidence ordinances of the City of Cumberland making it unlawful to obstruct with a locomotive, engine or car the crossing on Williams street for a longer period than five minutes, and for any owner or person in charge of an engine or locomotive to blow the whistle of such engine or locomotive, or to allow the same to be blown within the City limits except when absolutely required by the rules of the corporation or person owning or running the same, "or to avoid accident, or in any case to blow a full valve whistle."

The defendant proved that Williams street was sixty feet wide, and allowing ten feet on each side for sidewalks, the driveway was forty feet wide; that the space between the two tracks is seven feet, and that the space between the ends of the cross ties, "where you can walk," is three feet. Harry W. Critchfield, one of the brakemen on the train, testified

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that he was the middle brakeman and was at the crossing; that Smith, the head brakeman, who was on the far side of the crossing, and who at the time of the trial was in a hospital, gave him the signal to cut the train; that he "parted the hose, and not being able to see the engineer he crawled up on the cab, and as he backed down off the cab he nearly backed into two ladies; that he walked back to where the train was to be cut, and gave the engineer the signal to move ahead, and that the engineer answered him by two sounds of the whistle; that the first he saw "of the young ladies was when he backed down off of the engine"; that the crossing was blocked about four minutes, and the cut was made after the engineer sounded the whistle; that "he did not tell the young ladies to go around in front of the engine * * * did not hear the engineer say, 'If there are only two let them go around,' * * * and did not motion to them to go around"; that the only time he saw the girls was when he backed down off the engine; that when they passed him they were between two trains on the defendant's property, and he did not know where they were going. W. M. Foster, the engineer, testified that when he first saw the plaintiff and her companion he was on the engine and they were down on the right side of the engine, going towards the head of the engine; that the engine, tank and one or two cars were beyond the crossing; that he did not hallow back to the brakeman, "If there are only two girls let them walk around in front of the engine"; that he did not see them in front of the engine, and did not know where they were going when he saw them pass the side of the engine; that the brakeman was stationed at the crossing when he gave him the signal to go ahead, and that he sounded the whistle twice as an answer to his signal, because it is the rule to give two blasts in answer to a signal; that after answering the signal he remembered about the two girls being near the engine, and asked the fireman if they were around the engine and out of the way; that he supposed they were going around, but not knowing he wanted to be sure where they were, and finding that they were out of

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the way he moved the engine ahead and cut the crossing. He further testified that in going ahead he opened the throttle to admit steam to the cylinders, but there was no expulsion or escape of steam around the cylinders, and that he did not blow a long, shrill, loud blast; that he could not see right in front of the engine, and that after he answered the signal, before going ahead, he asked the fireman if the young ladies were out of the way, and that he replied: "Yes; they are going down here and one of them is bleeding in the mouth; she must be having a hemorrhage or something"; that he did not release the cylinder cocks, which "were operated from a lever inside the cab." The testimony of the fireman, who was on the opposite side of the cab, supports the statement of the engineer that he blew two short blasts, and he says that he did not hear the engineer say, "If there are only two girls let them walk around."

The defendant demurred to the declaration, and at the conclusion of the testimony offered a prayer to take the case from the jury. The main contention of the appellant in support of the demurrer and this prayer is that there can be no recovery for injuries resulting from fright without physical impact. That question has been so recently and carefully considered in *Green* v. *Shoemaker,* 111 Md. 69, that there would seem to be no room for further discussion. In that case the question was the right to recover for nervous prostration resulting from fright caused by continued blasting, and JUDGE PEARCE, after reviewing the cases bearing upon the question, quotes, as expressing the correct view, the statement in *Denver R. R. Co.* v. *Roller,* 100 Fed. Rep. 738, where the jury was instructed as follows: "If great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, with the ensuing wreckage, explosion and conflagration, placed the plaintiff, and if she was actually put in fright by those circumstances, and injury to her health was a reasonable and natural consequence of such fright, and was actually and proximably occasioned thereby, the said injury is one for which damages

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are recoverable." In the case at bar the injury, according to the averments of the declaration and evidence adduced by the plaintiff, were the result of a fall caused by the shock and fright produced by the sudden blowing of the whistle and escape of steam, and in *Green's case,* the learned judge who wrote the opinion said: "If, in the case before us, the plaintiff had received an actual blow, * * * by a fall of herself, caused by the alarm of the concussions, no one would question her right to maintain this action." It is also urged by the defendant in this connection that at the time of the accident the plaintiff was on the defendant's right of way and that the alleged invitation of the engineer and brakeman was beyond the scope of their employment and does not bind the defendant. But assuming that the engineer and brakeman had no authority to direct or authorize the plaintiff to use the defendant's property under the circumstances, and for the purpose indicated, they were nevertheless in full control of the train, and if they knew, as alleged and shown by the plaintiff's proof, that she was in a position of peril by reason of their invitation, they were bound to exercise reasonable care to avoid injuring her, and their failure to do so would render the defendant liable for resulting injuries. This doctrine has been so frequently announced and applied in this State that it requires no citation of authority. The engineer was in the cab and in control of the engine, and the cylinder cocks were operated by a lever in the cab. Neither the rules of the defendant nor the conduct of its business required an unusually loud whistle to be blown at the time mentioned, and the ordinance prohibited "in any case" the blowing of "a full valve whistle" within the city limits. If, as alleged and testified to by the plaintiff's witnesses, the train in question was blocking the crossing, and the plaintiff and her companion, in order to reach their destination, at the request or by the direction of the engineer and brakeman, undertook to pass around in front of the engine, and while in the act of doing so, and when in front of and within a few feet from the engine, the engineer suddenly blew an *unusually* and *un-*

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necessary loud whistle, and allowed an unusual and unnecessary amount of steam to escape from the engine, we think that the plaintiff is as much entitled to recover for the injuries sustained as the direct result of fright caused by such conduct on the part of the servants of the defendant as she would have been had said servants, in disregard of her position, suddenly moved the train forward and thereby injured her. On the other hand, the plaintiff was entitled to no greater caution on the part of the servants of the defendant than she would have been entitled to had she crossed the tracks of the defendant on the street crossing while the engine was standing near the crossing, and if, as stated by the engineer and brakeman, the engineer, in answer to the singal of the brakeman, blew only two short whistles, as required by the rules of the defendant and in the usual manner, and permitted only the usual amount of steam to escape, the plaintiff was not entitled to recover. *Duvall* v. *B. and O. R. R. Co.*, 73 Md. 516; *P., W. and B. R. R. Co.* v. *Burkhardt,* 83 Md. 516; *Riley* v. *New York, etc., R. Co.,* 90 Md. 53; 33 *Cyc.* 937.

Counsel for the appellant further contends that the statements of plaintiff's witnesses are too improbable to be accepted by the Court. The relative weight of the plaintiff's and defendant's evidence is, however, a matter exclusively for the jury. In this State the Court may pass upon the admissibility and legal sufficiency of evidence, but in doing so it must assume the truth of the statements offered or made, and cannot undertake to determine their weight. The principle applied in *Baltimore Traction Co.* v. *Helms,* 84 Md. 515, and *N. C. Ry. Co.* v. *Medairy,* 86 Md. 168, cannot be applied to statements of the plaintiff's witnesses in this case.

During the trial the defendant reserved eleven exceptions to the rulings of the Court on the evidence. In the first and second exceptions the plaintiff was asked to state what caused her to fall, and to compare the sound of the whistle of the

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engine at the time of the accident with the whistles of engines she had heard on other occasions. She had the right to show how the accident occurred, and having stated that she had very often heard engines blow when she was only about five feet from them, there was no objection to her comparing the sound of the whistle that frightened her with the sound of other whistles she had heard. There is no serious objection to the evidence referred to in the third exception. The plaintiff had testified that she was familiar with the crossing in question, and that there were eighteen or twenty tracks at that point, and when asked, without objection, whether or not engines were frequently on and over the crossing, she replied, "Yes, we had to wait several times." She did not say that she had been required to wait there *over five minutes* several times, and we do not see how the defendant could have been injured by her reply. The same may be said of the statement of Miss Trieber, in the fifth exception, that the blowing of the whistle and the "exhaust of steam" stunned her for a while. Miss Trieber did not fall in consequence of the shock, and as by the prayers the finding of the jury was limited to the effect of the whistle and steam upon the plaintiff, it is not probable the defendant was prejudiced by this testimony, even if it be, strictly speaking, inadmissible. What we have said in reference to the second exception applies to the fourth. This evidence of Miss Trieber was offered for the purpose of showing that the whistle was unusually loud. In the sixth exception the witness was asked to state whether she had noticed any change since the accident in the appearance of the plaintiff. Counsel for the defendant objected, but stated that if the injury referred to her face he did not object, but did object if it referred to her health. The answer of the witness was, "I notice in her face, I think the left side, her eye, her cheekbone is higher than the other one, and her voice does not seem the same as it did before the accident occurred. Her mouth is drawn." This answer seems to be fairly within the qualification of the objection.

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The seventh, eighth, ninth, tenth and eleventh exceptions are to questions asked Dr. Laughlin, as an expert. This witness was asked what would be the natural and probable effect upon the nervous system of a woman of suddenly subjecting her to a loud noise that greatly frightened her, "with reference to the control of her muscular movements." In answer to that question and practically the same question in the ninth exception, the witness replied that it would impair her nervous system and her control of "her muscular movements". It was encumbent upon the plaintiff to show that she was frightened and that her fall was the result of the fright, and this evidence was admissible as tending to support her statement that fright caused her to fall. The witness was not able to answer the questions in the eighth, tenth and eleventh exceptions, and there was consequently no injury to the defendant.

At the conclusion of the testimony the plaintiff offered two prayers, which were granted by the Court, and the defendant ten. The defendant's second, third, fourth, eighth and ninth prayers were granted and the others were rejected. To the granting of the plaintiff's prayers and to the refusal of the Court to grant defendant's rejected prayers the defendant excepted. By the fifth prayer of the defendant the Court was, in effect, asked to instruct the jury that if they found that the plaintiff had been using the crossing for about eight months previous to the accident, and had frequently heard the engine whistle and blow off steam when in close proximity thereto, then the injury of the plaintiff was not the natural and reasonable result of the blowing of the whistle or the escape of the steam, and she was not entitled to recover, unless the blowing of the whistle, etc., was done for the purpose of frightening the plaintiff, and by its seventh prayer it asked for an instruction that the plaintiff was not entitled to recover unless the jury found that the "blowing of said whistle and the expulsion of said steam was done in such an unusual and unnecessary way as to show a reckless disregard

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of the effect thereof upon the plaintiff." These prayers ignore the effect of the evidence tending to show that the whistle was *unusually* loud, and the duty of the defendant, under the circumstances shown by the plaintiff's witnesses, to exercise reasonable care to avoid injuring her, and were therefore properly rejected. The defendant's sixth, eighth and ninth prayers, in so far as they are free from objection, are covered by its second prayer, which was granted. The reporter is requested to set out in his report of the case the plaintiff's first prayer, and the defendant's second, sixth, eighth and ninth prayers. The plaintiff's first prayer is entirely in accord with what we have said in disposing of the demurrer and the defendant's first prayer to take the case from the jury. The plaintiff's second prayer, which relates to the measure of damages, is substantially in the usual form, and we do not understand that it was objected to except upon the ground that the case should have been taken from the jury.

Finding no reversible error in any of the rulings of the Court below, we must affirm the judgment.

Judgment affirmed, with costs.

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WASHINGTON COUNTY HOSPITAL ASSOCIATION

vs.

ESTATE OF EDWARD W. MEALEY, DECEASED.

AND

WASHINGTON COUNTY FREE LIBRARY

vs.

SAME.

Taxation: collateral inheritance tax; not a tax on property; corporations exempt from taxation.
Charters: revocable.

The collateral inheritance tax is not a tax on the property, but a tax on the privilege of succeeding to the inheritance or becoming a beneficiary under the will. p. 280

The provision in the charter of a corporation exempting from taxation its real and personal property, is not an exemption from liability for payment of the collateral inheritance tax. pp. 280, 281

The charters of the Washington County Hospital Association and the Washington County Free Library do not exempt them from liability for the payment of the collateral inheritance tax imposed by section 120 of Article 81 of the Code. p. 281

All charters granted since the Constitution of 1851, Article 3, section 47, are subject to be repealed or altered even though such right is not reserved in the charter itself. p. 282

Decided June 25th, 1913.

Two appeals from the Orphans' Court for Washington County.

The facts are stated in the opinion of the Court.

The two causes were argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

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Frank G. Wagaman, for the Washington County Hospital Association, appellant.

Charles A. Little, for the Washington County Free Library, appellant.

Edgar Allan Poe, the Attorney-General (by the consent of the Court), for the State.

BOYD, C. J., delivered the opinion of the Court.

The question submitted for our determination in this case and that of the *Washington County Free Library* v. *Estate of Edward W. Mealey, deceased,* is whether the residue of the estate which was left to the appellants in the two cases by the last will and testament of Edward W. Mealey, deceased, is subject to the collateral inheritance tax imposed by section 120 of Article 81 of the Code of 1912. After making certain other bequests not involved in this controversy, the testator by the seventh clause of his will left all the rest, residue and remainder of his estate to the Hagerstown Trust Company of Hagerstown, Maryland, trustee, "to hold the same and collect the income therefrom, and pay over the net amount thereof to my wife, Adelaide Savage Mealey in semi-annual instalments, and upon her death I direct that the whole corpus or principal of the trust estate held under this clause of my will be passed over and delivered by my said trustee as follows: two-thirds thereof to the Washington County Hospital Association, a body corporate, duly incorporated under the laws of the State of Maryland; and the remaining one-third thereof to the Washington County Free Library, a body corporate, duly incorporated under the laws of the State of Maryland."

On the 24th of January, 1913, there was stated what is designated as the "Restatement of the First and Final Account of the Hagerstown Trust Company, Executor of Edward W. Mealey," in which account there was shown to be a balance due the estate, after the payment of all costs,

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expenses, commissions, debts, specific legacies and the collateral inheritance tax on certain of said specific legacies, of the sum of.............................. $398,804.99
From which balance is deducted the sum of $19,940.24, being 5% collateral inheritance tax on the above balance,................ 19,940.24

Leaving a balance of.............. $378,864.75

That was distributed to the Hagerstown Trust Company of Hagerstown, Maryland, trustee, under the 7th clause of the will of the testator. That account was on the same day approved and ordered to be recorded by the Orphans' Court of Washington County. By agreement of counsel the account is not inserted in full in the record, but the above shows the balance due the estate by the executor, the amount of the collateral inheritance tax charged and the amount distributed to the trustee.

On February 25th, 1913, the appellants in the two cases each filed a petition in the Orphans' Court, objecting and excepting to the restatement of the account and to the order passed by the Court which affirmed and ratified the account. The petitions set out in full the charters of the respective corporations, refer to the will of the testator, quote the 7th clause in full, and each claims that it is exempt from the payment of all taxes, including the collateral inheritance tax, under the provisions of its charter. Each petitioner prays the Court to pass an order revoking, annulling and setting aside the order passed on the 24th of January, 1913, approving, confirming and ratifying the said account, also annulling and setting aside the account as stated and authorizing and directing the executor to state an account wherein shall be distributed to the trustee the entire balance of $398,804.99, without deducting therefrom the collateral inheritance tax of $19,940.24, or any portion thereof. The executor filed an answer to each petition, admitting the allegations of the petition, alleging that it had no interest in the distribution of the collateral inheritance tax, and submitting

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all questions raised by the petition to the immediate adjudication of the Court. The State's Attorney for Washington County answered each petition for the State and alleged that the petitioner was not exempt from the payment of the collateral inheritance tax. The Court on February 28th, 1913, passed orders dismissing the petitions of the respective corporations and each of them appealed. The Attorney General appeared for the State and each appellant was represented by counsel at the argument in this Court—the two cases being heard together.

There is no material difference between the two charters, in so far as this question is concerned. In that of the Hospital Association it is provided amongst other things that it "shall be capable of acquiring, purchasing and taking by gift, grant, devise or bequest or otherwise, in trust or in perpetuity, and of holding real and personal estate and property for the use and purposes of said corporation." By section 7 it is enacted: "That the real and personal estate authorized by this Act to be held by the said 'The Washington County Hospital Association' for the uses and purposes herein provided for, shall be exempt from all state, county and municipal taxes so long as the same shall be used for the purposes herein mentioned."

The Free Library is authorized to purchase, acquire and hold all real estate necessary for the purposes of the library; to receive by gift, grant, devise, bequest or otherwise, all lands necessary as a site for said library and also all moneys, funds or other property for the erection thereon of proper and suitable buildings for library purposes; and also to receive all moneys, funds or other property donated to it," and to apply the same or the annual proceeds thereof to the maintenance and support of said library, to the acquisition or purchase of books and all other things or property necessary for the proper equipment and maintenance of a free public library, according to the intent and directions of any donor or donors." Section 6 provides, "That the real and personal estate authorized by this Act to be held by the said 'The

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Washington County Free Library' for the uses and puropses herein provided for, shall be exempt from all state, county and municipal taxes forever."

Mrs. Mealey had died before the account was stated, and as we understand that no question was intended to be raised or desired to be determined by us, excepting as to the alleged exemption from the payment of the collateral inheritance tax, we will confine our discussion to that. Section 120 of Article 81 provides that: "All estates, real, personal and mixed, money, public and private securities for money of every kind passing from any person who may die seized and possessed thereof, being in this State, or any part of such estate or estates, money or securities, or interest therein, transferred by deed, will, grant, bargain, gift or sale, made or intended to take effect in possession after the death of the grantor, bargainor, devisor or donor, to any person or persons, bodies politic or corporate, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children and lineal descendants of the grantor, bargainor or testator, donor or intestate, shall be subject to a tax of five per centum in every hundred dollars of the clear value of such estate, money or securities." There are numerous provisions in the following sections for the ascertainment of values, the collections, etc., of this tax which need not be referred to, further than to say that they manifest great concern on the part of the Legislature to secure to the State the collection of this tax.

We find nothing in these charters which indicates an intention to exempt either of the corporations from the effects of the broad provisions of the statute quoted above. In the first place, as both of them are corporations of a character which would at least hope to receive property by devise or bequest, or in some way to take effect after the death of the benefactor, and as both in terms provided for devises and bequests and as both were created by special charters which were intended to give them broad powers and privileges, the mere fact that no such provision was made in the charters, or

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either of them, would of itself strongly indicate that the intention of the Legislature was that this tax should be paid—especially as each of them has a provision for an exemption from all state, county and municipal taxes *on the real and personal estate* authorized by the charters to be held by them. Indeed in the charter of the Hospital Association the exemption is in terms limited to "so long as the same shall be used for the purposes herein mentioned," which indicates that it was speaking of the kind of taxes imposed from time to time for state, county and municipal purposes and not of such a tax as the collateral inheritance tax.

When these corporations were chartered the General Corporation Laws of the State provided specifically for the creation and maintenance of hospitals and libraries (Article 23, sections 15 and 16 of Code of 1904), and section 4 of Article 81 of that Code exempted from taxation the buildings, equipments and furniture of hospitals, asylums, charitable and benevolent institutions, and the grounds appurtenant thereto which are necessary to the respective uses thereof, and the buildings, furniture, equipment and libraries of incorporated educational or literary institutions and to the ground appurtenant thereto, but it could not have been successfully contended that such exemptions included the collateral inheritance tax on any property left to such corporations. In 37 *Cyc.* 1572, in the consideration of "Legacy and Inheritance Taxes," it is said: "A legacy to a charitable, educational or religious institution is not exempt from taxation merely because the property of the institution is exempt from general taxes." A number of cases are cited in the notes. See also 27 *Am. & Eng. Ency, of Law,* 350, where it is said, under a discussion of "Exempt Succesion" that, "Express exemptions are found in the statutes of some jurisdictions in favor of religious, charitable or educational institutions, incorporated under the laws of the taxing State. In the absence of such express provision, however, a bequest can not escape taxation because for a charitable use."

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But in order to see that such exemptions as these charters provide for do not include the collateral inheritance tax, it is only necessary to keep in mind the kind of a tax the latter is. In *State* v. *Dalrymple,* 70 Md. 294, JUDGE McSHERRY said: "Every State in the Union, in the absence of a constitutional prohibition, has the authority to regulate by law the devolution and the distribution of an intestate's property situated within the jurisdiction of that State, and personal property situated elsewhere but owned by a resident, and to prescribe who shall and who shall not be capable of taking it," and, after speaking of instances of the exercise of the power, went on to say: "Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property actually located here, or personal property situated elsewhere but owned by a resident, to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the Legislature may deem expedient * * *. In other words, one of the conditions upon which strangers and collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent. into the Treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transmitted by will or by descent or distribution." The statute then in force provided for a tax of two and a half per cent., but it has since been increased to five per cent. Those principles were again announced by JUDGE BRISCOE in *Fisher, Trustee,* v. *State,* 106 Md. 104.

It is thoroughly settled that it is not a tax on the property but on the privilege of succeeding to the inheritance or of becoming a beneficiary under the will. 37 *Cyc.* 1553; 27 *Am. & Eng. Ency. of Law,* 338, and Maryland cases cited above. That being so, it cannot be said that the exemption

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of *the real and personal* estate, authorized by these charters to be held by the respective corporations, from all state, county and municipal taxes is an exemption from this tax. Many authorities might be cited to show that although certain property can not be taxed, or the owners are not liable to taxation, such a tax as this can be imposed on the transmission of the property exempt from taxation, or passing to those not liable to taxation. In *United States v. Perkins*, 163 U. S. 625, the Supreme Court held that personal property bequeathed to the United States was subject to an inheritance tax under the laws of New York, and quoted with approval from *State* v. *Dalrymple, supra.* The Court said, "That the Act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the Legislature assents to a bequest to it." In *Plummer* v. *Color,* 178 U. S. 115, the Court held that such a tax could be imposed on the transfer of United States bonds, although of course they were not within the ordinary taxing power of the State. In *Orr* v. *Gilman,* 183 U. S. 288, transfers of State and municipal bonds, exempt from taxation by statute, were held to be subject to the tax imposed by the succession tax laws, as United States securities are. In the note to *Succession of Levy,* 115 La. 377, as reported in 5 *A. & E. An. Cas.* 871, many cases are cited to the same effect. See also, 37 *Cyc.* 1554, and 27 *Am. & Eng. Ency. of Law,* 344.

We might assign other reasons for the conclusion we have reached but deem it unnecessary to do so, and are of the opinion that there is nothing in the charters of these corporations, or either of them, which could authorize an exemption from the collateral inheritance tax imposed by section 120 of Article 81, and the Orphans' Court was right in requiring it to be paid.

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We will only add that we do not understand how it can be contended, in view of the provisions in the State Constitution and the decisions of this Court, "that there being no power reserved in the Legislature to repeal or amend the appellant's charter, a subsequent change in the statute law of the State cannot affect the appellant's rights under its charter,"—referring to the change in the statute as to the rate of the tax on collateral inheritances, it having been two and a half per cent. when its charter was passed, and claiming that if liable to any such tax, it could only be two and a half per centum. All charters granted in this State since the Constitution of 1851 (Article 3, section 47), including of course those granted since the present Constitution was adopted, are subject to be repealed or altered, and it matters not that such right is not reserved in the charter itself. *State* v. *Northern Central Railway Company,* 44 Md. 165; *State* v. *Same,* 90 Md. 447, and other cases might be cited. The right reserved in the Constitution to repeal or alter a charter of a corporation is read into the charter as effectually as if made in express terms in it. "To hold otherwise would be to decide that the Legislature by omitting such a reservation could confer a power beyond the interference of the Legislature, and thus exercise a power forbidden by the Constitution." 44 Md. 165. In the case in 90 Md., *supra,* this Court held that a general law passed in 1890 (Acts 1890, Ch. 559) imposing a tax of one per centum on the gross receipts of all railroad companies, operated as a repeal by implication of Chapter 16, Acts of 1880 which imposed a lesser tax on the Northern Central Railway Co. The question is too thoroughly and clearly settled to require further discussion of it.

Order affirmed, the appellant to pay the costs.

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WILLIAM MASON SHEHAN, INSURANCE COMMISSIONER OF THE STATE OF MARYLAND,

vs.

I. TANENBAUM, SON & CO., A BODY CORPORATE.

Insurance brokers: licenses; corporations not entitled—. Code: construction; section 14, Article 1; persons and corporations. Statutes: construction; intention; extraneous circumstances.

The object of all construction of statutes is to arrive at the intention of the legislature. p. 285

If the language of a statute is ambiguous, courts are not confined to it, but may make use of extraneous aid to arrive at the meaning of the Act; in such cases the intention may be deduced from a view of the subject-matter, the necessity of the Act, and the object of the legislature. p. 285

Section 219 of Article 23 of the Code of 1912, relating to licenses for carrying on the business of insurance brokers, does not apply to an artificial person or body corporate. p. 287

This Act, in addition to the regulation of the insurance business, had for its purpose the raising of revenue. p. 285

Although section 14 of Article 1 of the Code provides that the word "person" shall include "corporation," unless such construction would be unreasonable, yet in construing statutes the rule can not override the clear intention of the legislature. p. 286

Decided June 25th, 1913.

Appeal from the Court of Common Pleas of Baltimore City (ELLIOTT, J.).

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The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

Arthur D. Foster, for the appellant.

A. C. Binswanger (with whom was *Mayer L. Halff* on the brief), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

The appellee, a foreign corporation, applied to the insurance commissioner to issue to it an insurance broker's license "in its own valuable corporate name." under section 200 of Art. 23, Code (1904). The commissioner refused to issue the license, upon the ground that the laws of the State did not authorize him to issue licenses to any but natural persons and to a *bona fide* co-partnership. Thereupon the appellee filed a petition asking that the writ of mandamus might issue, to compel the commissioner to issue such a license to it. Upon hearing had, the Court passed an order directing the commissioner to issue an insurance broker's license to the appellee as prayed. Thereupon the appellant took this appeal.

Section 200, Article 23, Code (1904), provides as follows: "Any person applying for the same and paying to the insurance commissioner the sum of one hundred dollars for the use of the State, and an additional sum of one dollar as a fee to the said commissioner for issuing said license, may obtain a license for carrying on the business of an insurance broker, and no license shall be issued to permit more than one person or the members of a *bona fide* co-partnership to act thereunder." The construction put by the commissioner upon the word person, appearing in the Act, was that it did not include or apply to an artificial person or body corporate.

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Unquestionably the purpose of this Act, in addition to the regulation of the business of insurance brokers, was the raising of revenue for the purposes of the State. With that purpose held in view what construction should be placed upon the statute? The object of all construction of statutes is to arrive at the intention of the Legislature, and when that is ascertained it will be carried out. A leading case in this State is that of *Canal Co.* v. *B. & O. R. R.*, 4 G. & J. 152, in which the Court, speaking through BUCHANAN, C. J., said: "Statutes should be construed with a view to the original intent and meaning of the makers and such construction should be put upon them as best to answer that intention, which may be collected from the cause or necessity of making the Act, or from foreign circumstances, and when discovered ought to be followed, although such construction may seem contrary to the letter of the statute." If the language of a statute is ambiguous Courts are not confined to it but may make use of extraneous aids to arrive at the meaning of the Act. In such cases the intention of the law makers is deduced from a view of the subject matter, the necessity of the Act and the object of the Legislature. *Clark* v. *Baltimore City*, 29 Md. 285; *Broadway Ferry Co.* v. *Hankey*, 31 Md. 346; *Mincher* v. *State*, 66 Md. 232. In the case of *Milburn* v. *State*, 1 Md. 17, this Court said: "That the policy and intention of the Legislature should be kept constantly in view, and control in a considerable degree the interpretation of language to be found in the revenue Acts." These are a few of the many cases on the construction of statutes in this State, but they all follow the cardinal principle that the intention of the Legislature should be sought and followed. In *Black on Interpretation of Laws*, 138, the rule is thus stated: "There are many cases in which the Legislature does not mean that the word person shall include corporations. This is always a question of intention, and the intention must be sought for and determined in each case by the aid of the context, the general scope and purpose of the Act and other pertinent

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considerations." To the same effect is section 89 of *Endlich on the Interpretation of Statutes.*

The appellee relies upon the Rule of Interpretation as it appears in sec. 14, Art. 1 of the Code (1912), providing that "The word person shall include corporation, unless such a construction would be unreasonable." But if such construction is without the clear meaning and intention of the Legislature it would be unreasonable to so include it. And although the rule is to be followed in some cases it cannot override the clear intention of the Legislature.

The Act says: "No license shall be issued to permit more than *one person* or the members of a *bona fide* co-partnership to act thereunder." Under section 17, Article 56 of Code 1888, the license was provided for as follows: "Any person applying for the same and paying the sum of one hundred dollars, may obtain a license for carrying on the business of insurance broker." This Act was repealed by the present. And bearing in mind that revenue is one of the main purposes of the Act, the Legislature seems to have wanted to make clear that although they extended the privileges of the license to the members of a *bona fide* co-partnership, they nevertheless intended, when issued to a person, its use was restricted to the use of one person. Corporations necessarily conduct their business through officers and agents. If then the proper construction would be to include corporation in the word person, there would be the effect of restricting the use of the license to one individual and at the same time permitting a corporation through any army of agents to negotiate insurance, upon the payment of one license fee. We do not think because the privilege is extended to the members of a co-partnership to do business on one license that it is open to the same criticism, for the Act limits its use to the members of a *bona fide* co-partnership. Whenever the numbers of the co-partnership indicated that it was not a *bona fide* co-partnership, action could be taken under the penalizing section. And in addition the use of the license would

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be confined to the individual members. In the case of a corporation there would be no means of restricting the number of agents who could operate under the one license. Thus if we apply the rule of interpretation it would be unreasonable to include corporation in the word person, for it would defeat the revenue feature of the Act.

The character of business to be conducted by the appellee itself clearly indicates this. According to the averments of its petition, it installs automatic sprinklers and fire-saving devices, after making a contract to write the fire insurance business of its customer. The premium on the policy is fixed at a certain rate and after the installation of the device the rate of premium is sufficiently lower to the appellee as to make the difference between the fixed contract rate and the actual premium rate an amount large enough to pay it for its apparatus, the work of installing it and a profit. Its agents scattered throughout the State selling a fire saving apparatus would each in reality be an insurance broker, under the definition contained in section 199 of Article 23, Code (1904), and all the State would derive in the way of revenue would be one hundred dollars, the cost of one license.

While this is only used by way of illustration to show the way in which the revenue feature would be destroyed, it nevertheless aptly shows that the Legislature could never have meant, when it provided that the license was not to be used by more than one person, to have included corporations in its use of the word person. Any other construction would be unreasonable.

Order reversed and petition dismissed, with costs to the appellant.

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TURNER ASHBY MADDOX

vs.

WILLIAM M. YOE.

Wills: construction; intention; presumption against intestacy; marriage as condition of defeasance.

In construing wills, it is to be presumed that the testator intended to dispose of his whole estate and not to die intestate as to any part of it. p. 291

A devise or bequest to a woman of an estate so long as she remains unmarried, with a limitation over in case of her marriage, is an estate under a special limitation, and the devise or bequest is valid, since it is not in fact a condition in restraint of marriage. p. 292

Such a limitation in a devise to a widow vests in her a life estate only, subject to be defeated by her marriage. p. 292

By his will, a testator devised all his property to M. for life; upon M.'s death to Y., so long as Y. should remain single; in case of Y.'s marriage, then from and after that date to T. and his heirs forever. Y., not having married, predeceased M.; *held,* that upon the death of M., T. took in fee simple. p. 296

Decided June 25th, 1913.

Appeal from the Circuit Court for Prince George's County (BEALL, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

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Sylvan H. Lauchheimer (with whom was *Douglas S. Mackall* and *Milton Strasburger* on the brief), for the appellant.

F. Snowden Hill (with whom was *Joseph C. Mattingly* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

William M. Maddox, of Prince George's County, Maryland, died in the year 1885. He left surviving him neither wife, child, nor descendants. Two brothers and five sisters survived him, all of whom are now dead, except Mary F. Maddox. The appellee in this case is a nephew of William M. Maddox,—a son of his sister Ellen D. Yoe, and the appellant is one of the children of his brother, Adderton Maddox. At the time of his death, William M. Maddox was seized and possessed in fee simple of a valuable farm located in Prince George's County, containing 156 acres of land more or less and called "Val Verde." He also owned some personal property of small value. He left a last will and testament duly executed, which was admitted to probate in the Orphans' Court for Prince George's County, and is now of record in the office of the Register of Wills of that county.

The whole of said last will and testament, except the attestation clause, which is in due form, is here transcribed:

> "I devise and bequeath to my sister, Mary F. Maddox, all my property, real, personal and mixed, wherever situated, for and during the term of her natural life. And from and after her death I give and devise the same to my niece, Catherine M. Yoe, of Prince George's County, Maryland, so long as she may remain single and unmarried. And in case of her marriage, from and after that time, give and devise all of my said property to my nephew, Turner Ashby Maddox, of Claiborne Co., Miss., and to his heirs, absolutely forever."

After the death of William M. Maddox, Catherine M. Yoe by deed dated November 12, 1891, in due form executed and acknowledged, and recorded among the Land Records of Prince George's County, granted and conveyed all her right, title and interest, and estate to the farm called "Val Verde" to the appellee, William M. Yoe. Catherine M. Yoe is now dead, having remained single and unmarried until her death.

Mary F. Maddox, named in the will, is still living. By deed dated September 11, 1912, duly executed, acknowledged and recorded, she granted and conveyed all her right, title, interest and estate in and to the farm called "Val Verde" to the appellee, who is now in full possession of the property, claiming it as his own and asserting a fee simple title thereto; but he is unable to sell the property or any part thereof. or to fully enjoy the same, because the appellant, Turner Ashby Maddox, claims that under the last will and testament of William M. Maddox the title to said property is vested in him in fee simple, subject to the life estate of Mary F. Maddox.

In December, 1912, a special case was stated in the Circuit Court for Prince George's County under the 47th General Equity Rule for the construction of the last will and testament of William M. Maddox in which the above stated facts were set forth. The opinion of the Court and a decree in conformity therewith were requested upon the question, whether by the true construction of the will of William M. Maddox and under the facts set forth in the case stated any title or interest, and if so, what title or interest vested either in the appellee, William M. Yoe, or in the appellant, Turner Ashby Maddox, or in each of them to the farm known as "Val Verde."

The lower Court decreed that by the true construction of the will of William M. Maddox, Catherine M. Yoe, her heirs and assigns were vested with a remainder in fee simple in said property determinable upon her marriage; that by her deed, dated November 12, 1912, she conveyed all her right,

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title, interest and estate in and to said property called "Val Verde" to the appellee; and that by the death of said Catherine, unmarried, and by the deed from Mary F. Maddox to the appellee of her life estate in said property, "he is seized and possessed of all the rights, title and estate of said testator, William M. Maddox, in and to the said property called 'Val Verde.'" From this decree Turner Ashby Maddox has appealed.

The important question in the case is this: What estate did Catherine M. Yoe take under the will? That depends upon the proper meaning and legal effect of the words *"so long as she may remain single and unmarried"* occurring in the devise to her, read in connection with the *limitation over contained in the will.* It is apparent from the language employed in the will and the environments and circumstances surrounding the testator at the time of its execution that the objects of his bounty were the three persons named in the will, viz: Mary F. Maddox, Catherine M. Yoe and Turner Ashby Maddox. The appellee is not mentioned in the will, and as it is to be presumed that the testator intended to dispose of his whole estate and not to die intestate as to any part of it, we must conclude that he intended that the persons named should take his whole estate to the exclusion of all others.

It is now well settled that a devise or bequest to a woman of an estate in the terms used in this will, with a limitation over in case of marriage, is an estate upon special limitation, and the devise or bequest is valid, since there is in fact no condition in restraint of marriage. The effect of such a limitation is to circumscribe the duration of the estate devised. The authorities are practically unanimous in support of this proposition. *Mitchell* v. *Mitchell,* 29 Md. 581; *Clark* v. *Tennison*, 33 Md. 85; *Trenton Trust Co.* v. *Armstrong*, 62 Atl. Rep. 456; *Burch's Estate,* 185 Pa. St. 194; *Nash* v. *Simpson,* 78 Me. 142; *Harlow* v. *Bailey,* 189 Mass. 208; *Courter* v. *Stagg,* 27 N. J. Eq. 305, and many other cases.

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It is conclusively settled by the American and English cases that such limitations in a devise to a widow vests in the devisee a life estate only subject to be defeated upon her marriage.

In *Sink* v. *Sink,* 64 S. E. Rep. 193, the Supreme Court of North Carolina had under consideration an item in a will which read as follows:

"I give and bequeath to my beloved wife, Mahaley, the remainder of my land, after selling off, as directed in the 10th item, whatever there may be remaining, to have and to hold to her own proper use and behoof, to embrace my mansion house and other out houses and improvements of the land I now live on, during the term of her widowhood, and after her marriage to be equally divided between my brother and sisters or their legal representatives share and share alike." The Court said:

"We are of opinion that the estate in the land devised to the widow could not endure beyond her life. Blackstone says that, if an estate be granted to a woman during her widowhood or to a man until he be promoted to a benefice, in these and similar cases, whenever the contingency happens, or when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingences upon which they are to determine do not sooner happen. 2nd *Blk.* 121. In *Fuller* v. *Wilbur,* 170 Mass. 506, 49 N. E. 916, the devise was as follows: 'I give and bequeath to my beloved wife, all my real and personal estate of whatever name, for her sole use and benefit so long as she remains my widow, except the legacies to my children.' With reference to this devise the Court, by MORTON, J., said: 'The first question in these cases is: What interest did the widow of Elijah Wilber take under her husband's will? There is some ground, perhaps, for saying that, with the exception of the

legacies to her children, she took the entire estate absolutely and in fee, subject to be divested if she married again; but we think that the better construction, and the one which is according to the weight of authorities here and elsewhere, is that she took a life estate determinable on the happening of that event.' *Knight* v. *Mahoney,* 152 Mass. 523; *Loring* v. *Loring,* 100 Mass. 340; *Dole* v. *Johnson,* 3 Allen (Mass.), 364; *Mansfield* v. *Mansfield,* 75 Me. 509; *Nash* v. *Simpson.* 78 Me. 142; *Evans Appeal,* 51 Conn. 435; *Cooper* v. *Pogue,* 92 Pa. 254; 4 *Kent Com.* 26, 27; 2 *Bl. Com,* 121; 1 *Washb. Real Prop.* 5th Ed. 63. The words 'so long as she remains my widow' imply a continuation of the estate during widowhood and no longer; and, at most, it could not extend beyond her life. In *Kratz* v. *Kratz,* 189 Ill. 276, the devise was to the wife during her widowhood of the real and personal estate 'absolutely and unconditionally,' and the Court held that her interest was limited to the period of her widowhood —that is, during her life or until she married."

In *Gough* v. *Manning,* 26 Md. 347, the Court quoted from *Coke and Cruise,* as follows: "If an estate be given to a woman *'dum sola fuerit,'* or *'durante viduitate,'* the grantees have an estate for life determinable upon the happening of these events. 1 *Inst.* 42 (*a*); *Cruise Dig. Tit. Est. for Life,* Ch. 1, section 8."

The cases make no distinction as to the duration of the estate whether the devisee be a widow or an unmarried woman. In both instances the object of the devise is the support of the devisees until marriage, and the estates devised are at most life estates. This was distinctly held in *Dana* v. *Murray,* 122 N. Y. 604; *Harlow* v. *Bailey,* 189 Mass. 208; *Trenton Trust Co.* v. *Armstrong, supra.* We, therefore, hold that by the true construction of the will of William M. Maddox, Catherine M. Yoe took a life estate only in the property devised, and, being now dead, that estate is terminated.

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The next question is: Does the remainder, after her death and the death of Mary F. Maddox, pass to Turner Ashby Maddox under the limitation over contained in the will? This question, upon settled rules of construction, is free from difficulty. The courts have been called upon frequently to construe similar provisions in wills, and they have uniformly held that under limitations over, such as that now under consideration, the devisee in remainder will take the estate. The principle of construction deduced from the decisions is thus stated in 1 *Underhill on Wills,* 625: "A devise by the testator to his widow for the term of her natural life, but if she should marry again, then in fee to A, without any provision for the disposition of the fee after her death *in case she should not marry again,* is a very common form of disposition. In such cases the courts will insert the words 'when she dies,' or 'after her death,' and A will take a vested remainder by implication upon the death of the widow, without having remarried."

In *Metcalf* v. *Farmingham Parish,* 128 Mass. 370, CHIEF JUSTICE GRAY said: "It is well settled in England that a devise or bequest to a widow for life, if she shall not marry, and, if she shall marry, then over to another person, gives a remainder to him if she dies unmarried. *Luxford* v. *Cheeks,* 3 Lev. 125; *Gordon* v. *Adolphus,* 6 Bro. P. C. (2nd Ed.), 306; *Eaton* v. *Hewitt,* 2 Dr. & Sm. 184; *Browne* v. *Hammond,* Johns. Ch. 210; *Underhill* v. *Roden,* L. R. 2 Ch. D. 494. In such cases the general intent is implied to give the remainder over after the death of the tenant for life; and the event of her marrying again is treated as merely qualifying or cutting down her life estate, and not as prescribing the contingency upon which the remainder is to take effect."

In *Underhill v. Roden,* Law Rep. 2 Ch. Div. 494, referred to by CHIEF JUSTICE GRAY, Sir George Jessel, Master of the Rolls, said: "It is a great pity where a general rule of this kind is well established that judges should not follow it. The general rule is extremely well expressed, if I

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may say so, in *Eaton* v. *Hewitt,* 2 Dr. & Sm. 184, 192, by a very distinguished judge in these terms: 'It is a rule now well established that where a testator gives to a woman a life interest if she so long remains unmarried, and then directs that in the event of her marriage the property shall go over to another, although, according to the strict language, the gift over is expressed only to take effect in the event of the marriage of the life tenant, the gift over is held to take effect, even though the tenant for life does not marry.' The rule is again stated thus by another distinguished judge in *Browne* v. *Hammond, Johns* Ch. 210, 214: 'It appears to me clear that I am concluded by the authorities which have determined that a devise or bequest over, though in terms made upon the marriage of the donee of the preceding estate, is to be extended by implication, so as to take effect on the determination of that estate by death.'"

It is to be observed that the limitation over in this will is upon the marriage of Catherine M. Yoe. The will is silent as to the disposition of the remainder in the event of her death. Is the Court to hold that the testator died intestate as to this remainder, and that, contrary to his evident intention, it is now vested in his heirs at law, or must it hold that upon the death of Mary F. Maddox, it will vest in Turner Ashby Maddox, whom the testator intended to be the ultimate object of his bounty? There would seem to be no reasonable doubt that he intended him to have the property at the expiration of the preceding life estate.

In *Clark* v. *Tennison,* 33 Md. 85. a question identical in principle with the one under consideration was decided. In that case the testator had devised all the residue of his estate to his wife so long as she remained his widow; and at her *death* to be equally divided among his children. The widow remarried. The Court, in construing this item of the will, said: "By this will the wift to the wife is during *her widowhood;* the limitation over to the children is upon *her death.* What becomes of the property in the intermediate time between her marriage and her death? The will is silent as to

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that, and the appellants contend there is an intestacy; while the appellees maintain that the will must be read as if the limitation over was to take effect upon the marriage or death of the widow, in order to carry out the intent of the testator, and that the necessary words to effectuate that intention may be supplied. In support of this proposition the appellees have referred to several cases in which the Courts have, in the construction of wills, transposed or changed words, or even supplied words omitted in the will, in order to effect the intention of the testator, where that intention is manifest on the face of the will. * * * The plain intent of the testator was that the widow should have the property no longer than during her widowhood. It is equally clear that the limitation over is in favor of the testator's children, who were the primary objects of his bounty, after giving her the preceding estate. He failed to limit it over to them after her marriage, but has limited it to them at her death. To hold that there was an intestacy would defeat this limitation over entirely. It is therefore necessary in order to carry out the plain intention of the testator, to construe the will as giving the property to the children upon the termination of the estate given to the wife, whether that be by marriage or her death." The principle which underlies this case is in harmony with the cases heretofore cited.

We accordingly decide that, by the true construction of the will of William M. Maddox, Mary F. Maddox and Catherine M. Yoe each took a life estate in the property known as "Val Verde," and, Catherine M. Yoe being now dead, her estate in that property is determined, and that, upon the death of Mary F. Maddox, Turner Ashby Maddox will take the property in fee simple. It follows that the decree appealed from must be reversed and the case remanded that a decree may be passed in conformity to this opinion.

Decree reversed and cause remanded, with costs to the appellant.

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CHARLES D. FOWLER AND EDITH L. FOWLER *vs.* BENJAMIN S. PENDLETON.

Injunction: necessary allegations. Mortgages: foreclosure; injunctions; parol evidence. Land in different counties. Written instruments: parol evidence. Mistake: jurisdiction of equity.

Where the defendants, or any of them, reside in a different county from that in which the land lies, which is affected by a suit in chancery, the Circuit Court for the county (or Baltimore City), where the land, or any part thereof, lies, shall alone have jurisdiction. p. 299

Courts of equity will not grant relief by injunction to stay a sale or prevent the foreclosure of a mortgage, except in special cases, and those mentioned in section 16 of Article 66 of the Code. p. 300

The mere allegation, in a bill for an injunction, that irreparable loss and injury will ensue, is not sufficient, unless such facts be stated as will satisfy the Court that the apprehension is well founded. p. 300

Where a mortgage is executed in proper and regular form and duly recorded as required by law and appears binding in every way, its foreclosure will not be enjoined merely upon the allegation of a verbal agreement, inconsistent with and in contradiction to its express terms. p. 301

Parol evidence is not admissible to contradict or vary the terms of a mortgage. p. 301

When a contract is reduced to writing, the presumption is that the entire actual agreement of the parties is contained in it, and parol evidence as to any negotiations or covenants prior to its execution is not admissible to vary or explain it. p. 301

When a deed or mortgage regular in appearance and bearing a genuine signature and the duly certified acknowledgment of the grantor or mortgagor is attacked, the evidence to impeach it must be clear and convincing. p. 301

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A court of equity will, upon proof of fraud, mistake or surprise, rectify an agreement according to the intent of the parties; but it will not interfere when the instrument is such as the parties themselves designed it to be; if they voluntarily chose to express themselves in the language of the deed, they must be bound by it. pp. 301-302

Decided June 25th, 1913.

Appeal from the Circuit Court for Prince George's County (Beall, J.)

The facts are stated in the opinion of the Court.

The cause was argued before Boyd, C. J., Briscoe, Burke, Thomas, Pattison, Stockbridge and Constable, JJ.

William J. Neale (with whom was *J. Van Clagett* on the brief), for the appellant.

Claude W. Owen, for the appellee.

Briscoe, J., delivered the opinion of the Court.

The bill in this case was filed by the appellants against the appellee, in the Circuit Court for Prince George's County, in Equity, seeking to restrain by injunction the foreclosure of certain mortgages upon real property executed by the appellants to the appellee, dated the 1st day of December, 1909, and duly recorded among the Land Records of Prince George's County.

The bill also seeks to have the mortgage notes, and the deeds of mortgage, cancelled, the defendant declared to be the true owner of the property described in the mortgages, and that the defendant shall be required by the decree to accept a deed, in fee simple, for the property, and for other and further relief, as the nature of their case may require.

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The original and amended bill, was demurred to, and the demurrer was sustained. The injunction which had been issued upon the original bill was dissolved, and the amended bill was dismissed reserving certain rights to the plaintiffs on other proceedings respecting the subject-matter of this controversy as stated in the decree passed by the Court on the 10th day of January, 1913. From this decree, the pending appeal was taken.

The property, covered by the mortgages, it will be seen consists of two lots, described as Lots A and B, located in "Maryland Park," in Prince George's County, Maryland.

The appellants are residents of the City of Washington, D. C., and the appellee, the former owner of the property, in fee, is a resident of Montgomery County, Maryland.

As to the objection, that the proceedings should have been commenced in Montgomery County, the residence of the defendant, it is only necessary to say, that as the land to be affected by the suit lies wholly in Prince George's County, the Circuit Court for that county had jurisdiction under section 87 of Article 16 of the Code of Public General Laws. This section (87) provides, that when the defendants, or any of them, reside in a different county from that which the land lies, which is to be affected by a suit in Chancery, the Circuit Court for the county, or (Baltimore City) where the land, or any part thereof lies, shall alone have jurisdiction, and process may be sent to the county or counties, wherein the defendants respectively reside, to be served by the sheriff of such county or counties upon the defendants named therein, and returnable as directed in the summons. *Dorsey* v. *Omo*, 93 Md. 81, and cases there cited.

The real questions, however, presented on the appeal are first, whether the averments of the bill are such as to give the Court jurisdiction of the case, and, secondly, whether the allegations of the bill assuming them to be true, present a case for the interposition of a Court of Equity, by the process of injunction.

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It is not necessary to cite authorities to support the proposition, that Courts of Equity in this State will not grant relief by injunction to stay a sale, or prevent the foreclosure of a mortgage, except in particular cases.

The statute declares (section 16 of Article 66 of the Code of Public General Laws), that no injunction shall be granted to stay any sale or any proceedings, after any sale of mortgaged premises under this article * * *, unless such party shall on oath allege that the mortgage debt and all interest due thereon has been fully paid, or that some part of such debt or interest, the amount of which, he shall state, has been paid and that the mortgagee or person acting under him, refuses to give credit for such amount, or that some fraud which shall be particularly stated in the bill or petition for injunction was used by such mortgagee, or with his knowledge in obtaining the mortgage.

In *Thrift* v. *Bannon,* 111 Md. 308, it was said, ordinarily without these statutory provisions being first complied with, no injunction to restrain the sale of the mortgaged premises could properly be granted. *Barrick* v. *Horner,* 78 Md. 258; *Powell* v. *Hopkins,* 38 Md. 1; *Gayle* v. *Fattle,* 14 Md. 84.

There is no sufficient allegation in the bill of fraud on the part of the appellee, or by any one else with his knowledge, in obtaining either the notes or the mortgages. On the contrary, it is averred by the 5th paragraph of the bill, that the mortgages were placed upon the property at the suggestion of the appellant, Fowler, for the protection of the appellee's investment, and as a record evidence of his title and interest. And it is further alleged by the bill, that the State and county taxes on the property have been paid by the appellants, the insurance has been kept up for the benefit of the mortgagee, and the interest on the mortgages paid so far as the money received from the property would permit.

But apart from this, we think it is clear, on other grounds that the averments of the bill are insufficient to justify an injunction, or the relief sought by the bill against the defendant.

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It is well settled that the mere allegation in a bill, that irreparable loss and injury will ensue, is not sufficient, unless such facts be stated, as will satisfy the Court that the apprehension is well founded. The averments of the bill in this respect, we think, are insufficient according to the decisions of this Court to authorize an injunction in the case. *W. Arlington L. Co.* v. *Flannery,* 115 Md. 274; *Blaine* v. *Brady,* 64 Md. 373; *Gas Company* v. *R. R. Co.,* 107 Md. 671.

The mortgages in this case are regular in form, properly executed and duly recorded as required by law, and they appear in every way to be valid and binding instruments.

It is difficult to perceive upon what legal principle the appellants could be allowed to set up, in defense, an alleged verbal agreement, absolutely inconsistent with their clearly expressed terms, and contradictory thereof. The cases are conclusive, that this cannot be done.

The general rule is thus stated in 27 *Cyc.* 1136 and supported by authorities: "Parol evidence is not admissible to contradict or vary the terms of a mortgage. When a contract is reduced to writing, the presumption is that the entire actual agreement of the parties is contained in it and parol evidence as to their negotiations or conversations prior to its execution is not admissible to vary or explain it."

In *Insurance Co.* v. *Nelson,* 103 U. S. 544, it is held, when a deed or mortgage regular in appearance and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor is attacked, the evidence to impeach it should be clear and convincing. *Howland* v. *Blake,* 97 U. S. 624; *Selden* v. *Myers.* 20 Howard, 506; *Timms* v. *Shannon,* 19 Md. 296; 17 *Cyc.* 526, 628; *Jones on Evidence,* sec. 499.

In *Showman* v. *Miller,* 6 Md. 479, it is held, though a Court of Equity will upon proof of fraud, mistake or surprise, rectify an agreement according to the intent of the parties, it will not interfere when the instrument is such as the parties themselves designed it to be; if they voluntarily

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choose to express themselves in the language of the deed, they must be bound by it. *Keedy* v. *Nally,* 63 Md. 317; *Stiles* v. *Willis,* 66 Md. 556.

In the case at bar, the Court is not only asked to cancel the notes and mortgages given and executed by the appellants to the appellee, as stated in the bill, but in effect to hold upon parol evidence a mortgage to be a deed and the appellee be required to accept this deed for the property in fee simple in the place of the mortgages.

The cases relied upon by the appellants and cited in the brief are entirely unlike this and upon an examination it will be seen, do not support the appellants' contentions on this record.

To grant the prayers of the appellants' bill, on the vague and uncertain averments contained therein, would not only do an injustice to the appellee but might defeat his rights altogether to the property in controversy.

The bill alleges, that all three of the lots A, B and C were conveyed by the appellee to the appellant, Edith L. Fowler, but only lots A and B were included in the mortgages from the plaintiffs to the defendant. It is stated in the appellee's brief that if the appellants should pay off the mortgages and retain the property, they would have a profit of $1,300, and if the property is of the value alleged in the bill, they would make that difference and have lot C in addition.

It is apparent, we think, upon the averments of the bill, that the plaintiffs have failed to state a case for equitable relief, and the Court below committed no error in sustaining the demurrer and dismissing the amended bill.

The decree will be affirmed.

Decree affirmed, with costs.

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LOMBARD GOVERNOR COMPANY, A BODY CORPORATE OF NEW JERSEY, AND NATIONAL METER COMPANY, A BODY CORPORATE OF NEW YORK,

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE, A BODY CORPORATE; NATIONAL BANK OF BALTIMORE, A BODY CORPORATE; FORT WAYNE ELECTRIC WORKS, A BODY CORPORATE OF INDIANA; TRUMP MANUFACTURING COMPANY, A BODY CORPORATE OF OHIO, AND EDMUND F. HELLINGS, CLARENCE M. MORFIT AND JOHN G. SCHILPP, RECEIVERS OF THE MCCAY ENGINEERING COMPANY, A BODY CORPORATE.

Municipal contracts: duty of contractor to exhibit vouchers. Material men: no liens; equity no jurisdiction.

Ordinance No. 25, approved April 4, 1898, provided that in the building contracts of the City of Baltimore there shall be a clause requiring the contractor, before delivering the building, etc., to produce and exhibit vouchers showing a settlement by him in full with all persons or corporations who were engaged by him in the construction of the building, etc. A similar provision was inserted in Sanitary Contract No. 51 for the construction of the Baltimore Sewerage System. *Held,* that neither the ordinance nor the terms of the contract gave material men who had furnished materials for such construction any lien for the materials furnished under the contracts; nor does it give such material men any right to any lien by invoking the interposition of a court of equity. p. 312

Decided June 25th, 1913.

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Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Joseph T. England and W. Milnes Maloy (with *Maloy, Brady and Embert* on the brief), for the appellant.

Alexander Hardcastle, Jr., filed a brief for Edmund F. Hellings *et als.*, receivers, appellees.

John Hinkley and *Jacob France,* filed a brief for the National Bank of Baltimore, appellee.

S. S. Field and *Robert F. Leach, Jr.*, filed a brief for the Mayor and City Council of Baltimore, appellee.

STOCKBRIGE, J., delivered the opinion of the Court.

This appeal is from a decree of the Circuit Court of Baltimore City dismissing the bill of complaint of the Lombard Governor Company and the National Meter Company against the Mayor and City Council of Baltimore, and certain other defendants.

The material allegations of the bill are to the following effect: In May, 1910, the McCay Engineering Company entered into a contract with the Mayor and City Council of Baltimore, known as Sanitary Contract No. 51, by which the McCay Company "undertook to furnish the electrical and mechanical equipment, to erect metal stairways, build special floors, piers and abutments, and other parts of and equipment for a building for the Sewage Disposal Works erected under the supervision of the Sewerage Commission of the

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City of Baltimore" * * * "which lot and improvements thereon are the property of the Mayor and City Council of Baltimore."

It is further alleged that the Lombard Governor Company furnished to the McCay Company machinery and equipment to the value of $949.56, which is still due and unpaid; that the National Meter Company furnished machinery and equipment to the amount of $1,365.50; that the Fort Wayne Electric Works and the Trump Manufacturing Company likewise furnished certain parts of the equipment, the value of which is not given, but on the contrary the bill alleges that the plaintiffs are without knowledge what rights these creditors have, and whether they or either of them have waived any of their rights; that the National Bank of Baltimore had loaned to the McCay Company a certain sum of money, amount unknown, and that as security therefor the McCay Company had assigned to the bank, Sanitary Contract No. 51, or certain rights thereunder; that the McCay Company became financially embarrassed and in April and May, 1912, receivers were appointed for that company, both in Delaware, where it was chartered, and ancillary receivers in Baltimore City, and such ancillary receivers are also made parties to the bill of complaint. The bill also sets out that there still remains in the hands of the City of Baltimore $9,012.32, a large portion of which is now due and payable under Contract No. 51, and that the said Contract No. 51 has been fully performed. The prayer of the bill is that jurisdiction over this fund be assumed by the Court; a discovery had of the amount of the claims of the several parties thereto; that the plaintiffs may be decreed to have a lien or claim in the nature of a lien, on the funds in the hands of the city; and that out of such fund the plaintiffs may be paid the amounts of their claims. The Bank of Baltimore filed an answer to the bill of complaint and a demurrer to the 9th paragraph of the bill, and demurrers were filed on the part of the Mayor and City Council of Baltimore and the receivers of

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the McCay Company to the entire bill. The case was heard upon the demurrers, and by the decree of the Circuit Court the demurrers were sustained, and the bill dismissed. In passing upon this case, therefore, this Court can deal only with the allegations of the bill, without any reference whatever to the matters set forth in the answer of the bank.

The plaintiffs rely for the support of their case upon the provisions of an ordinance of the Mayor and City Council of Baltimore, approved April 4th, 1898, being Ordinance No. 25, and which reads as follows:

> "An ordinance to provide for the insertion in all contracts for the construction of city buildings, of a clause requiring the contractor or contractors to produce vouchers showing settlement in full for materials used in such construction.
>
> Section 1. *Be it enacted and ordained by the Mayor and City Council of Baltimore,* That in all contracts hereafter made by the Mayor, or any of the city's departments for the construction of city buildings, there shall be inserted a clause stipulating and providing that the contractor or contractors so employed shall at time of tendering the delivery of the completed buildings, also produce vouchers showing settlement in full by him or them, with all persons or corporations, who have furnished labor and materials used in the construction of said building."

This ordinance, it is claimed, must be read into, as constituting a part of Sanitary Contract No. 51, but whether that contention be well founded or not, substantially the same ground is covered by a provision in the contract itself, which is

> "The contractor shall furnish the commission with satisfactory evidence that all persons who have done work or furnished material under the contract and who have given written notices to the commission, before or within ten (10) days after the final completion and acceptance of the whole work under the contract,

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> that any balance for such work or materials is due and unpaid have been fully paid or satisfactorily secured. And in case such evidence is not furnished as aforesaid, such amount as may be necessary to meet the claims of the persons aforesaid may be retained from any moneys due the contractor under the contract until the liabilities aforesaid shall be fully discharged or such notice withdrawn.
>
> The city or the commission may also, with the written consent of the contractor, use any moneys retained, due or to become due under the contract, for the purpose of paying for both labor and material for the work for which claims have not been filed in the office of the commission."

The plaintiffs both in their oral argument and in their brief, conceded that they are not entitled to any lien as against the city's property for materials furnished to the McCay Engineering Company, and that they are not entitled to recover the amounts due them by means of attachment, but the bill is filed upon the theory of an equitable jurisdiction to treat the fund remaining in the hands of the city as a trust fund, which may be subjected to their claims, the effect of this is to say, that while they have no lien or right of attachment at law, they can accomplish the same thing through the interposition of a Court of Equity. This contention rests entirely upon three cases. In the City of New York there was an ordinance of the Mayor and Alderman, that

> "In all contracts for work done by or for the corporation, the head of a department having charge thereof shall cause to be inserted a provision that the payment of the last installment due in pursuance thereof shall be retained until the head of such department shall have satisfactory evidence that all persons who have done work or furnished materials under any such contract, and who may have given written notice to the head of the department any time within

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ten days after the completion of the work that any balance for work or material is still due and unpaid, have been fully paid and secured such balance, and if any person so having done work or furnished materials and given such notice as aforesaid shall furnish satisfactory evidence as aforesaid to the department that money is due to him by the contractor, such head of department shall retain such last installment, or such portion thereof as may be necessary, until such liability shall be discharged or secured."

It will be observed that the language in this case is far more mandatory in form than that of the ordinance passed by the Mayor and City Council of Baltimore. The New York Ordinance came up for construction in the *Merchants and Traders' National Bank* v. *New York*, 97 N. Y. 355, and it was there held that the purpose of the ordinance was to secure persons furnishing labor and materials to contractors with the city some of the advantages which the lien law of the State gave, and that this was sought to be accomplished by making the city a trustee of the unpaid balance due upon the contract with it for the benefit of such persons, but at the same time the Court distinctly held, that "the city in such a contract assumed no express liability to pay the laborers and material men and can not be sued upon such a liability, but it is placed under an implied obligation to hold the money as trustee according to the terms and effect of the contract which can be enforced in an action to which all persons interested in the money are made parties." It was evidently this language which induced the plaintiffs to make as parties defendant in this case the Fort Wayne Electric Works and the Trump Manufacturing Company, neither of which have appeared in the case, nor as against which, as non-resident corporations, does any notice by advertisement appear from the record to have been made. The next case is that of the *Mechanics and Traders' National Bank* v. *Winant*, 123 N. Y. 265, in which the question arose between

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an assignee of the original contractor and a sub-contractor as to the relative priority of their claims, and that was the sole question passed upon in that case. The case of *Luthy* v. *Woods,* 6 Mo. App. 67, grew out of a contract in connection with the building of a school house, under the phraseology of a contract which provided that the school board might retain certain funds in their hands for the purpose of meeting the demands of those who furnished materials, and this provision of the contract was held to constitute an equitable assignment of the fund, not the conferring of a positive right of action arising out of the relation of original and sub-contractor. The case of *St. Louis* v. *Keane*, 27 Mo. App. 642, is hardly in point inasmuch as in that case the city filed a bill of interpleader and brought the fund in its hands into Court for distribution, and the contest in that case related solely to the relative priorities between contending creditors of the contractor.

The appellants have referred to a case in the District Court of the United States *In the Matter of James E. Granberry, Bankrupt.* It is difficult to see upon what theory this case can be cited to support the appellant's claim. Mr. Granberry had entered into a contract with the Mayor and City Council of Baltimore for erecting and furnishing a heating plant and laundry machinery at the Field House in Patterson Park, and also for furnishing and delivering certain machinery at Walters Baths No. 1. At the time when Granberry was adjudicated a bankrupt, there was a balance still due him by the City of $796.70; this was claimed by his trustee in bankruptcy and by the Troy Laundry Company, which had furinshed certain material to Mr. Granberry as contractor. The ordinance relied upon in this case was also set up in that case. No question was raised as to any standing of the parties, but it was expressly agreed that the District Court in Bankruptcy should adjudicate to whom this fund belonged, and after full hearing JUDGE MORRIS awarded the fund to Mr. Howard Embert, the bankrupt's trustee;

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if in the present case the receivers of the McCay Company, the plaintiffs and the Mayor and City Council of Baltimore had all agreed upon a submission to the Circuit Court for a determination as to the proper ownership of the fund in question, the *Granberry case* would undoubtedly be an authority for its award to the receivers of the McCay Company. Instead of pursuing this course, the City and the receivers each demurred to the bill of complaint, and the order of JUDGE MORRIS constitutes no precedent whatever in determining the sufficiency or insufficiency of the bill.

As opposed to the view of the New York Court are numerous cases, reference to a few of which will be sufficient. In *Lesley v. Kite and the City of Phila.*, 192 Pa. 268, the proceeding was one in a court of equity, as in the present case. An ordinance of the City of Philadelphia provided that "the Director of Public Works shall give one month's notice of the date of final payment and satisfactory evidence shall be furnished that full compensation has been made for all labor and materials furnished previous to drawing a warrant for final payment." This was not a separate and independent ordinance, but included as part of an ordinance for the construction of sewers in that city. Kite & Co. had taken a contract to build, and the contract in a general way incorporated the provisions of the ordinance above recited. Kite not paying all of the sub-contractors, proceedings were instituted in equity, as in the present case, and upon demurrer the bill was dismissed. The opinion of the Court, after a statement of the facts, says:

"Properly construed * * * the ordinance relied on * * * never created nor was it intended to create, any contractual or other relation between the city and its contractors for municipal improvements, or sub-contractors under the latter, or between any of them, that would authorize the maintenance of any such proceeding as that now under consideration. If it did it would be clearly *ultra vires* the City Councils and void as being manifestly in conflict with sound principles of public policy * * * It is unnecessary to multiply

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authorities for the purpose of showing that City Councils have no authority whatever, express or implied, to provide a new remedy in the nature of an attachment, lien or trust of any kind, whereby sub-contractors may enforce payment of their claim out of money due the principal contractor. On grounds of public policy the legislature has hitherto withheld from contractors and sub-contractors not only the right of lien on public buildings, but also the right of attaching money in the hands of the city. On the same principle it can not be successfully contended that Councils may by ordinance empower the Director of Public Works to retain money due one of the city's contractors in order that his creditors, who are not parties to the contract, may proceed by bill in equity or otherwise against him, and thus have the money applied to their claim."

A similar case arose in the District of Columbia, and was there decided by ALVEY, C. J., formerly of this Court. As in this case, the proceeding was by bill in equity, and in disposing of it JUDGE ALVEY says:

"This is an attempt by equitable garnishment to bind the money due the contractor Thomas in the hands of the municipal corporation of this District. This we think can not be done. If it could be done in this instance, it could be done in hundreds of other cases; and the consequences would be that the municipal government would constantly be liable to the obstruction and embarrassment in the administration of municipal affairs, that such claims and resulting litigation would necessarily produce. In the absence of express legislation making the municipal corporation liable to such proceedings, both reason and public policy forbid it."

Among the authorities cited by him is the case of *Merwin v. Chicago,* 45 Ill. 133, and the rule there laid down is as follows: "The city should not be subjected to this species of litigation, no matter what may be the character of the indebtedness. If we hold it must answer in all these cases and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still have it liable

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to a vast amount of litigation in which it has no interest and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to the object of its creation. A municipal corporation can not properly be turned into an agency or instrument for the collection of private debts. It exists simply for the public welfare and can not be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another. * * * A municipal corporation is a part of the government. Its powers are held as a trust for the common good. It should be permitted to act only with reference to that object, and should not be subjetced to duties, liabilities or expenditures merely to promote private interests or private convenience."

It will be thus seen that so far as the principle applicable to these cases is concerned, outside of the State of New York, no distinction whatever is drawn between the rule applicable in a suit at law and a proceeding in equity; and upon the same ground relied on in the cases thus quoted from, a like conclusion has been reached in *Electric Appliance Co.* v. *U. S. F. and G. Co.,* 110 Wis. 434; *Albany* v. *Lynch,* 119 Ga. 491; *McDougal* v. *Supervisors,* 4 Minn. 184; *Wallace* v. *Lawyer,* 54 Ind. 501; *Switzer* v. *Wellington,* 40 Kan. 250.

While a number of other questions are raised or suggested in the brief of the appellants, they relate to matters which can have no material effect in the determination of this case, and need not therefore be discussed. In view of the very great weight of authority, and the sound ground of public policy upon which the conclusion is placed, the decree appealed from will be affirmed.

Decree affirmed, with costs to the appellee.

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POWERS SYMINGTON

vs.

FREDERICK G. SIPES.

Master and Servant: injury to third party; when master not liable. Automobiles: chauffeurs.

A master is not liable to third persons for the negligence of his servant, if at the time of the accident the servant was not acting within the scope of his employment, but was acting contrary to his master's express orders and exclusively for his own individual purpose. p. 315

A chauffeur having been sent back with his master's automobile from Virginia and ordered to take the machine to the garage in Baltimore City, instead of so doing, when near Baltimore spent the day driving about with friends and going from road house to road house with them, and while so engaged ran into and injured the plaintiff's carriage; *held,* that under such circumstances the servant alone was responsible for the consequences of his negligence. p. 315

Decided June 25th, 1913.

Appeal from the Superior Court of Baltimore City (Dawkins, J.).

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The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

W. Stuart Symington, Jr., for the appellant.

No appearance for the appellee.

URNER, J., delivered the opinion of the Court.

The appellant placed his automobile and chauffeur at the disposal of his brother for a trip from Baltimore to Virginia. After being used for that purpose the car was brought back to Baltimore by the chauffeur alone under instructions to take it direct to Griffin's garage. Upon reaching the suburbs of the city in the early afternoon, instead of obeying his orders by proceeding to the destination mentioned, he diverted himself during the remainder of the day by driving around to various road houses and saloons, accompanied part of the time by five of his acquaintances who joined him at one of the places thus visited. While returning with his companions about nine o'clock in the evening to the point from which he started on this excursion he negligently ran the car into the rear of the appellee's buggy and caused the injuries for which recovery is sought in this action. His itinerary is thus described by the testimony: From Arlington in the suburbs he drove to the Seven Mile House and back; then over to Park Heights avenue to the Suburban and Gray's Road House; then to the Five Mile House on the Reisterstown road, where he found the friends referred to and also a blacksmith whom he drove to the Maryland General Hospital to be treated for an injured leg; then back to the Five Mile House; then to Brodie's on the Liberty road; then to Forney's saloon beyond Mt. Hope Gate; then back

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towards Arlington along the Reisterstown road, at which time and place the accident occurred; and then to the garage of the Green Spring Valley Club where the automobile was left for the night.

A judgment was recovered by the appellee against the owner and chauffeur jointly. The appeal is by the owner alone, a writ of summons and severance having been granted upon his application.

Upon the facts we have recited, as to which there is no dispute, we have no hesitation in deciding, as a matter of law, that the appellant is not liable in this action, and that the instruction he proposed to that effect should have been granted. The proof makes it perfectly clear that even if the chauffeur be regarded as the servant of the appellant rather than of his brother, during the period in question, he was not at the time of the collision acting within the scope of his employment, but was using the automobile contrary to the express orders to which he was then subject and exclusively for his own individual purposes. The decisions are unanimous in holding that under such circumstances the servant is solely responsible for the consequences of his negligence.

In *Colwell* v. *Aetna Bottle and Stopper Company* (R. I.), 82 Atl. 388, a chauffeur was directed by the owner of an automobile to drive it to a garage, but used the car to take a co-employee home and to go for his supper, and while so doing collided with another automobile. Upon this state of facts it was held that the chauffeur was not acting in the course of his employment at the time of the accident and that the owner was not liable. In discussing the conduct of the chauffeur the Court said: "When he first arrived at the garage on Bradford Street it was his duty, then, to take the automobile into the garage, and wash it and put it up for the night. That was all that he was instructed or expected to do. He had no authority, either express or implied, to use the machine for the benefit of another employee, or for his own convenience, in going to get his

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supper. His use of the automobile from the time he left the Bradford Street Garage and during the whole circuit that he made from that point to Potter Avenue and from there to the restaurant on Westminster Street and from there back to the Bradford Street Garage, was unauthorized and beyond the scope of his employment."

In *Steffen* v. *McNaughton,* 142 Wis. 49, the accident for which the suit was brought happened while the defendant's chauffeur was alone in the automobile and was going to his home for dinner. Under his contract of employment the chauffeur was to provide himself with meals. He had previously used the car a number of times in going to his home for that purpose, but without the knowledge of his employer. The relation of master and servant was held to have been suspended at the time of the accident, and the defendant owner was exempted from liability.

The case of *Danforth* v. *Fisher,* 75 N. H. 111, 71 Atl. 535, is thus stated by the Court: "At five o'clock on the day of the accident, McCauley, who was employed by the defendant as a chauffeur, took the automobile from the place where it was kept, drove to the defendant's store, and awaited orders. He was told to get his supper and to be at the New City Hotel with the automobile at a quarter before 7 o'clock. After he had eaten supper, instead of taking the car to the hotel, according to the defendant's orders, he drove to West Manchester, a mile or two distant from his boarding place and in an opposite direction from the hotel, for the purpose of calling upon a friend. At the time of the accident he had finished his call and was on his way to the hotel. Although the evidence shows that McCauley was the defendant's servant, and that he drove the automobile against the plaintiff's horse and caused the animal to run away, it also shows that he took the automobile without the defendant's permission and went with it on an errand of his own; that he was acting for himself, and not for the defendant, at the time. As it cannot be found from the evidence that McCau-

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ley was doing what he was employed to do at the time the plaintiff was injured, there was no error in the order of non-suit."

In *Northup* v. *Robinson* (R. I.), 82 Atl. 392, the facts as narrated in the opinion were as follows: "The plaintiff was thrown from his bicycle by a collision with an automobile owned by the defendant and operated by his chauffeur. The chauffeur started out that morning from the defendant's house to go to the postoffice and express office at Wakefield for his employer. After leaving the postoffice, instead of going to the express office or returning to the defendant's home, he started to deliver a note from the gardener, who was employed on the defendant's premises, to the gardener's wife, who lived on another road beyond the postoffice some distance from the route between the postoffice, the express office, and defendant's home. At the time of the collision, he was undertaking this errand with the automobile without the knowledge or consent of the defendant, and solely to accommodate the gardener." The Court said: "This act was not in furtherance of the defendant's business, and was not done under authority or permission either express or implied. It was an independent journey, exclusively his own." It was held that the verdict had been properly directed for the defendant.

The Supreme Judicial Court of Massachusetts, in a case where the accident occurred while the chauffeur, who was ordered to take the automobile from the garage to a shop less than a mile distant, was driving a friend to a point six miles away to get a chain for his own use, declared the rule to be that "the master is not liable if the servant has abandoned his obligations, and is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work." *Fleischner* v. *Durgin,* 207 Mass. 435.

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The cases already cited sufficiently illustrate the principle which must be applied to the facts now under review, but there are numerous other decisions to the same general effect: *McCarthy* v. *Timmins,* 178 Mass. 378; *Fiske* v. *Enders,* 73 Conn. 338; *Howe* v. *Leighton* (N. H.), 75 Atl. 102; *Jones* v. *Hoge,* 47 Wash. 663; *Slater* v. *Advance Thresher Co.,* 97 Minn. 305; *Doran* v. *Thomsen,* 76 N. J. Law, 754; *Lewis* v. *Amorous,* 3 Ga. App. 51; *McIntire* v. *Hartfelder-Garbutt Co.,* 9 Ga. App. 327; *Fielder* v. *Davison* (Ga.), 77 S. E. 618; *McNeal* v. *McKain* (Okla.), 41 L. R. A. (N. S.), 779; *Reynolds* v. *Buck,* 127 Iowa, 601; *Daily* v. *Maxwell,* 152 Mo. App. 415; *Patterson* v. *Kates,* 152 Fed. 481; *Quigley* v. *Thompson,* 211 Pa. St. 107; *Lotz.* v. *Hanlon,* 217 Pa. St. 339; *Clark* v. *Buckmobile Co.,* 107 N. Y. App. Div. 120; 94 N. Y. Supp. 771; *Stewart* v. *Baruch,* 103 N. Y. App. Div. 577; 93 N. Y. Supp. 161; *Cunningham* v. *Castle,* 127 N. Y. App. Div. 580; 111 N. Y. Supp. 1057; *Douglass* v. *Hewson,* 142 N. Y. App. Div. 166; 127 N. Y. Supp. 220; *Story* v. *Ashton,* L. R. 4 Q. B. 476; *Mitchell* v. *Crassweller,* 13 C. B. 235.

In 28 *Cyc.* 39, the rule is stated to be that the owner is not liable "where the servant or chauffeur, although originally taking the vehicle out for the owner's use, deviates from the owner's business and goes upon some independent journey for his own or another's pleasure or benefit." The same conclusion is expressed in *David's Law of Motor Vehicles,* section 216; *Berry, Law of Automobiles, sections* 138, 145; *Babbitt, Law of Motor Vehicles,* sections 570, 570A, and *Huddy, Automobiles,* 3rd Ed., sections 32, 269.

In a number of the cases above cited the contention was made that an automobile is a dangerous instrumentality and that a master who trusts such a machine to his servant for use on a public highway is chargeable for injuries resulting from the servant's negligence, but this theory has been uniformly rejected.

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While this Court has not heretofore had submitted for its decision an issue arising upon facts analagous to those shown by this record, it has repeatedly applied the general and elementary rule that the master is liable for the negligent act of the servant only when it is committed within the scope of the service for which he is employed. *Evans* v. *Davidson,* 53 Md. 245; *Steinman* v. *Laundry Co.,* 109 Md. 62; *Beiswanger* v. *Bonding Co.,* 98 Md. 296; *Carter* v. *The Howe Machine Co.,* 51 Md. 290; *Central Railway Co.* v. *Peacock.* 69 Md. 257. There is nothing in the statutory law of the State relating to the use of motor vehicles that is inconsistent with this well settled principle of the common law. Code, Article 56, sections 133-161.

The exceptions contained in the record relate in part to the admissibility of evidence and also dispute the liability of the appellant upon the ground that the chauffeur was in the service and pay of the appellant's brother during the trip to and from Virginia. We do not find it necessary to pass upon these questions as the point we have considered is conclusive of the case. The judgment will accordingly be reversed as to the appellant, and we find no occasion to award a new trial.

Judgment reversed as to the appellant, without awarding a new trial; the appellee to pay the costs of the appeal.

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EDGECOMBE PARK COMPANY
vs.
WILLIAM B. FINNEY.

WYLIE HEIGHTS COMPANY
vs.
WILLIAM B. FINNEY.

Mortgages: foreclosure; advertisement; description, sufficiency; terms; whole tract or separate lots; mere inadequacy of price.

Where the advertisement of a mortgage foreclosure was published in full in a paper published in the county where the land lay, and also in a paper published in the City of Baltimore, for the full time required by law, and an abbreviated form of advertisement was inserted in another Baltimore paper, and large placards were placed on the property and galley-proof copies of the full advertisement were mailed by the auctioneer to more than a hundred persons likely, in his judgment, to be interested as possible purchasers, and where in all of said advertisements there was the information that copies of the plat of the property and fuller details with regard to it could be had on application, etc., it was *held,* that this advertisement was greater than required by law, and that no valid objection could be made to the sale because of the means provided for public notice. p. 324

It was further held, that objection to the sufficiency of description in the advertisement was not sustained by the proof. p. 324

In a mortgage foreclosure it is the duty of the trustee to offer the property in such a manner as to bring its fair market value, and to exercise the same judgment and prudence that a careful owner would use in the sale of his own property. Whether it is advisable to sell the land by the acre or by building lots depends largely upon the location of the property and the surrounding circumstances. p. 325

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Certain suburban land was sold under foreclosure proceedings subject to the lien of a prior mortgage; the prior mortgage contained provisions for releasing the land from time to time in one or more blocks into which it had been subdivided; according to the terms of the advertisement, the land was first offered by separate blocks and finally sold as an entirety; upon objection to the ratification of the sale on the ground that the land should have been divided and offered in separate lots instead of in bulk, it was *held,* that upon all the facts of the case no valid exception could be made on this ground to the ratification. p. 326

Mere inadequacy of price is not sufficeint ground upon which to set aside a sale, unless it be so gross as to indicate mistake or fraud on the part of the trustee or mortgagee making the sale, or unless there is some just cause which the purchaser may be responsible for, which affords reasonable ground to suppose that the sale was improperly made. p. 326

Suburban property, consisting of 106 acres on the Pimlico Road near Baltimore, was sold under foreclosure proceedings for $36,000, subject to a prior mortgage of $66,000 and to other liens, costs and charges, making the actual aggregate purchase price $110,676; upon an exception to the ratification of the sale on the ground of inadequacy of price, it was *held,* that the price could not be said to be so grossly below its full value as to make proper a reversal of the decree ratifying the sale. p. 327

Decided June 25th, 1913.

Two appeals in one record from the Circuit Court for Baltimore County, in Equity (HARLAN, J.).

The facts are stated in the opinion of the Court.

The causes were argued together before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

William Colton, for the appellant.

M. N. Packard and *John M. Little,* for the appellee.

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STOCKBRIDGE, J., delivered the opinion of the Court.

The Wylie Heights Company was formed in the year 1907 for the purpose of developing a tract of about 125 acres on the northern edge of the City of Baltimore, lying partly in Baltimore City and partly in Baltimore County. The tract extended from the Pimlico road on the west to Green Spring avenue on the east, and with a portion of it lying to the east of Green Spring avenue. It was conveyed to the company by Gerald Hill, and was at the time of the conveyance subject to a mortgage of $100,000 which had five years to run from the 29th July, 1907. On July 29, 1907, the day when Mr. Hill conveyed the property to the Wylie Heights Company, that corporation executed a mortgage on the property for the sum of $25,000 to William B. Finney, which amount is recited in the mortgage to have been that day loaned and advanced to the Wylie Heights Company. While it does not in terms appear from the record, the inference is very strong that the purpose of this loan was to prosecute the development work on the property. The corporation having thus come into possession of the property, it had the same, or at least that portion of it lying between the Pimlico road and Green Spring avenue, platted in lots, streets laid out and to some extent graded and macadamized, some drains and sewerage pipes laid, and concrete walks put down to a considerable extent. By the Spring of 1912, out of 328 lots platted, 79 had been sold and 249 remained unsold. Defaults had been made in both mortgages and in April of 1912 Dr. Finney instituted proceedings to foreclose his mortgage.

Under the terms of the mortgage from Gerald Hill to Henry F. Carstens, Trustee, for $100,000, it was provided that the mortgagor and his assigns should have the right to sell the property in lots, and that the mortgagee would release lots having "an area of one acre and be in the form of a square, *i. e.*, bounded by four sides of equal length at right angles to each other; any number of such lots may be included in a single release." For the release of each such lot fronting on the east side of the Pimlico Road, the mortgagee

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was to be paid the sum of $5,000, and for each lot lying to the east of those fronting on the Pimlico Road and the west side of Green Spring avenue the sum of $2,000. At the time when the foreclosure proceedings were instituted, payments had been made upon the Carstens mortgage to an extent which reduced the amount then due on it from $100,000 to $66,807.03, and $1,000 appears to have been paid on account of the principal of the $25,000 due on the mortgage to Dr. Finney, although there was at this time a considerable accumulation of interest due and unpaid on each of these mortgages, besides the taxes for three years. In the prosecution of the improvements there had been two other mortgages placed on the property in 1910, one to Dr. Finney for $5,728 and one to Dr. Charles G. Hill for $25,000.

The property was sold under the foreclosure proceedings instituted by Dr. Finney on the 7th of May, 1912, subject to the outstanding mortgage to Carstens, upon which there was then due $66,807.03, and was bought in by the mortgagee Finney, for his own protection, for the sum of $36,000. It further appears from the testimony that the Wylie Heights Company in April, 1910, sold out to another corporation known as the Edgecombe Park Company. Upon the report of the sale, exceptions to its ratification were filed by both the Wylie Heights Company and the Edgecombe Park Company, and it is from the order of the Circuit Court for Baltimore County overruling these exceptions and ratifying the sale that each of these corporations have appealed.

The exceptions to the sale are twelve in number, but it is unnecessary to consider each one in detail, since they all may be grouped under three heads—first, the advertisement of the sale; second, the manner of the sale; and third, the adequacy or inadequacy of the price for which the property was sold.

With regard to the advertisement the objection made is twofold in character, insufficiency of the media through which the property was advertised, and insufficiency of description of the property. The evidence is that advertisement in full

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was made in the *Democrat and Journal,* a paper published in Towson, and the *Daily Record,* a law and real estate paper published in the City of Baltimore, and that such advertisements were made for the full length of time required by law; that an abbreviated form of the advertisement appeared in the *Baltimore Sun;* that large placards were placed upon the property; that galley proof copies of the advertisement in the *Record* were mailed by the auctioneer to more than a hundred persons, who in his judgment, were likely to be interested as possible purchasers in the sale of such property, and that in all of said advertisements the public was advised that copies of a plat of the property and fuller details with regard to it could be had upon application to either the auctioneer or the attorney of the mortgagee. This advertising of the property was greater than is required by the law of this State, and therefore no valid objection can be had to the sale because of the means employed to give public notice of it. The objection of the sufficiency of description in the advertisement is not supported by the proof; that which the witnesses who testify to this really object to is not any misdescription or inaccuracy of description of the premises, but goes in reality to a different phase of the case, the judgment exercised by the trustees as to the manner of the offering of the property, and this involves the second of the grounds of the exceptions filed to the ratification of the sale, the manner of the conduct of the sale.

When the property was surveyed and laid off, it was divided into blocks and lots; the advertisement of the sale stated that the property would be offered by blocks, and subsequently as a whole, the mortgagee reserving the right to close the sale as a sale of blocks or an entirety, according as the property would produce most. The ground of the exceptions under this head, is that the property should have been offered by lots, instead of by blocks, for the purpose of attracting individual buyers for single lots, and the evidence is more or less conflicting upon this point. The situation was one which undoubtedly called for the exercise of judg-

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ment to an unusual degree. In the case of *Thomas* v. *Fewster,* 95 Md. 446, a similar question was presented where the mortgaged property consisted of seven and one-half acres and was sold in its entirety; the sale was set aside upon the grounds, that the mortgage indebtedness in that case would have been amply satisfied by the sale of less than the entire property, and also that a division of the property into lots would have produced double the amount which was realized. The estimated number of lots in that case was fourteen, and that which may be perfectly true where the property is of such size as to be divisible readily into a small number of lots, is not necessarily so where the number of lots is very much larger. In this case the corporation had been pushing the sale of lots for over four years, and had sold 79 out of 328 lots, not quite one-quarter of the whole. The first mortgage on which there still remained due more than $65,000 was rapidly approaching maturity, and in such a situation there is much force in the evidence given by some of the witnesses, that there was not sufficient demand for individual lots to absorb the remaining 249 lots, and that, therefore, the property when sold under a foreclosure proceeding, must be sold by some larger division than by the platted lots. It approaches more nearly the situation which was presented in the case of *Hopper* v. *Hopper,* 79 Md. 400, where exceptions were filed, upon the same ground, to a sale made for the purposes of partition; in which case it was said by JUDGE ROBINSON, speaking for this Court, that "It was the duty of the trustees of course to offer the property in such a manner as to bring its fair market value and to exercise the same judgment and prudence that a careful owner would exercise in the sale of his own property. Whether it is advisable to sell land by the acre, or in building lots, depends largely upon the location of the property and the surrounding circumstances." But there was another and still greater objection to the offering of this property by the lot. As the property had been laid out, none of the lots were of such size and shape as to make possible the sale of any single lot, and

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require as matter of right the release of the Carstens mortgage on that lot. It is true that this mortgagee had on numerous occasions waived the strict enforcement of the provisions contained in his mortgage with respect to releases, and when appealed to by the representative of Dr. Finney, to agree that the property might be offered in lots, he required as a condition of so agreeing that the assent thereto should be obtained from the subsequent mortgagees, and from the owners of the equity of redemption. A letter was addressed asking for such assent by the attorney of Dr. Finney, to which no reply in writing was ever made by Dr. Hill, holder of the fourth mortgage, or the owner of the equity of redemption. The recollection of the witnesses Hill, Packard and Freeny differs as to what passed orally at an interview upon this subject, Mr. Hill being positive that he did give the assent for his father as fourth mortgagee and for the owner of the equity, to a sale by lots; Mr. Freeny and Mr. Packard being equally positive that he distinctly objected to a sale by the lot, but assented to a sale by blocks, or in the entirety. Whatever may have been the real facts, the situation as it existed just before the advertisement of the sale was made, could have been readily solved by a distinct reply in writing to the letters sent out by Mr. Packard. This was not done, and as Mr. Packard understood the assent given to be one to a sale by blocks and not by lots, no valid exception can be predicated upon this ground to the advertisement and sale in the manner it was made.

The rule has been long and well settled in this State "that mere inadequacy of price, of itself, is not sufficient to set aside a sale unless it is so gross as to indicate misconduct or fraud on the part of the trustee or mortgagee making it, or there is some just cause which the purchaser may be responsible for which affords reasonable ground for supposing that the sale was improperly made." *Conroy* v. *Carroll,* 82 Md. 127; *Shaw* v. *Smith,* 107 Md. 523.

Upon the question of price the evidence in this case is very conflicting, and differs, therefore, radically from the case of

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Robertson & Co. v. *Chambers,* 113 Md. 232, where the evidence was *uncontradicted* that the property was worth double the amount for which the sale was made. The facts in this case are easily understood. A large amount of money had been expended in the development of property, all or nearly all of the lots fronting on the Pimlico Road, and which from the provisions of Carstens mortgage would appear to have been most valuable, had already been sold; to dispose of the balance would involve additional and probably still greater expenditure of money; the sale would necessarily be protracted over a period of years, during which extensive advertising and attention to the property would have to be given as well as the payment of taxes on the portions remaining unsold, and the ultimate amount which could or would be realized therefrom was largely speculative. It was a matter of opinion upon which two persons might and would naturally differ, and differ widely, and the testimony in this case shows that persons of equal experience did so differ. In this respect the case is closely analagous to that of *Chilton* v. *Brooks,* 71 Md. 445; and in such a situation, as was very tersely said by JUDGE IRVING in that case, the inadequacy is not "in itself sufficient to invalidate the sale".

Without reviewing in detail the opinions and reasons given by the different witnesses for their widely varying estimates, it will be sufficient to say, that the evidence offered upon both sides has been carefully examined and compared, and that as the result of such examination this Court cannot say that the witnesses of the appellee are entirely wrong, or that the price for which the property was sold was so grossly below its full value as to make it proper for this Court to set aside the sale.

The order of the Circuit Court for Baltimore County in overruling the exceptions and ratifying the sale will, therefore, be affirmed.

Order affirmed, with costs in each case to the appellee.

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WILLIAM L. RUSSELL AND GEORGE W. FELTER
vs.
T. IRVIN ZIMMERMAN.

Right of way: obstruction; dwelling or store fronting on way; injunction. Condemnation of land: title by inquisition; special agreements as to—; effect of—.

An electric railway condemned from a large tract of land a strip binding on an avenue from its intersection with a turnpike road; by agreement of the parties there was incorporated in the condemnation proceedings (to be taken as part of them), a provision that the railway should construct and maintain crossings over its tracks for each *dwelling* that should be built on the tract *fronting* on the avenue, for the benefit of the owners of the land condemned, their heirs and assigns; subsequently a corner lot of the tract on the turnpike, and running 120 feet along the strip so condemned, was sold to Z. by the successor in title to the tract; the deed reserved to the grantor, his heirs and assigns, the right to use a strip of the land conveyed ten feet wide along said avenue, as a sidewalk or footway. Subsequently the railway removed its tracks from the said right of way fifty feet binding on the lot adjacent to the turnpike road, and deflected the tracks to those of a line running parallel to the right of way, and by deed released the land so abandoned to the successors in title of the land that had been condemned, who in turn deeded such strip of the land to X.; X. claimed the land in fee and proceeded to erect a building thereon; Z. filed a bill for an injunction to restrain its erection on the ground that it cut off the access, over the railroad tracks, to the building he had erected on his property; and on appeal from a decree of the lower Court granting the writ, it was ***held,*** that the injunction should issue. p. 392

The erection of the building on part of a right of way separating the plaintiff's property from the avenue amounted to an

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unauthorized obstruction in violation of an agreement relating thereto, and inconsistent with its purposes, in so far as it deprives the plaintiff of his property right, acquired thereunder, to cross said right of way in front of his building in reaching the avenue, and the erection of the building was enjoined. p. 342

From the construction and use of the building, it must be considered as "fronting" on both the turnpike and the avenue. p. 333

The fact that the building was used as a store and for other business purposes, does not prevent it being entitled to a crossing over the railway tracks, according to the provisions incorporated in the condemnation proceedings. p. 341

In condemnation proceedings, inquisition may take the place of a deed in conveying the interest and estate acquired by such proceedings, and the land condemned may be made subject to the terms and conditions imposed by agreement between the parties, and made part of the condemnation proceedings, and be binding on them and those claiming under them. pp. 339, 340

The right of way along the avenue was conveyed, by the agreement and condemnation proceedings, to the owner of the land and her assignees, and the railway company could not be permitted to place upon the right of way any obstructions that would abridge or interfere with the exercise of such right. p. 339

A court of equity has power to restrain the railway or its grantees from any attempt to violate the right. p. 341

If a covenant, although not running with the land, is of a character to create a right and an equity in favor of the vendor or lessor and those claiming in his right as against those holding and occupying the land, a court of equity will assume jurisdiction and administer relief. p. 341

Decided June 25th, 1913.

Appeal from the Circuit Court of Baltimore County in Equity (BURKE, J.).

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The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

James F. Thrift and *D. G. McIntosh* (with whom was *D. G. McIntosh, Jr.*, on the brief), for the appellant.

Laban Sparks and *T. Scott Offutt*, for the appellees.

PATTISON, J., delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court for Baltimore County enjoining and restraining the appellants, defendants below, from obstructing that part of a strip of land thirty feet in width, lying on the northwest side of Belvedere avenue, which abuts upon the lands of the appellee, T. Irvin Zimmerman, by the erection of a building or buildings thereon.

Belvedere avenue, of the width of sixty feet, was opened by the authorities of Baltimore County as public highway of said county about the year 1879, and after it had been opened the Baltimore Traction Company, a passenger railway, laid its two tracks on the northern portion of it between Park Heights avenue and Reisterstown turnpike.

In the year 1898 the Falls Road Electric Railway Company condemned for the construction, use and occupation of its railway a strip of ground thirty feet wide lying immediately northward of Belvedere avenue, extending from Park Heights avenue to Reisterstown turnpike, and upon this condemned strip of land laid its two tracks extending westwardly from Park Heights avenue to a point within a few feet of said turnpike.

At the time this land was condemned it formed a part of a tract or parcel of land situated northward of Belvedere avenue and eastward of Reisterstown turnpike that was owned by Mary J. Wamsley, wife of John S. Wamsley.

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The aforesaid railway companies separately operated their lines until about the year 1898, when they consolidated under the name of the United Railways and Electric Company, at which time the extreme ends of the two tracks of the Falls Road and Electric Railway Company, near the turnpike, were deflected southward, running into the tracks on Belvedere avenue which were formerly owned by the Baltimore Traction Company and which thereafter crossed the turnpike.

The removal of these tracks, resulting from the deflection mentioned, left the extreme westward end of the right of way, for a distance of probably fifty feet or more, eastward from the turnpike, without any tracks upon it, and this portion of the right of way was not thereafter used by the railway company, except occasionally it would temporarily place thereon cross-ties or other material to be used in the repair of the road. It is this part of the right of way that the defendants are restrained and enjoined from obstructing by erecting thereon a building fronting on the turnpike, to be used as a bank building, as disclosed by their testimony.

All of the Wamsley tract or parcel of land not disposed of prior to the fifth day of September, 1906, became at such time the property of one Charles A. Hook, Jr., who, with his wife, on the 17th day of December, 1906, conveyed the same to James E. Ingram, Sr. By this conveyance to Ingram the reversionary interest formerly held by Mary J. Wamsley in the aforesaid strip of land, as well as in the northern half of Belvedere avenue as opened, passed from Hook to Ingram.

On the 6th day of March, 1907, James E. Ingram, Sr., and wife conveyed unto the appellee, T. Irvin Zimmerman, a part of the land so conveyed to Ingram by Hook. In this deed to Zimmerman the land is described as follows: "Beginning for the same at the intersection of the northeast side of Reisterstown road and the northwestern boundary or outline of the strip of ground thirty feet wide lying along and parallel with the northwest side of Belvedere avenue (sixty

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feet wide) condemned by the Falls Road Electric Railway Company, and running thence with and binding along the northwest outline of said strip, north thirty-six degrees forty minutes east, and parallel with Belvedere avenue, one hundred and twenty-nine feet; thence north fifty-three degrees twenty minutes west and at right angles with Belvedere avenue, sixty-two feet and seven inches; thence thirty degrees forty minutes west and parallel with Belvedere avenue, one hundred and twenty-one feet to the northeast side of Reisterstown road; thence binding on and along with the northeast side of said road sixty-three feet to the place of beginning."

In the habendum clause of the deed is found the following reservation: "The right is hereby reserved unto said grantor, his heirs and assigns, to use as a sidewalk or footway all that portion of said lot or parcel of ground ten feet wide next adjacent to and binding on and along said Belvedere avenue and extending the full *frontage* of said lot or parcel of ground on said Belvedere avenue."

In a very short time after the purchase of the lot from Ingram, Zimmerman started the erection of his building thereon, which was completed in the summer or fall of 1907. The building, on the turnpike, extended across the entire width of the lot—that is, from the sidewalk to its northern limit, and upon the sidewalk it extended a much greater distance. Upon the first floor of the building was a storeroom occupied by the plaintiff, with entrances thereto from both the turnpike and sidewalk, and the postoffice, with its entrance upon the sidewalk. The second floor was used as a pool room and bowling alley, and the entrance to the stairway leading to it is from the sidewalk. The main entrance to the storeroom is what may be termed a corner entrance, and is at the corner of the sidewalk and the turnpike.

It is contended by the plaintiff that this building fronts on the sidewalk facing Belvedere avenue, while the defendants contend that the front of the building is on the Reisterstown turnpike, and much evidence, including photographs of the building, was offered in support of their respective

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contentions. From the evidence, we are of the opinion that it was erected so as to front on both the Reisterstown turnpike and the sidewalk on Belvedere avenue, and that such was the intention of the owner in building it.

The evidence discloses that before the plaintiff built upon the lot, a drain, or what some of the witnesses called a ditch, extended along the eastward side of the turnpike from the location of the plaintiff's store to Belvedere avenue, and that after the erection of his building, the plaintiff placed tiling in the ditch and covered it over, and removed some stones that were the remnants of a fence that at one time ran parallel with the ditch and to the eastward of it. He also leveled the ground which formed the end of the right of way by hauling dirt and cinders thereon, and the letter carriers and others having business at the store of the plaintiff could and did thereafter pass over said land on foot and in vehicles in reaching the postoffice and store, and there was some testimony that vehicles were used in delivering material and other things to persons occupying buildings fronting on the sidewalk to the eastward of plaintiff's property, and that others reached the store and postoffice from Belvedere avenue by a crossing placed by the railway company over its tracks, at the request of the plaintiff, in front of the postoffice. This crossing at first, it seems, was used as a footway, but later some of the letter carriers, if not others, crossed with their vehicles. The rails upon the right of way, as well as those upon Belvedere avenue, are what are called "T" rails.

Much evidence was offered, including photographs, as to the physical appearance and condition of the ground extending from the southern limits of Belvedere avenue to the sidewalk above mentioned, including both Belvedere avenue and the right of way, and whether or not to the ordinary observer there was anything to indicate the location of the division line between Belvedere avenue and the right of way. In our opinion, the fact is established by a preponderance of evidence that there was nothing to indicate to the ordinary ob-

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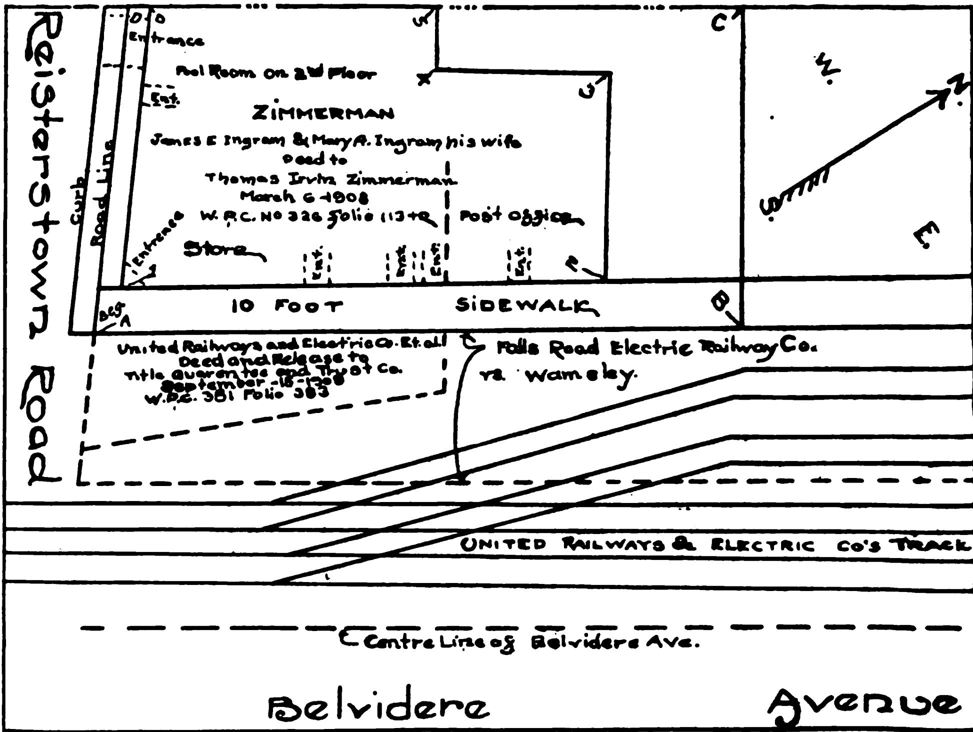
server any difference in the physical condition or appearance of the avenue and the right of way, or to indicate the location of the division line between them.

We here insert the plat, Plaintiff's Exhibit A, which shows the location of the lot conveyed to Zimmerman and the outlines of the building and the entrances thereto, both from the turnpike and the sidewalk, and the relative position of said lot to the Reisterstown turnpike, Belvedere avenue, the ten-foot sidewalk, the thirty-foot strip or right of way, the tracks as now laid upon Belvedere avenue and said right of way, and the lot of land upon which defendant was restrained or enjoined from erecting a building.



Plat, Plaintiff's Exhibit A, showing location of the lot conveyed to Zimmerman, the building thereon, and the strip of land adjacent thereto, abandoned by the railway, and upon which, by injunction, the defendant was enjoined from erecting a building.

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The plat, however, does not show the original position of the tracks upon the right of way near the turnpike before they were deflected, but by the use of the plat the position then occupied by them may be easily understood. They extended in a straight line over and near to the eastward end of the lot upon which the bank building is sought to be erected. Nor does the plat show the buildings, stores and dwellings, etc., and there are many of them, which are upon the ten-foot sidewalk to the easteward of plaintiff's lot and which face Belvedere avenue.

With the facts as we have stated them and with the conditions existing as we have described them, the defendants, who had for a number of years resided in the immediate vicinity of the land here involved, and who were well acquainted with said facts and conditions, purchased from James E. Ingram, Sr., and wife all the lands conveyed to him by Hook and wife, except such parts of it as had been sold and conveyed to Zimmerman and others, and on the 25th day of June, 1909, Ingram and wife conveyed unto the defendants all their right, title and interest in the lands so purchased by them, and in the deed to the defendants the land thereby conveyed is described as beginning at the intersection of the northeast side of Reisterstown turnpike with the center line of Belvedere avenue, sixty feet wide, and the land described therein constituted all of the Wamsley land at the time owned by Ingram lying northward of the center line of Belvedere avenue, and therefore including the thirty-foot strip or right of way.

After acquiring the reversionary interest of Ingram in the right of way mentioned, the defendants conveyed unto the Title Guarantee and Trust Company the interest so acquired by them in all of said right of way, except in that part thereof which is described in the deed to them from the Title Guarantee and Trust Company hereafter mentioned. On the 15th day of September, 1909, the railway company released and conveyed unto the Title Guarantee and Trust Company all its

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title and interest in and to that part of said right of way which is described as beginning for the same at a point where the northeast side of Reisterstown turnpike intersects the northwest right of way line of a thirty-foot strip of land lying along the northwest side of Belvedere avenue, and running thence north thirty-six degrees forty minutes east along said right of way line, a distance of seventy feet; thence south fifty-three degrees twenty minutes east, thirteen feet four inches; thence south twenty-eight degrees twenty-four minutes west, seventy-three feet three inches to the northeast side of the Reisterstown turnpike, and thence north forty-seven degrees twenty-one minutes west along the side of said turnpike, twenty-five feet to the place of beginning, the outlines of which are clearly shown upon the above mentioned plat. The consideration named in the last mentioned deed was one thousand dollars and the conveyance to the grantor of the reversionary interest of the grantee in that part of said right of way which was conveyed to the grantor by the defendants.

On the 23rd day of November, 1909, the Title Guarantee and Trust Company conveyed unto the defendants the interest it had acquired from the United Railways Company in the land described in the aforesaid deed of September 15th, 1909, at and for the sum of five dollars and other good and valuable consideration.

Why the Title Guarantee and Trust Company was used by the defendants in these proceedings as a medium of conveyance is not shown or explained. The defendant Russell in his testimony stated that the negotiations for this lot commenced shortly after Zimmerman purchased his lot, and that the negotiations therefor with the United Railways and Electric Company were almost wholly conducted by him, although the title thereto was not transferred until September 15th, 1909, and at which time the title was conveyed to the Title Guarantee and Trust Company.

Under the aforesaid deeds from Ingram and wife and the Title Guarantee and Trust Company the defendants claim

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the absolute fee in the lot conveyed. The defendants were about to improve the lot by the erection of a bank building thereon when the bill in this case was filed. The bill prayed for an injunction restraining them from obstructing in any manner that portion of the right of way described in the deed to them from the Title Guarantee and Trust Company "where the same abuts upon the land of the said T. Irvin Zimmerman or any part thereof, and from erecting any building or buildings, fence or fences, structure or structures of any kind whatsoever thereon."

An answer and replication were filed and a great mass of testimony was taken.

Although there are other facts alleged in the bill in addition to those that we have very fully stated, we do not think it necessary to refer to them in the view we take of this case.

All the land mentioned in these proceedings at one time belonged to Mary J. Wamsley, and while it was so owned by her the railway company acquired its rights in said strip of land by condemnation proceedings. Mrs. Wamsley, however, held thereafter a reversionary interest therein. In the condemnation proceedings there is found filed with the inquisition of the jury, to be considered with it, an agreement between the Falls Road Electric Railway Company and Mary J. Wamsley and John S. Wamsley, her husband. This agreement reads:

> "The Falls Road Electric Railway Company agrees to construct and maintain suitable crossing over its tracks to each dwelling which may be erected on the property of Mary J. Wamsley, fronting on the said railway, and in addition thereto to maintain and construct at such points and places where a road, avenue or street may be laid off on the property of the said Mary J. Wamsley leading to the north side of the railway constructed along Belvedere avenue, the crossings to be one or two to each dwelling house, as may be required by the owner. This obligation is also made *for the benefit of Mary J. Wamsley, her heirs or as-*

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signs, and the parties hereto agree that the Circuit Court for Baltimore County shall ratify and confirm the inquisition in the above entitled case, with the understanding that the above agreement shall be taken *to constitute a part of said inquisition as much as if the same had been incorporated therein."*

This inquisition was finally ratified, the order being as follows:

"No cause to the contrary appearing, it is, this 31st day of July, 1897, ordered that the within inquisition be confirmed *in accordance with the agreement filed in the case."*

This agreement, in our opinion, is an important factor in determining the rights of the parties involved in these proceedings. The tract of land so owned by Mrs. Wamsley at the time of the institution of the condemnation proceedings, contained about eight acres and was situated at the intersection of Belvedere avenue and the Reisterstown turnpike, lying immediately north of the avenue and east of the turnpike. The strip of land sought to be condemned, thirty feet wide, formed the southern portion of this lot of land, and with it condemned, no part of her land would abut on Belvedere avenue, but would be separated therefrom by the land so condemned.

At this time the said land of Mrs. Wamsley was vacant, in the sense that it had not been built upon, but it was her purpose to develop it by dividing it into lots and selling them to persons to erect buildings thereon. Many of these lots were to face upon Belvedere avenue with no means of ingress and egress, to and from them, other than a sidewalk in front and an alley in the rear of them, and it was very natural that she should wish to make some provision by which she and her assigns, owners of buildings upon the lots fronting or facing Belvedere avenue, should have access to Belvedere avenue by crossing this strip of land, and it is mani-

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fest that this agreement was made in order that this right should be reserved to her and those claiming by, from or under her.

The right of Mrs. Wamsley and her assigns, for the benefit of whom the agreement was made, as expressly stated in it, to use said strip of land in reaching Belvedere avenue, was undoubtedly conferred upon them by the requirement imposed upon the railway company of constructing and maintaining said crossings over its tracks. The right to cross said right of way in reaching Belvedere avenue was, by said agreement, conferred upon or reserved to such persons, and the agreement can not be read without reaching this conclusion. This being the meaning and effect of the agreement, then the railway company will not be permitted to place upon the right of way any obstructions that would abridge or interfere with the exercise of such right.

In this case the interest of the railway company in the right of way was not acquired by deed, but by condemnation proceedings, and the inquisition takes the place and has the full effect of a deed in conveying to the railway company the interest and estate acquired by such proceedings, subject to the terms and conditions imposed by the agreement, which was, by its provisions, to be considered a part of such inquisition, and which was so considered and treated by the Court in confirming the inquisition.

In the case of *Pennsylvania R. R. Co.* v. *Reichert,* 58 Md. 272, it is stated: "It is well settled that it is the duty of the jury, in condemnation proceedings, to award compensation to the land owner in money, and that they have no power to impose terms and conditions upon the condemning party without its consent; it is equally well settled that where such terms and conditions are prescribed in the inquisition, enter into the estimate of damages and are assented to by the parties, they are binding and constitute a contract between them." And in *Mills on Eminent Domain,* sec. 112, which was approvingly cited by the Court in that case, it is said by the author: "Compensation is ordinarily to be made in

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money, yet reservations of rights to owners are favored and the condemning parties may ratify an award a part of which requires improvements to be made for the benefit of the owner. The reservation of rights to the owner is only carrying out the spirit of the law that the public improvement shall be made with the least damage to private individuals."

In this case, however, the counsel for the appellants contends that the reservation here claimed is not a part of the inquisition, and therefore should not have the effect sought to be given it.

In the body of the agreement it is specially agreed between the parties thereto that "the Circuit Court for Baltimore County shall ratify and confirm the inquisition in the above entitled case, with the understanding that the above agreement shall be taken *to constitute a part of said inquisition as much as if the same had been incorporated therein*," and the agreement was filed with the inquisition and was confirmed "in accordance with the agreement filed in the case."

It was not only asked by the parties that it be considered as a part of the inquisition with which it was filed, but the Court so considered and treated it and confirmed the inquisition as embodying said agreement. Even should it be held that the agreement formed no part of the inquisition, both parties to the original agreement and those claiming under them or either of them, by reason of its express terms, upon which the Court acted in confirming the inquisition, are now estopped from denying that such agreement forms a part of the inquisition. It was filed with, and at the time, the inquisition was filed, and it is fair to assume that the jury at the time had knowledge of it and that it was considered by them in estimating the damages allowed to the owner of the land. But as was said by JUDGE BURKE in his opinion delivered in the lower Court, "Whether the agreement be treated a part of the inquisition or not, it was certainly binding on all persons who had knowledge or notice of it, and the defendants upon the facts in evidence are chargeable with notice of this agreement." In addition to other facts and circum-

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stances indicating knowledge on their part of the said agreement, it is specially referred to in the deed to them from the Title Guarantee and Trust Company.

The agreement was binding upon the parties to the agreement, and the rights conferred or reserved thereby enured to the benefit of all persons claiming through or under the Wamsleys and the provisions of said agreement could not be violated either by the Wamsleys or their grantees, or by the company or its grantees, and a Court of Equity has power to restrain any of them who may attempt to violate it.

As was said by JUDGE BURKE, this case in our opinion is governed by the principles laid down in *Newbold* v. *Peabody Heights Co.,* 70 Md. 493. There it was held, that if the covenant, although not one running with the land, "be of a character to create a right and an equity in favor of the vendor or lessor, and those claiming in his right, as against those holding and occupying the land, a Court of Equity will assume jurisdiction and administer relief. This relief may be furnished either by way of injunction or upon application for specific performance, according to the circumstances of the case calling for the exercise of equitable jurisdiction."

It is, however, contended by the counsel for the appellants that if these principles be applicable to a case of this character, nevertheless the appellee is not, upon the facts of this case, entitled to the relief sought by him, inasmuch as the property of the plaintiff, as they allege, does not front on the railway and is not a dwelling.

We have already expressed ourselves as being of the opinion, upon the evidence offered, that the building fronts on the railway. It is true, no part of the building, as now used, is a dwelling, but because of this fact should the defendants be permitted to place in front of this property a substantial and permanent obstruction, depriving the plaintiff of the right to cross said street at the point where such obstruction is to be placed? The construction placed upon this agreement by the defendant is, in our opinion, too narrow.

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By the agreement the benefits of it were to enure to Mrs. Wamsley and to all of her assigns, and in our opinion it was not intended by the agreement, nor should it be so construed, as being a right accruing to dwelling house properties alone, but to all properties, whether business places or dwelling houses, that front upon said right of way, even should it be determined that it was only in front of the dwellings that it was encumbent upon the company to construct and maintain crossings. A distinction favorable to dwelling houses cannot be based upon sound reasoning, for the necessity of the exercise of this property right in respect to buildings used and occupied as business places, exists to the same, if not to a greater, extent than it does in cases of dwelling house property.

The erection of the building upon that part of the right of way separating the plaintiff's property from Belvedere avenue, not even to be used for the purposes—of a railway company—would, in our opinion, be an unauthorized obstruction thereon, in violation of the terms of the agreement and inconsistent with its purposes, in so far as it deprives the plaintiff of his property-right acquired thereunder to cross said right of way in front of his building in reaching Belvedere avenue. The erection of the proposed building, under the facts and conditions disclosed by the record, would, we think, be a violation of the plaintiff's property-rights and would result in injury to him.

The plaintiff is entitled to the relief sought and the decree of the Court below will be affirmed.

Decree affirmed with costs to the appellee.

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EMMA G. CHIPMAN

vs.

FARMERS & MERCHANTS NATIONAL BANK.

Usury: payments by others than the borrower; voluntary payments. Loans on chattels: Acts of 1894, *Chapter* 629; *interest; loans on real and personal property. National banks: interest; Revised Statutes; sections* 5197, 5198.

The usury laws of this State do not render the contract void; but only permit the borrower to recover, in law or in equity, the amount paid by him in excess of the interest allowed by law; or he may, when sued on a usury contract, be allowed such excess. p. 355

But usury laws are enacted for the protection of the *borrower* only from the oppressive demand of the lender; and only from excessive burdens imposed on the *borrower* is relief afforded. p. 355

One of the conditions of a written agreement under which a bank made a loan to a debtor was that, in addition to the legal rate of interest, a debt owed by a third party to the bank should be paid by the borrower, if not paid before a certain date by certain relatives of the third party. Such payment was in fact made by the relatives. *Held*, that there being no evidence that such payment was made at the request of the borrower, the bank was not guilty of usury. p. 357

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Voluntary payments can not be recovered. p. 356

A party is not entitled to recover payments which he was under moral obligation to pay. p. 356

While relief may be had from usurious demands, regardless of the device resorted to by the lender, a borrower can not recover what he has not actually paid, in the absence of some statute authorizing him to do so. p. 356

Under sections 5197 and 5198 of the Revised Statutes of the United States, recovery may be had for interest charged by national banks in excess of that which is allowed by law; but such actions must be commenced "within two years from the time the usurious transaction occurred." p. 358

Chapter 629 of the Acts of 1894, prohibiting corporations from making any loan on the security or chattels, etc., otherwise than in its own name, or at any rate higher than 6 per cent., and declaring such contracts in violation of such provisions to be null and void, does not apply to mortgages on real or leasehold property. p. 356

This Act does not apply to a mortgage covering both chattels and leasehold property. p. 356

Decided June 25th, 1913.

Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Richard S. Culbreth, for the appellants.

Edward Duffy, for the appellee.

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THOMAS, J., delivered the opinion of the Court.

This appeal is from a decree of the Circuit Court of Baltimore City dissolving an injunction granted upon the application of the appellants and dismissing their bill of complaint.

On the 5th of June, 1906, a petition was filed in the District Court of the United States for the District of Maryland against Henry C. Chipman, who was engaged in the business of manufacturing and selling chairs in Baltimore City, to have him adjudged a bankrupt, and he received his discharge in bankruptcy on the 23rd of March, 1907. At the time the petition was filed he was indebted to his wife, Emma G. Chipman, in the sum of $62,000.00; to his brother, Washington Chipman in the sum of $54,246.30; to his daughter, Mary C. Chipman, in the sum of $48,263.06; to his daughter, Jennie C. Dushane, in the sum of $38,298.52; to the Third National Bank of Baltimore in the sum of $13,500.00; and to the Farmers and Merchants National Bank, the appellee, in the sum of $24,156.60, which claims were filed against his estate. On the 14th of August, 1906, Emma G. Chipman, Washington Chipman, Mary C. Chipman and Jennie C. Dushane executed the following agreement:

"This agreement made this 14th day of August, 1906, by and between Washington Chipman, Mary C. Chipman, Emma G. Chipman and Jennie C. Dushane, hereinafter styled assignors, and Edward N. Rich, assignee. Whereas, the assignors, and each of them, did on the third day of July, 1906, in writing, duly assign all their and each of their respective claims and debts against the estate of Henry C. Chipman, bankrupt, and all dividends that may be due on said claims to the said Edward N. Rich, assignee, and at the time the said assignment was made it was agreed by and between the parties hereto that the said assignee should use, appropriate and apply all dividends received on said claims to the payment and satisfaction of the debts due by the said Henry C. Chipman, bankrupt, to the Third National Bank of Baltimore City, until said

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debts were paid in full, and that after the payment in full of the debts due by the said bankrupt to the aforesaid bank the said Edward N. Rich, assignee, should pay the balance of said dividends to the asignors, the same to be paid by a check to the order of all of said assignors; and, whereas, it has been agreed by and between the parties hereto that the said Edward N. Rich, assignee, shall pay the balance of the said dividends, which may remain in his hands after the payment has been made of the aforesaid debts of the Third National Bank, to the Farmers and Merchants National Bank, on account of the debts due the said bank by the said bankrupt. Now, therefore, this agreement is executed and witnesseth, that the assignors do hereby authorize and direct the said Edward N. Rich, assignee, to pay over to the Farmers and Merchants National Bank of Baltimore City on account of the debts due by the aforesaid bankrupt to the said bank, all of the aforesaid balance of the said dividends that may be received by him, until the said debt and interest shall be paid in full."

The agreement contained the further provision that the amount so paid by said Rich might be charged by him against all the assignors, or against any one or more of them, and that he should not be required to apportion the same "between" them.

On the 13th of September, 1906, the Farmers and Merchants National Bank and George H. Chipman, a son of Henry C. Chipman, entered into the following agreement:

"This agreement, made this 13th day of September, 1906, by and between the Farmers and Merchants National Bank of Baltimore and George H. Chipman: Witnesseth, That for and in consideration of the agreement made and entered into this day by and between Edward N. Rich and the said Farmers and Merchants National Bank the said Farmers and Merchants National Bank agrees with the said George H. Chipman that it will procure a loan of forty thousand dollars

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($40,000.00) to be made to said Chipman, which loan is to be secured by a first mortgage, with the usual covenants, conditions and agreements satisfactory to said bank on the leasehold property on the south side of Boston street in the City of Baltimore, and the improvements thereon, and the plant, machinery, tools, furniture, fixtures and appliances located therein, and also located on the fee simple lot of ground or in the improvements thereon at the northwest corner of Boston street and Lakewood avenue, in said city, the said leasehold property being the same property which was formerly used by Henry C. Chipman as a chair factory, said leasehold property to be free of all encumbrances except the ground rent of two thousand dollars ($2,000.00) per annum. The principal of said loan shall bear six per cent. interest (6%) per annum, payable quarterly, and said principal shall be payable as follows: $5,000.00 in two years, $5,000.00 in four years, and $30,000.00 in ten years, and said loan and interest shall be evidenced also by the promissory notes of George H. Chipman. Said Farmers and Merchants National Bank further agrees that after it shall have received its claims in full (which said claims are specially mentioned in, referred to and payable in the manner set forth in the aforesaid agreement between said bank and said Edward N. Rich), it will procure an additional loan of $5,000.00 to be made to George H. Chipman, said loan to bear six per cent. interest per annum, payable quarterly, and to be paid off at a period of five years from the date of the aforesaid loan of $40,000.00, said loan to be secured by a second mortgage, with the usual covenants, conditions and agreements satisfactory to said bank on the aforesaid leasehold property, improvements, plant, machinery, tools, furniture, fixtures and appliances, subject only to the aforesaid ground rent and mortgage of $40,000.00, and said loan and interest shall be evidenced also by the promissory notes of George H. Chipman. The procuring of said loan is conditioned upon the

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said Chipman complying with all the terms, covenants and conditions contained in the aforesaid mortgage to secure the sum of $40,000.00, and upon the said bank receiving its aforesaid claims in full at or before the expiration of one year from the date of the aforesaid loan of $40,000.00, which claims said George H. Chipman agrees to pay at or before said expiration, provided they shall not have been received under the aforesaid agreement with Edward N. Rich. The mortgage loans herein provided for are conditional upon the title to the leasehold property being guaranteed by the Title Guarantee and Trust Company."

To this agreement was attached the following guaranty executed by Henry C. Chipman on the same day:

"Whereas, the Farmers and Merchants National Bank has this day entered into an agreement with George H. Chipman to procure a loan of forty-five thousand dollars ($45,000.00); and whereas, said agreement was entered into at my request; and whereas, a condition precedent to the making of said agreement and the procuring of said loans is that this guarantee should be executed; now, therefore, in consideration of the premises and of the execution of the aforesaid agreement by the Farmers and Merchants National Bank of Baltimore, I hereby guarantee the repayment of any loans made under the said agreement, it being understood that this guarantee shall inure to and be made for the benefit of any person holding the notes evidencing said loans, it being further understood that recourse can be had against me immediately upon default in the repayment of any of said loans."

The agreement referred to in the above agreement between the bank and George H. Chipman as having been made by Edward N. Rich on the same day, after reciting the bankruptcy of Henry C. Chipman; that the claims to which we have referred had been filed against his estate, and the provis-

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ions of the assignment by Washington Chipman and others of their said claims to him, for the purpose therein stated, as set out above, then proceeds as follows:

> "Now, therefore, this agreement witnesseth, That in consideration of the agreement this day entered into between the Farmers and Merchants National Bank and Geo. H. Chipman, the said Edward N. Rich hereby agrees to collect the dividends which may be finally audited and awarded to the aforesaid Washington Chipman, Mary C. Chipman, Emma G. Chipman and Jennie C. Dushane, and he further agrees, after the aforesaid Third National Bank shall have been paid out of the dividends so collected the balance due upon its claim, to pay all the balance of said dividends received by him to the aforesaid Farmers and Merchants National Bank until its aforesaid claim, amounting to $24,438.20, shall be paid in full with interest, as hereinbefore set out; no part of the amount paid to the aforesaid Farmers and Merchants National Bank by the said Edward N. Rich shall be credited on account of the balance due to said bank by the aforesaid Henry C. Chipman, bankrupt, and when the said bank shall have been paid its claim in full, it will assign to the said Edward N. Rich so much of the said claims as shall have been paid by him."

George H. Chipman became the purchaser from the trustee in bankruptcy of the property formerly owned by his father, Henry C. Chipman, consisting of the leasehold property, plant, machinery, etc., constituting the factory referred to in his agreement with the bank and the raw and manufactured material on the premises, and on the 15th of September, 1906, he conveyed the same by mortgage, containing the usual terms and covenants, to Edward Duffy of Baltimore City, to secure the payment of a loan of $40,000.00, and interest thereon at six per cent. per annum, and further evidenced by three promissory notes, payable to said Duffy, as follows: One for $5,000.00, payable in two years; one for

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$5,000.00, payable in four years; one for $30,000.00, payable ten years after date, and notes for the interest on said sums. On the 27th of October, 1906, the bank received from Edward N. Rich the sum of $7,438.10 and on February 27th, 1907, the further sum of $12,327.40, which sums, amounting to $19,755.51, with the dividends the bank received on its claims, paid in full its claim against the estate of Henry C. Chipman, and on the 6th day of April, 1907, George H. Chipman executed to Edward Duffy a second mortgage of said property to secure a further loan of $5,000.00 and interest at six per cent. per annum, for which he gave to said mortgagee his promissory note for $5,000.00 payable four years after date, and other notes for the interest on said principal sum. These notes and the notes secured by the first mortgage and the mortgages were assigned by the mortgagee to the Farmers and Merchants National Bank, and the proceeds of the bank's checks to the mortgagee for the amount of said loans were received by George H. Chipman. Henry C. Chipman having received his discharge in bankruptcy, he and George H. Chipman, on the 9th day of May, 1907, executed a guaranty to the bank, in which, after reciting that George H. Chipman had borrowed from Edward Duffy the amounts mentioned in the two mortgages; that George H. Chipman had carried on the business in the name of George Chipman & Son, and had used the money so borrowed in his business; that all the promissory notes referred to in said mortgages had been transferred by the mortgagee to the bank; that he, Henry C. Chipman, had or was about to enter into a partnership with George H. Chipman, and that George H. Chipman had requested the bank to transfer his account in said bank to the account of said partnership under the name of George Chipman & Son, which the bank had agreed to do on condition that they executed said guaranty; they "jointly and severally, both individually and as copartners trading as George Chipman & Son," guaranteed the payment of and agreed to pay each of the promissory notes

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described in said mortgages when they became due. After the execution of said guaranty the firm from time to time borrowed various sums of money from the bank until the sums so borrowed amounted, in August, 1908, to $6,900.00, for which the firm gave its note to the bank, and deposited with the bank, as collateral security for the note, forty-one shares of the capital stock of the Crown Cork and Seal Securities Company. At the time the stock was deposited with the bank, and before it was transferred to the bank, twenty-seven shares belonged to and was in the name of Emma G. Chipman, and the remaining fourteen shares belonged to Washington Chipman, and was in the name of George H. Chipman. One of the mortgage notes for $5,000 became due on the 15th of September, 1908, and was not paid, and the note of the firm for $6,900.00 became due on the 18th of September, 1908. The bank having refused to accept renewal of the note for $6,900.00, the firm offered to pay it and to take up the stock deposited as collateral, but the bank refused to surrender the stock on the ground that by the terms of the note the stock was not only pledged to secure the payment of the note, but also to secure "any other indebtedness or liability ascertained or contingent (joint or several) that the said firm might then be under or might thereafter incur" to the bank. The bank threatened to foreclose the mortgage, and Emma G. Chipman and Washington Chipman threatened to contest the right of the bank to hold the stock as security for other indebtedness of the members of said firm, whereupon, the said Emma G. Chipman, Washington Chipman, George H. Chipman, Henry C. Chipman and the bank, on the 6th day of October, 1908, entered into an agreement, in which, after setting out the excution of said mortgages and notes, the pledging of said stock as collateral security for the payment of said notes, and the threat of Emma C. Chipman and Washington Chipman to contest the right of the bank to hold the stock as collateral security for the payment of the mortgage notes, and

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after reciting that it was entered into in order to avoid litigation, and in consideration of the mutual agreements therein, the said Emma G. Chipman, Washington Chipman, George H. Chipman and Henry C. Chipman agreed that the bank should hold said stock as collateral security for the payment of the notes mentioned in the mortgages and the note of $9,700.00 thereinafter mentioned, and any renewals thereof, and for any sums of money then or thereafter due the bank from George H. Chipman and Henry C. Chipman, or either of them, and the bank agreed to loan George Chipman & Son the further sum of $2,800.00 upon the delivery to it of the note of said firm for the sum of $9,700.00, covering the note of $6,900.00 and said additional loan, payable one year after date, with interest from date. The agreement also provided that the mortgage for $40,000.00 should not be foreclosed prior to September 15th, 1912, and further provided:

> "that if the said George H. Chipman or Henry C. Chipman, either individually or as co-partners, trading as George Chipman & Son, shall fail to pay the note due September 15th, 1908, mentioned and described in the aforesaid mortgage dated September 15th, 1906, on or before Sepetmber 15th, 1909, or interest thereon from September 15th, 1908, to September 15th, 1909, quarterly at the rate of 6 per cent. per annum, or shall fail to pay the note due September 15th, 1910, mentioned and described in said mortgage, on or before September 15th, 1912, or interest thereon from September 15th, 1910, to September 15th, 1912, quarterly at said rate, or shall fail to pay any other note mentioned in either of the mortgages aforesaid as and when it falls due, or shall fail to perform the covenants, conditions and agreements of each of the said mortgages at the times therein limited, or shall fail to pay the aforesaid note of $9,700.00, or any renewals thereof, or the interest thereon as therein limited, or shall fail to perform any agreement herein contained, then upon such failure the agreement herein contained on the part of said bank not to foreclose

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> said mortgage of $40,000.00 prior to September 15th, 1912, shall become null and void, and the said note for $9,700.00, or any renewal thereof, shall immediately become due and payable, and upon such failure, or at any time thereafter, the said bank, or its president or cashier shall have full power and authority to sell, assign and deliver the whole or any part of said capital stock aforesaid, any substitutes therefor, or any additions thereto, or the property represented by the same, at any broker's board or elsewhere, at public or privtae sale, at his or its option, without advertising and without giving to said parties of the first part, or any of them, any notice, or making any demand for payment on any of the aforesaid notes herein mentioned or referred to, * * * the proceeds, after deducting all legal or other costs and expenses of sale or delivery, to be applied to the payment of any of the aforesaid notes herein mentioned or referred to, and then due and payable or matured," etc.

After the execution of the above agreement the firm of George Chipman & Son continued to borrow further sums from the bank to the amount of $14,000.00 which were secured by accounts receivable, and which were paid. In October, 1911, the note secured by the second mortgage became due and not having been paid, the bank, on the 16th of November, 1911, notified the firm that unless the notes secured by said mortgages and the note for $9,700.00 were paid on or before December 1st, 1911, the bank would sell the stock and foreclose the mortgages. On the 21st December, 1911, the bank instituted foreclosure proceedings and the property described in the mortgages was sold under a decree of the Circuit Court for Baltimore City in January, 1912, and purchased by a representative of the bank for $14,650. George H. Chipman filed exceptions to the sale, but before the exceptions were heard they were withdrawn and the sale was finally ratified by the Court, the bank agreeing that if the property was sold by the bank within a reasonable time

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the mortgagor should receive credit for any advance in price over the sum for which it was previously sold. The bank subsequently sold the property for $20,000.00, and after crediting the advance realized from such sale, the amount still due the bank on the debts secured by said stock was about $33,000.00. On the 28th of May, 1912, the bank notified George H. Chipman, Henry C. Chipman, Emma G. Chipman and Henry C. Chipman, Administrator of Washington Chipman, that there was due on May 31st, 1912, on account of said notes $33,752.14, and that if the same was not paid on or before June 10th, 1912, the stock would be sold and the proceeds of sale applied to the payment of that sum. The amount due the bank was not paid, and, accordingly, the bank, on the 12th day of June, 1912, advertised the stock for sale on the 24th of June, 1912. Thereupon the appellants, Emma G. Chipman, Henry C. Chipman, George H. Chipman and Henry C. Chipman, Administrator of Washington Chipman, filed the bill in this case to enjoin the sale of the stock until the bank is authorized by the Court to make the sale.

The grounds upon which the bill was filed are: (1) that the loan of $45,000.00 was made by the bank, and that the bank was guilty of usury in exacting the payment of the debts due it by Henry C. Chipman to the amount of the $19,755.51, paid it by Edward N. Rich, and that that sum, with interest, should be allowed as a credit on the mortgage debt; (2) that the mortgages are void under the Act of 1894, Chapter 629, Code of 1904, Article 23, section 112; (3) that under the United States statutes, relating to usury, no sum of money is due the bank; and, (4) that at the time the bank foreclosed the mortgage of 1906 the mortgage debt was not due, and that the bank by foreclosing said mortgage broke the agreement of October 28th, 1908, and cannot, therefore, hold the stock as security for the loans therein referred to.

We have stated fully the case as presented by the pleadings and evidence in order to show the circumstances under which the questions to be determined arise.

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Learned counsel for the appellants very forcibly and earnestly contends that the record shows that notwithstanding the loans were made in the name of Edward Duffy they were in fact made by the bank, and that the bank was guilty of usury in exacting, in addition to six per cent. interest, the payment of the debts due it by Henry C. Chipman, bankrupt. But even if we assume that the loan was made by the bank, and that it exacted something more than legal interest, that alone would not be sufficient to support the contention of the plaintiffs for the allowances claimed. The effect of usury under the laws of this State is not to render the contract *void*, but the borrower may in law or equity recover the amount paid by him in excess of the interest allowed by law, or he may when sued on an usurious contract be allowed such excess. *Scott* v. *Leary,* 34 Md. 389. Usury laws are, however, enacted for the protection of the *borrower* from oppressive demands of the lender, and it is only from excessive burdens imposed upon the *borrower* that relief is afforded. In this case the allegations of the bill are, and the record shows that the claims of the bank against Henry C. Chipman, bankrupt, were paid by Emma G. Chipman, Washington Chipman, Mary C. Chipman and Jennie C. Dushane. They were not paid by George H. Chipman, the borrower, and there is no evidence in the case to show that they were paid at his request. On the contrary, the evidence tends to show that those payments were made at the instance of Henry C. Chipman. He says in his testimony that the claims of his family against his estate were assigned to Mr. Rich to pay the bank in order to assist him, and in the guaranty attached to the agreement between the bank and George H. Chipman he stated that that agreement was made at his request, and because of that fact he guaranteed the payment of the sums mentioned in said agreement. The agreement signed by Edward N. Rich provided that after the payment of the bank's claims they should be assigned by the bank to Mr. Rich to the extent that he had paid them out of dividends

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belonging to Emma C. Chipman and others, and immediately after Henry C. Chipman reecived his discharge in bankruptcy he entered into a partnership with George H. Chipman and they conducted the same business that he was engaged in at the time he was adjudged a bankrupt. There is no principle upon which George H. Chipman can claim an allowance for what he has not paid, and third parties liable for his debts can demand only such credits as he is entitled to receive. As between the bank and Emma G. Chipman and Washington Chipman, and apart from the connection of Emma G. Chipman and Washington Chipman as owners of the stock with the debts now due the bank, the claims of the bank against Henry C. Chipman, bankrupt, were voluntarily paid, and they have no cause of action against the bank for the amounts so paid by them. On the other hand, if we treat said claims as having been paid by Henry C. Chipman, he would not be entitled to recover what he was under a moral obligation to pay. *Wilson* v. *Russell,* 13 Md. 494; 39 *Cyc.* 985. We have examined the cases cited by counsel for the appellant, and while in this State and elsewhere the Courts have repeatedly held that relief may be had from usurious demands regardless of the device resorted to by the lender, we know of no case holding that the borrower can recover what he has not actually paid, in the absence of some statute authorizing him to do so. In the case of *Baugher* v. *Nelson,* 9 Gill, 308, the Court said: "It is established that if the borrower has paid money upon an usurious contract, both the Courts of law and equity will enable him to recover back the excess paid beyond the principal and lawful interest, but no further," and in the case of *Scott* v. *Leary, supra,* JUDGE MILLER, after quoting the above statement in *Baugher* v. *Nelson,* says: "The reasons upon which this doctrine is found are stated by LORD MANSFIELD, in *Browning* v. *Morris,* 2 Cowp. 792, and 3 *Parsons on Cont.* 128, where it is said: 'The distinction has been taken between statutes enacted on general grounds of policy and public expediency in which

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each party violating the law is *in pari delicto* and entited to no assistance from a Court of justice, and those laws enacted to protect weak or necessitious men from being overreached, defrauded or oppressed, in which event the injured party may have relief extended to him, and the whole purport and reason, both of the law of usury and of the great mass of decisions under it, indicate that the lender on usury is regarded as the oppressor and the criminal, and the borrower as the oppressed and injured.' "

While the "lender on usury" is no longer regarded as a criminal in this State, and his contracts are not made void, the principle upon which the borrower is allowed his remedy is that he is the victim of oppression.

If the question of usury in this case is to be determined in accordance with the laws of this State, it is quite clear that the plaintiffs are not entitled to an allowance of the amount paid to the bank in settlement of its claims against the bankrupt estate of Henry C. Chipman. If the United States Statutes are to control, the same result must follow. Section 5197 of the Revised Statutes authorizes national banks to charge interest "at the rate allowed by the laws of the State," and section 5198 declares that "The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. If the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided, such action is commenced within two years from the time the usurious transaction occurred." If we regard the amounts paid by Mr. Rich to the bank, in 1906 and 1907, as usurious interest on the mortgage notes, there would be no redress for the plaintiffs in this case, for

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according to the Supreme Court's construction of section 5198, the remedy therein provided, when the interest has been paid, is the exclusive remedy, and the action must be commenced "within two years from the time the usurious transaction occurred." *Hazeltine* v. *Cent. Bank, etc.,* 183 U. S. 132; *Schuyler Nat. Bank* v. *Gadsden,* 191 U. S. 451; *Lazear* v. *Nat. Union Bank,* 52 Md. 78. Independent, then, of other considerations, it is apparent that the plaintiffs are not entitled to a credit for the amount paid on account of the bank's claims against the bankrupt estate of Henry C. Chipman.

We think it equally clear that the mortgages in this case are not void under the Acts of 1894, Chapter 629. That Act was construed by this Court in *Commercial Assn.* v. *Mackenzie,* 85 Md. 132, and held not to apply to mortgages on real or leasehold property. It is true, the mortgages in this case do convey some personal property in addition to the leasehold property therein described, but the evils that Act was intended to remedy, and the reasoning of the Court in *Mackenzie's case* excludes the idea that that is sufficient to render the mortgages void. The amount of the personal property is not shown, and may be of comparatively little value as compared with the leasehold property. The mortgages are in the usual form, specify the debt and interest to be paid, provide that the mortgagor shall remain in possession of the property until default, were duly recorded, and could not be foreclosed except through legal proceedings. It is evident that they do not come within the class of contracts the statute condemns. The language of the Act does not require and the wrongs sought to be avoided do not suggest a different construction. By its terms the Act is expressly limited in its application to loans on "chattels," and we can not hold that it strikes down the mortgages in this case, covering both leasehold and personal property.

Nor do we think the record sustains the remaining contention of the appellants, that the bank broke the contract of

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October 28th, 1908, by foreclosing the first mortgage before the notes thereby secured became due, and that, therefore, it is not entitled to hold the stock as security for the mortgage debt. The contract did not in terms extend the time for the payment of the first mortgage notes, but provided that if they were not paid on or before the dates therein mentioned, or if the other notes therein referred to were not paid when due, then the agreement that said mortgage should not be foreclosed before 1912 should be void. The failure to pay the second mortgage note when due avoided the agreement in reference to the foreclosure of the first mortgage, and the note due September, 1910, being overdue, under the terms of the mortgage, the bank was authorized to foreclose. It is suggested in the bill that the circumstances under which the bank obtained the stock in question disentitles it to hold the stock as security for any of the notes except the firm note for $9,700.00. Whatever may have been the right of the bank under the original deposit of the stock, after the agreement of October 28th, 1908, entered into for the purpose of adjusting the claims of the plaintiffs and the bank, and in consideration of the agreements contained therein, and a further loan to the firm of George Chipman & Son, there was no longer any room to question the right of the bank to hold the stock as security for the mortgage notes.

As the bank has not received as usurious interest any sum that the plaintiffs are entitled to have deducted from its mortgage claim in this case, and as the bank is entitled to sell the stock, in accordance with the terms of the agreement of 1908, for the purpose of paying the debts therein referred to, and as provided therein, we must affirm the decree of the Court below.

Decree affirmed, with costs.

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MANOR MINING & MANUFACTURING COMPANY

vs.

EDWARD H. SINCELL AND JOHN T. MITCHELL.

Land Office: appeals; patent for vacant lands.

An appeal was taken from the ruling of the Commissioner of the Land Office, deciding that the patent applied for, for certain land alleged to be vacant, was valid and should issue as prayed; the evidence in the case was considered by the Court of Appeals and the ruling of the Commissioner affirmed. p. 365

Decided June 26th, 1913.

Appeal from the Commissioner of the Land Office (Hanson, Commissioner).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, STOCKBRIGE and CONSTABLE, JJ.

E. McClure Rouzer and *Albert A. Doub* (with whom was *Jacob France* on the brief), for the appellant.

John T. Mitchell and *Edward H. Sincell,* for the appellee.

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CONSTABLE, J., delivered the opinion of the Court.

A special warrant was issued by the Commissioner of the Land Office, at the instance of Edward H. Sincell, directed to the County Surveyor of Garrett County, authorizing him to survey and lay out a certain tract of land in Garrett County alleged to be vacant. In pursuance of said warrant Alexander C. Mason, the surveyor of Garrett County, after complying with the requirements of law, surveyed the alleged vacant tract of land and returned to the Commissioner of the Land Office the certificate of survey, to which was attached a plot of the same. Subsequently Edward H. Sincell assigned a one-half interest therein to John T. Mitchell and directed that upon the issuance of the patent for the same it should be issued to him and John T. Mitchell as tenants in common. Thereafter the Manor Mining and Manufacturing Company filed a caveat, protesting against the issuane of the patent.

Upon a hearing before the Commissioner an order was passed dismissing the caveat and ordering the patent to issue. From that order the caveator has appealed.

The grounds of the appeal are (1) that the land described in the certificate of survey is not vacant, (2) that the survey was not made in accordance with the rules of the Land Office and the laws of Maryland and (3) because it would be unjust to the caveator to have a patent issue.

The land in this case alleged to be vacant, consisting of fourteen acres and ninety-six square perches, has a width of two and one-half perches and is located between a tract of land called Crotia on the north and a tract called Fairleigh on the south. These two tracts are composed of several parcels of land, each of fifty acres, which were a portion of over four thousand lots surveyed and laid out west of Fort Cumberland in 1788 by one Francis Deakins, acting in virtue of a resolution of the General Assembly. The purpose being to grant these lots to officers and soldiers of the Revolutionary Army as bounties of land previously promised to encourage recruiting. Mr. Deakins upon the completion of the survey

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returned a general plot of the country westward of Fort Cumberland, on which, with other tracts, were laid off these four thousand lots, called Military lots, and two books containing all the certificates of survey of these Military lots. By the Act of the Legislature 1788, Chapter 44 (November Session), this plot and the books of certificates were lodged in the Land Office, and the books of certificates were therein authorized to be considered to all intents and purposes as record books of that office.

The contention of the caveatees is that the certificate of survey for these Military lots as well as certificates of resurvey of the tracts Crotia and Fairleigh show that there is this strip of land not embraced in any or either of these aforesaid tracts. The caveator on the other hand contends that a portion of the strip is contained in the lines of the original Military lots now owned by it. And that if any of the part intended to be patented is embraced in a former survey then the patent for the whole must be refused. This principle of law is not open to question. The caveator owns two of the Military lots about the eastern end of the tract claimed to be vacant; one lot being north of the strip and the other south. The one on the north being a part of Crotia and the one on the south a part of Fairleigh. The one on the north is numbered 361 and the one on the south 287. The contention of the caveator being that the south line of the former is the north line of the latter. In other words that the two tracts are contiguous, and there is no vacant land between them as claimed by the caveatees. To support the issues raised by the caveat, testimony was taken before the examiner of Garrett County by the respective parties, and several certified copies of deeds, certificates of survey of the Military lots made by Deakins and certificates of resurvey of Crotia made in 1840 and of Fairleigh made in 1853, were filed as exhibits and returned, and are now contained in the present record. The only witness, produced by either party, bearing upon the question of the fact of the vacancy was Mr. Mason, the

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County Surveyor of Garrett County, who was produced upon behalf of the caveatees.

We have considered closely and carefully all the testimony offered on this point including a careful study of the certificates of survey in connection with the plats offered, and have arrived at the conclusion therefrom that this land claimed by the caveatees is vacant land.

Briefly stated we have reached this conclusion for the following reasons: In the first place, the plot filed by the caveator, assuming it to be a correct copy of the one made by Deakins, shows the lots of the caveator, before mentioned, numbers 361 and 287, to be contiguous. If a true running of the lines of the certificates proves a variance between them and the plot the variance must be determined in favor of the correctness of the certificates. Irrespective of the true location of the corners and the beginnings of the different Military lots, concerned in or about this tract of land, the certificates of survey and resurvey show clearly, because of the relative position of the tracts and lots, that wherever the lots Nos. 361 and 287 may be situated there is between them on the south and north sides respectively a space of two and one-half perches. The beginning for the first line of Lot 361, which is the south boundary of that lot, is fixed as being twenty-two perches due north of the end of the first line of Lot 359 which last line coincides its entire length of 89½ perches with the first line of Lot 358, the said first line being extended further west 26½ perches. The course of the first line of Lot 361 is given as due west. The eleventh line of Fairleigh runs north nineteen and one-half perches from the end of the first line of Lot 358 or the first line of Lot 359 extended, and with the first line of Lot 287. The second line of Lot 287 which is the north boundary of that lot runs due west from the end of the eleventh line of Fairleigh, also being the end of the first line of Lot 287. Therefore since the beginning of the first line of Lot 361 is 22 perches north of the first line of Lot 358 and the beginning of the second line

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of Lot 287 is north 19½ perches from the same line, the beginning point of Lot 361 must be two and a half perches north of the beginning point of the second line of Lot 287. Since these two lines run due west they must be parallel and therefore the distance between them throughout is two and a half perches. The extension of the first line of Lot 361 to the west is the 14th line of Crotia and forms a straight line; and the extension of the second line of Lot 287 to the west is the 12th line of Fairleigh and is a straight line. Therefore these lines are parallel and it follows that there must be an open space of two and a half perches between these two lines of Crotia and Fairleigh or of the lines of the Military lots forming these lines. We further find that the surveyor has properly located the original beginnings and lines of the Military lots and that the lines constitute the boundaries of this vacant tract, as laid down in his returned plot.

As to the objection that the surveyor violated the rule of the Land Office, which provides, that "Nor are you to return to the Land Office any plot or certificate for land of which either you or your assistant has not actually measured every line," we think it is clear from a reading of the entire testimony of Mr. Mason that there was a sufficient compliance with the rule to remove any reasonable objection. His testimony shows that he did not actually survey every line at the time of the execution of the special warrant in this case, but some of the locations had been made by him on former surveys. We think if all of the lines were surveyed by him before the return of the certificate and plot, as he testified, it is immaterial whether they all were actually done so at the time of the execution of the warrant or not. The important thing is that all lines shall be measured, and if they have, all requirements of the rule have been met.

The caveator contends further that assuming a vacancy exists and that the proceedings have been regular, still a patent should not issue in this case for the principal reason that one of the caveatees, John T. Mitchell, was its attorney

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and agent in the purchase by it of Lot 287, and failed to disclose that he knew or had reason to believe that a vacancy existed between this lot and another owned by it. That Mr. Mitchell knew of the alleged vacancy is apparent from the fact that two special warrants for this same tract of land were issued to him and the other caveatees four and five years before the purchase of Lot 287, neither of which was executed. The testimony of the only witness, Mr. Frick, president of caveator company, is so meagre and indefinite, that we are not able to find from anything in it that Mr. Mitchell is open to the criticism that the caveator makes of his conduct. There is, however, nothing contained in the record that would justify the refusal of a patent to Mr. Sincell on any grounds of improper conduct. And we cannot conclude from any facts before us that the imputations of the caveator are well founded.

We are of the opinion that the Commissioner of the Land Office was correct in his ruling that the patent should issue; and that whatever rights the caveatee has can be protected in a Court of law or equity. *Kilty's Landholders' Assistant,* 372, 495, 496; *Cunningham* v. *Browning,* 1 Bl. 321; *Chapman* v. *Hoskins,* 2 Md. Ch. 485; *Armstrong* v. *Bittinger,* 47 Md. 103; *Jay* v. *VanBibber,* 94 Md. 688.

Order affirmed, with costs to the appellees.

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THE MAYOR & CITY COUNCIL OF BALTIMORE

vs.

JOHN S. L. YOST, INFANT, BY NELLIE B. YOST, HIS NEXT FRIEND,

AND

JOHN S. L. YOST, INFANT, BY NELLIE B. YOST, HIS NEXT FRIEND,

vs.

THE MAYOR & CITY COUNCIL OF BALTIMORE.

Pleading: amendments; name of plaintiff; new parties; discretion of lower Court. Streets: dedication; description in deeds; references to maps and plats. Appeals: non-reversible errors no ground for reversal.

There can be no reversal by the Court of Appeals for erroneous rulings, when it appears that the rulings complained of worked no injury to the party excepting. p. 383

The title to certain property was in an infant, and on a petition for an appeal from an inquisition allowing damages and assessing benefits in condemning and opening a right of way through the property, the caption of the petition and affidavit was in the name of the infant by N. B. Y., *his next friend,* but the petition itself was signed by N. B. Y.; it was *held,* that a motion to amend the petition so as to make it read correctly, signed in the name of the infant by N. B. Y., *his next friend,* was proper and should be allowed. p. 376

Such an amendment was not the introduction of a new party plaintiff, in violation of section 41 of Article 75 of the Code of 1912. p. 375

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Syllabus.

The action of the Court below in allowing such amendment can not be made the subject of exception, or of review by the Court of Appeals. p. 376

Where a party sells property within the limits of a city and the conveyance binds it by streets designated as such in the conveyance or on a map made by the city, or by the owner of the property, there is an implied covenant that the purchaser shall have the use of such streets. p. 378

Where such a street is actually opened and laid out with clearly defined width and is capable of being definitely located and described, an implied covenant to dedicate the street will arise from a conveyance describing land as bordering along such street, even without reference to any maps or plats. pp. 378-379

But in such cases the location of the road and such other facts as might be necessary to arrive at the intention of the grantor in relation to the land or extent of land that was intended by him to be dedicated should be clearly proven; for the intention of the owner to dedicate his land to such use is absolutely essential, and unless such intention is clearly shown no dedication exists. p. 379

Where a deed simply describes the land conveyed as bordering on a street which was only referred to once, and whose width was not given, and where there was no other evidence of any dedication, it was *held,* that no dedication could be presumed from the deed. p. 380

Decided June 26th, 1913.

Appeal and cross-appeal in one record from the Baltimore City Court (Dawkins, J.).

The facts are stated in the opinion of the Court.

The two causes were argued together before Boyd, C. J., Briscoe, Burke, Thomas, Pattison, Stockbridge and Constable, JJ.

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Benjamin H. McKindless (with whom was *S. S. Field* on the brief), for the Mayor and City Council of Baltimore.

Clifton S. Brown (with whom were *Sauerwein, Brown & Cook* on the brief), for John S. L. Yost, infant, etc.

The following are the prayers of the parties, together with the action of the lower Court thereon:

Petitioner's First Prayer.—If the jury find from the evidence that the petitioner, his agent or agents, exercised the right of ownership of Bonner Road, and placed or had placed upon said road signs designating said road as a private way; and further that if they find that the petitioner, or his agent or agents, had erected on said road a gate or fence, which gate or fence was erected prior to 1908, if they so find, and was maintained during 1911, if they so find, and if they further find that said gate or fence was not taken down by the authority or at the direction of the petitioner, or his agent or agents, then they must find that Bonner Road is a private and not a public road. (*Granted. Granted in connection with City's 9th Prayer and 15th Prayer.*)

Petitioner's Second Prayer.—If the jury find from the evidence that Bonner Road has not been dedicated, they are instructed that the measure of damage is the square foot value of the northern half of said road from the east side of Winfield Avenue to a point three hundred feet east thereof. (*Refused.*)

Petitioner's Third Prayer.—The jury are instructed as a matter of law that in fixing the value of the northern half of Bonner Road spoken of in the evidence, that they are not to consider the use to which said road had been put before the said property was condemned by the Mayor and City Council of Baltimore. (*Refused.*)

Petitioner's Fourth Prayer.—The petitioner prays the Court to instruct the jury that in awarding damages to the

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petitioner they must take into consideration the value of his property before Bonner Road has been widened ten feet, and the value of said property after it has been widened said ten feet, and the measure of damage is the difference between what they find the aforesaid values to be. (*Granted.*)

Petitioner's Fifth Prayer.—The petitioner prays the Court to instruct the jury that there is no evidence legally sufficient from which they could find a dedication of Bonner Road. (*Refused.*)

City's Prayer No. 1.—The Court instructs the jury, that the plaintiff has offered no testimony, in this case, legally sufficient to entitle him to any other or different damages or benefits than those assessed by the Commissioners for Opening Streets, and therefore, their verdict should be in confirmation of the award of the Commissioners for Opening Streets. (*Refused.*)

City's Prayer No. 2.—The Court instructs the jury that the plaintiff has offered no evidence, in this case, legally sufficient to entitle him to any other or different damages for his interest in the property to be taken in the condemning and opening of Harford Road than those awarded to him by the Commissioners for Opening Streets, and, therefore, their verdict should be in confirmation of said award of the Commissioners for Opening Streets. (*Refused.*)

City's Prayer No. 3.—The Court instructs the jury, that, in making up their award of damages (the only matter for their inquiry is) the jury is to determine the value of the appellant's interest in the property to be taken for the proposed condemning and opening of Bonner Road, and in determining the amount of said damages they are not at liberty to indulge in vague speculations or conjecture, but shall allow only such damages as they shall find, from the evidence, is the fair market value of the appellant's interest

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in said property to be taken, at the present time, in its present condition, at a fair and not at a forced sale. (*Granted.*)

City's Prayer No. 4.—The City prays the Court to instruct the jury, that, in estimating the damages to be awarded to the property owner, they can only award him the fair market value of his interest in the property of which the part to be taken for the proposed improvement is part. less the fair market value of his interest in so much thereof as will remain after the opening of Bonner Road. (*Granted.*)

City's Prayer No. 5.—The Court instructs the jury that if they shall find that the amount of damages awarded to the appellant for his interest in the property to be taken for the condemning and opening of Bonner Road is more than the fair market value of said interest in said property at the present time, in its present condition, then the jury have the right and it is their duty to reduce said award to an amount equal to a fair market value of the appellant's interest in said property at the present time, in its present condition at a fair and not at a forced sale. (*Granted.*)

City's Prayer No. 6.—The Court instructs the jury, that the burden of proof rests upon the appellant to establish to the satisfaction of the jury that the value of his interest in the property to be taken for the proposed condemning and opening of Bonner Road, mentioned in the evidence, is in excess of the amount awarded to him by the Commissioners for Opening Streets; and if he has not so established to the satisfaction of the jury that the value of his interest in the property to be so taken is in excess of the amount so awarded to him, then they are not at liberty to increase the amount of said award. (*Refused.*)

City's Prayer No. 7.—The Court instructs the jury that if they shall find from the evidence that the property of the appellant abutting on Bonner Road, mentioned in the evidence, after the same is condemned and opened, will be benefited by said condemning and opening as a public road

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or highway, then they are to assess such benefits against said property as it is, in their opinion, from the evidence, fairly and reasonably apparent that said property of such abutting owner will receive from the proposed improvement, other than the general benefit to the community at large. (*Granted.*)

City's Prayer No. 8.—The Court instructs the jury, that the measure of damages of the property here being condemned is the fair market value thereof as it stands now, between a purchaser willing but not anxious to buy, and a seller ready but not compelled to sell. (*Granted in connection with City's 5th prayer.*)

City's Prayer No. 9.—The Court instructs the jury, that if they shall find from the evidence in this case that Bonner Road from Garrison to Winfield Avenues was dedicated to public use as a public highway, then said John S. L. Yost is entitled to nominal damages only for that portion of the bed of said Bonner Road so dedicated. (*Granted.*)

City's Prayer No. 10.—The Court instructs the jury, that the undisputed evidence shows that Bonner Road, 40 feet wide between Garrison and Winfield Avenues, is dedicated to public use, and, therefore, for so much of said road claimed by John S. L. Yost as has been so dedicated, that is to be taken by the Mayor and City Council of Baltimore in the present proceeding for the opening of Bonner Road, the said John S. L. Yost is entitled to nominal damages only. (*Refused.*)

City's Prayer No. 11.—The Court instructs the jury, that if they shall find, from the evidence, that Nellie Bonner Yost was seized and possessed of the land lying in the bed of Bonner Road, as described in the evidence, from Garrison Avenue to Winfield Avenue, and of certain land on the sides of said road, and that prior to the passage of Ordinance No. 681 of the Mayor and City Council of Baltimore, approved April 29, 1911, offered in evidence, and whilst being so seized and possessed of said land lying in the bed of Bonner

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Road, and on the side thereof, the said Nellie Bonner Yost conveyed a portion of the land owned by her fronting on the side of said road, between the avenues aforesaid, and in the conveyance thereof described the lot so conveyed as bounding on the south side of Bonner Road, and in said conveyance did not reserve said Bonner Road from dedication, then said conveyance was and operates as a dedication to the use of the public of the bed of Bonner Road so owned by her at the time of said conveyance from Garrison Avenue to Winfield Avenue. (*Refused.*)

City's Prayer No. 12.—The Court instructs the jury, that if they shall find from the evidence, that Nellie Bonner Yost was seized and possessed of the land lying in the bed of Bonner road, as described in the evidence, from Garrison avenue to Winfield avenue, and of certain land on the sides of said road and that prior to the passage of Ordinance No. 681 of the Mayor and City Council of Baltimore, approved April 29, 1911, offered in evidence, and whilst being so seized and possessed of said land lying in the bed of Bonner road, and on the side thereof, the said Nellie Bonner Yost conveyed a portion of the land owned by her fronting on the side of said road, between the avenues aforesaid, and in the conveyance thereof described the lot so conveyed as bounding on the south side of Bonner road, and in said conveyance did not reserve said Bonner road from dedication, then said conveyance was and operates as a dedication to the use of the public of the bed of Bonner road so owned by her at the time of said conveyance from Garrison avenue to Winfield avenue. And if the jury shall further find, that, thereafter, the said Nellie Bonner Yost conveyed to John S. L. Yost a certain tract of ground, which included a portion of the ground on the side of said Bonner road and a portion of the land lying in said Bonner road, between Garrison and Winfield avenues, then said John S. L. Yost is entitled to nominal damages only for that portion of the bed of said Bonner road, above mentioned, claimed by him, and to be taken by the Mayor

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and City Council of Baltimore for the purpose of opening said Bonner road. (*Refused.*)

City's Prayer No. 13.—The Court instructs the jury, that if they shall find from the evidence that the appellant, John S. L. Yost, acquired title to the property owned by him on the north side of Bonner road, as heretofore existing between Garrison and Winfield avenues, referred to in the proceedings, by deed from Nellie Bonner Yost, in evidence in this case, and that, theretofore, said Nellie Bonner Yost was the owner of the property lying in the bed of Bonner road between Garrison and Winfield avenues, and on both sides of said road, and that prior to said conveyance to him, and to the passage of the ordinance of the Mayor and City Council of Baltimore for the opening of Bonner road, under which the present proceedings were taken, the said Nellie Bonner Yost conveyed to Mrs. Moog a portion of said land between Garrison and Winfield avenues, and in the said conveyance described the lot so conveyed as bounding on the south side of said Bonner road, then said conveyance was a dedication by said Nellie Bonner Yost of the portion of the bed of said Bonner road then owned by said Nellie Bonner Yost between Garrison and Winfield avenues to the use of the public, and the said John S. L. Yost is entitled to nominal damages only for the portion of the bed of said Bonner road, dedicated as above mentioned, claimed by him, and to be taken by the Mayor and City Council of Baltimore for the purpose of opening of Bonner road. (*Refused.*)

City's Prayer No. 14.—The Court instructs the jury that, by the true construction of the several deeds from Nellie Bonner Yost to Mrs. Moog, Mr. Miller et al., trustees, Gladys D. Yost, John T. Ford and Mabel B. Yost, respectively, offered in evidence, the grantees therein and their assigns are entitled to the use of the bed of Bonner road, as mentioned and called for in said deeds; for the use and benefit of the lots fronting thereon, respectively; and the appellant in this case can, therefore, only recover such damages for the

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land lying in the bed of Bonner road, mentioned in said deeds, as the jury may find the said John S. L. Yost will sustain by the condemnation of said bed of Bonner road as a public highway, taking into consideration the fact that he holds the bed of said road subject to said right of way. (*Granted.*)

City's Prayer No. 15.—The Court instructs the jury, that if they shall find from the evidence, in this case, that Bonner road between Garrison avenue and Winfield avenue did, at any time after the 8th day of April, 1908, for a period of one year, connect with, open into, or lead to or from any public street, lane, alley or way of Baltimore City, and that passage between said Bonner road and said public street, lane, alley or way, was not barred or obstructed by a wall, fence, or similar structure erected along the dividing line between them either without a gate or gates therein, or with a gate or gates kept closed at all times except when in actual use, shall be conclusively presumed to have been dedicated by the owner or owners thereof to public use as a public highway. (*Granted.*)

PATTISON, J., delivered the opinion of the Court.

This is an appeal and cross-appeal from an inquisition of a jury in the Baltimore City Court allowing damages and assessing benefits to John S. L. Yost, an infant, in condemning, opening and widening Bonner road, located within the limits of Baltimore City.

The first exception is to the action of the Court in permitting an amendment to the petition by which an appeal was taken from the award of the Commissioners for Opening Streets.

The caption of said petition when filed was "*John S. L. Yost, by Nellie B. Yost, next friend,* v. *The Mayor and City Council of Baltimore,*" and the name of the petitioner, as therein stated, was "Nellie B. Yost." To the petition was attached an affidavit to the truth of the matters and things therein alleged, made by Nellie B. Yost "as next friend." A

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motion was made by the plaintiff in open Court "to amend the petition in the body thereof by interlineation, by adding before the name of Nellie B. Yost the words 'John S. L. Yost, infant, by,' and after the name of Nellie B. Yost the words 'next friend,' so that it will read 'John S. L. Yost, infant, by Nellie B. Yost, next friend.'" A motion had previously been made by the Mayor and City Council of Baltimore to dismiss the petition. The latter motion, however, was overruled and the amendment asked for permitted to be made.

It is contended by the defendant, the Mayor and City Council of Baltimore, that as shown by the petition aforesaid the appeal was not taken in the name of the infant by his mother Nellie B. Yost as next friend, but by her individually, and that by the amendment an entire new party plaintiff was introduced or made, in violation of section 41 of Article 75 of the Code of 1912.

We cannot agree with the defendant in this contention. It should be borne in mind that it was to the infant, John S. L. Yost, the owner of the property affected by the opening and widening of said road, and not to the mother, Nellie B. Yost, that damages were allowed and benefits assessed. She was in no way interested in or affected by the award appealed from except as mother of the infant plaintiff, and she could not in her own right appeal from said award; as to such appeal she could only act as the next friend of the infant.

It is true, we find that the petition is signed by her and that her name appears therein as petitioner, but we also find attached to said petition the affidavit made by her "as next friend;" and in the caption of the petition the plaintiff or petitioner is named as "John S. L. Yost, by Nellie B. Yost, next friend."

To us it is sufficiently shown by the petition, when considered as a whole, in connection with the proceedings of the commissioners and the purpose for which it was filed, that

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the appeal was taken in the name of the infant by the mother as next friend.

The effect of the amendment was not to make an entire new plaintiff, as contended by the defendant, but to make all parts of the petition conform to the fact shown by it, that the appeal was taken in the name of John S. L. Yost, infant, by Nellie B. Yost, next friend.

The Court acted within its power in permitting the amendment to be made, and therefore it is not the subject of exception nor of review by this Court. *Thillman* v. *Neal,* 88 Md. 525.

In this case Nellie B. Yost acquired the lands on both sides of what is now Bonner road, as well as the bed of said road, between Garrison avenue and Winfield avenue, by deed from Fielder C. Slingluff and Frank Slingluff, trustees, dated April 15, 1901. Upon this land she built a dwelling near Winfiled avenue and opened a road or lane twenty feet in width over said lands leading to it from Garrison avenue, and called it Bonner road. Later she built a second house. adjoining the one in which she lived. This she sold in 1903 to Mrs. Wilhelmina Moog. In the deed to her the property is described as the lands on the south side of Bonner road, and in it there is no reservation of Bonner road from dedication. Later she sold and conveyed other lots south of Bonner road and binding upon it, two in 1905 and one in 1906. Each of these deeds contained a clause reserving the road from dedication. In 1906 she conveyed to her daughter, Mabel B. Yost, a lot on the north side of Bonner road. At the same time she conveyed unto her son John S. L. Yost the remainder of said lands on the north side of said road, and later, in 1910, she executed a confirmatory deed to her son. the necessity for which arose from some error or irregularity in the description contained in the first deed. The description of the land in the two deeds to her son included the entire bed of Bonner road, except that which passed to her daughter under the deed above mentioned.

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In 1911 the city determined to open and widen Bonner road for public use, and condemnation proceedings were accordingly instituted. In these proceedings Bonner road was regarded as having a width of forty feet and was to be widened ten feet, making it thereafter fifty feet in width.

For the strip of land ten feet in width extending a distance of three hundred feet, to be used for widening said road, and designated in the proceedings as Lot B, John S. L. Yost was awarded the sum of five hundred dollars, and for the strip of land twenty feet wide, designated as Lot E, lying immediately south of Lot B, and regarded in the proceedings as the northern half of Bonner road, he was awarded the sum of one dollar, and the remaining portion of his land was assessed, for benefits, the sum of three hundred dollars. The rights of the plaintiff, if any he had, in the southern half of Bonner road, as mentioned in the condemnation, do not seem to have been considered, or if so, no damages were awarded to him therefor.

Upon appeal to the Baltimore City Court John S. L. Yost was awarded by the jury for both lots, B and E thirteen hundred and fifty-one dollars, and was assessed, for benefits, the sum of three hundred dollars.

It is contended by the city that Bonner road, of the width of forty feet, was dedicated to public use by Nellie B. Yost by the aforesaid conveyance to Wilhelmina Moog, in which the lot of land so conveyed is described as *binding* on Bonner road, and in which deed there is no clause reserving the road from dedication, and that by reason of such dedication the plaintiff is entitled only to nominal damages therefor. It is upon this deed that the defendant chiefly relies to establish the dedication of the road, of the width of forty feet, to public use.

The plaintiff contends, however, that there is no implied covenant to be found in said conveyance by which Bonner road was to be dedicated to public use, inasmuch as there was no map or plat upon which the said road was located or

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designated in existence at the time of said conveyance, and that without such map or plat the language found in the deed describing the lot conveyed as binding on Bonner road could not have the effect sought to be given to it by the defendant. The record does not disclose that there was such a map or plat.

This Court has said in the case of *White* v. *Flannigan,* 1 Md. 540, and in a number of subsequent cases, "that where a party sells property lying within the limits of a city, and in the conveyance, bounds such property by streets designated as such, *in the conveyance,* or on a map made by the city, or by the owner of the property, such sale implies, necessarily, a covenant that the purchaser shall have the use of such streets." *Moale* v. *Mayor, etc.,* 5 Md. 321; *Clendenin* v. *Md. Cons. Co.,* 86 Md. 83; *Hawley* v. *Mayor and City Council of Baltimore,* 33 Md. 280, and others.

The plaintiff, in support of his contention, has referred us to the cases of *Mayor and City Council* v. *Frick,* 82 Md. 83; *Canton Co.* v. *Mayor and City Council,* 106 Md. 69, and *Mayor and City Council* v. *Northern Central Ry. Co.,* 88 Md. 427.

In the first of these cases the Court said: "The settled rule appears to be if the lot is described as fronting or binding on a street which is designated on a public map or private plat, such description and calling for an unopened street raises an implied covenant that such right of way exists." And in the last of these cases this Court, through JUDGE PEARCE, said one of the essential elements or conditions of such a dedication is "a street designated on a map or plat made or adopted by the party himself as passing over his lands."

In the above mentioned cases there were maps and plats and the Court in what it said in those cases had reference to the facts which were at such times before it. And in those cases we do not understand the Court to have said that without a map or plat an implied covenant to dedicate a road or street to public use could not arise from a grant of land de-

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scribed as binding on such road or street, if at the time, said road or street was actually opened or laid out, with a clearly defined width and capable of definite location and description. In such cases, however, the location of the road and such other facts as might be necessary in each particular case to arrive at the intention of the grantor in relation to the land or extent of land that was intended by him to be dedicated should be clearly proven, for the intention of the owner to dedicate his land to such use is absolutely essential, and unless such intention is clearly shown no dedication exists. *Pitts* v. *Baltimore,* 73 Md. 332; *Glenn* v. *Baltimore,* 67 Md. 390; *McCormick et al.* v. *Baltimore,* 45 Md. 524; *Tinges* v. *Baltimore,* 51 Md. 609; *Bloede* v. *Mayor, etc.,* 115 Md. 594; *Baltimore* v. *Northern Central Ry. Co., supra,* and others.

In the deed to Mrs. Moog the land conveyed is simply described as binding on Bonner road. The road is not further described or referred to, and the only evidence as to its width is that of Mrs. Yost, who testified that it was opened and laid down by her of the width of twenty feet.

It may be that the road has since been widened to the extent of forty feet for the use of those living upon the road, but if so, there is nothing, so far as disclosed by the record, showing that such widening was a dedication to public use, for the evidence discloses that before, at the time of, and long subsequent to the conveyance to Mrs. Moog, this road was closed by fences, gates and ropes placed at Winfield and Garrison avenues, and whatever travel there was upon the road by the general public was against the strong protest of Mrs. Yost, acting for herself so long as she was the owner of the land, and for her son after he became the owner of it. She states in her testimony that she put up fences across Bonner road at Garrison and Winfield avenues, and they were knocked down; she replaced them and they, in turn were destroyed; at other times she put up gates, locked them and gave keys to those living on the road, entitled to its use, and

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these gates, too, were destroyed; she also used ropes to prevent public travel upon this road. These efforts to prevent the public use of this road continued so late as 1911, the year in which these proceedings were instituted. She also during this period of time warned all persons, other than those residing on the road, from using the road, and where she could, she stopped them.

It was said in the oral argument by counsel for the city that he understood it to be a *concessum* that the width of the road was forty feet. But in the brief of the plaintiff we find this language: "We cannot conceive how it can be argued that it was then forty feet wide, in the absence of any testimony to that effect, especially as Nellie B. Yost testified 'We built a road twenty feet wide from Garrison avenue to get in.' How can it be assumed that the Bonner road called for in the Moog deed was not this twenty-foot road, and if so, this would be the road which was dedicated, and the northern half of the present Bonner road, now forty feet wide, would still be not dedicated, and it was only for the northern half that any damages were asked." Therefore, we must consider the case as we find it presented to us by the record.

The only evidence as to the width of Bonner road is that of Mrs. Yost, and she says that it was laid out by her twenty feet wide. If the road has since been widened there is no evidence that it had been done at the time of the conveyance to Mrs. Moog. It has not been shown that at the time of such conveyance the road was more than twenty feet in width, and the burden was upon the defendant to prove this fact. If the road at such time was but twenty feet wide, the twenty feet of land now spoken of as the northern half of said road, was not then in the bed of the road, and could not have been dedicated under the grant to Mrs. Moog, and as we have already said, there is no evidence showing that it has otherwise been dedicated.

There is no dedication of the above mentioned strip of land twenty feet in width, whatever conclusion might be

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reached as to the remaining twenty feet of the road, which we are not called upon in this case to decide. And having reached this conclusion there is no need of our passing upon any of the exceptions of the city except those touching the question of damages and benefits.

The only granted prayer of petitioner affecting the question of damages is the fourth, which states the measure of damages as to the ten-foot strip of land to be used in widening Bonner road. By it the Court was asked to instruct the jury "that in awarding damages to the petitioner they must take into consideration the value of his property before Bonner road has been widened ten feet, and the value of said property after it has been widened ten feet, and the measure of damages is the difference between what they find the aforesaid value to be." In connection with this prayer the Court granted the third, fourth, fifth, seventh, eighth and fourteenth prayers of the city, which the Reporter is asked to insert in the statement of the case.

The law of this case as to the damages to be allowed and the benefits to be assessed as presented by the petitioner's fourth prayer and the city's granted prayers as stated above, is in our opinion, as favorable to the city, as could be asked for by it.

After the witness Coale, a real estate agent, had testified as an expert to the value of the strip of land twenty feet wide, forming the northern half of Bonner road, subject to the rights of the grantees of Mrs. Yost to use the same, he was asked the value of the ten-foot strip which was to be used in widening the said road. The question was objected to by the City and the objection being overruled the twenty-fifth exception was taken, which is the first exception to the testimony touching upon the question of damages or benefits. The twenty-sixth exception is upon the ruling of the Court in permitting the witness Bond, also a real estate agent, to be asked the value of the twenty-foot strip of land. If to these questions the witnesses gave their estimates of the value of

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the lands mentioned, it was open to the City upon cross-examination to inquire of them how and in what manner they arrived at such valuations, and to ascertain whether the methods by which they arrived at such valuation were the proper methods to be employed in such cases, and also to inquire as to the facts considered by them in arriving at such estimates of value.

The objections are to the questions and not to the answers and we can discover no reversible errors of the Court in permitting the questions to be asked, nor do we find any reversible error in the ruling of the Court upon the twenty-seventh exception. In the twenty-eighth exception the Court was asked to strike out all testimony of the witness Bond "in reference to the value of the road or any land forming the bed or a portion of the bed of Bonner road." This the Court refused to do and we find no error in its ruling thereon. There was at least some evidence that was properly admitted, that was, by this motion, asked to be stricken out. *Jessup* v. *State,* 117 Md. 122.

The twenty-ninth exception is to the ruling of the Court in striking out the testimony of Clarence W. Biddle, assistant clerk to the Appeal Tax Court, who testified that prior to the opening of Bonner road the whole tract was assessed for taxes; and that after it was opened the assessment was removed from the bed of the road, but increased as to the remainder of the land. On cross-examination he admitted that the beds of private streets or roads were no longer taxed or assessed, and therefore there was no distinction between this road and other private roads in respect to assessments. Upon the motion of the petitioner this evidence was stricken out. Bernard was subsequently put upon the stand and the offer was made to show by him the reason that Bonner road was not assessed, that is, the land forming the bed of the road, but he was not permitted to testify in relation thereto. This forms the thirtieth exception. In these rulings we think the Court committed no error. We cannot see the

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force and effect of this testimony, if admitted, upon the issues here presented, especially in view of the fact that we hold there was no dedication of the strip of land concerning which the inquiry was made.

The thirty-first, thirty-second and thirty-third exceptions are to the rulings of the Court in not permitting certain questions to be asked the City's witness Bernard, as to his method of reaching the value of the land sought to be condemned. The record discloses, without stating what was said by the witness, that he thereafter testified as to the value of the property to be taken by the City, the benefits to the remaining portions of the property of the petitioner and as to his "means of arriving at the value of the same." We are therefore unable to say that the City is injured by these rulings, for it may be that he was therefore permitted, in stating the means or methods by which he arrived at such valuation, to give in evidence, that which was excluded by the rulings complained of and therefore we cannot say that such errors, if errors at all, were reversible errors. What we have said as to the thirty-first, thirty-second and thirty-third exceptions also applies to the thirty-fourth and thirty-fifth exceptions.

In the cross-appeal of the petitioner there are but two exceptions, one to the admission of testimony and the other to the ruling of the Court upon the prayers. We will, however, not discuss or pass upon the rulings of the Court presented by these exceptions, for it is apparent to us from an examination of the whole case, that the rulings complained of have worked no injury to the petitioner and should it be held that the Court has erred in either or both of these rulings there is no reversible error. *W. U. Tel. Co.* v. *Lehman*, 105 Md. 452. The judgment appealed from will be affirmed.

Judgment affirmed, with costs to the appellee in each appeal.

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OTTO BREGENZER
vs.
ABRAM G. HUTZLER.

Reversal: harmless error.

To justify a reversal on account of erroneous rulings, it must be apparent from the record that some injury was thereby done to the party complaining. **p. 386**

Decided June 26th, 1913.

Appeal from the Court of Common Pleas of Baltimore City (DUFFY, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wells & McCormick, for the appellant.

Enos S. Stockbridge and *W. Calvin Chesnut* (with whom were *Gans & Haman* on the brief), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

The appellee in this case recovered a judgment against the appellant in a case for damages for injuries to himself and automobile received in a collision between the automobiles of each, occasioned by the alleged negligent management of that of the appellant. The case was tried before the Court, sitting as judge and jury.

The collision occurred in Baltimore County at the intersection of Falls road and Lake avenue. At this point Falls road is practically level and runs north and south. Lake avenue runs from the east to Falls road, where it ends, making a sharp descent as it approaches Falls roads. On the southeast corner of the intersection there is a store building

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which obstructs the view of those traveling to the north on Falls road to objects on Lake avenue, and, of course, obstructs the view of one traveling to the west on Lake avenue to objects to the south of the intersection of Falls road.

The testimony was conflicting as to the manner and cause of the collision; but the testimony offered by the appellee and the other occupants of his car, two relatives and a chauffeur, was in substance that they were running north on the extreme right-hand side of Falls road at a speed of 15 or 18 miles an hour. When they approached Lake avenue the car was slowed down to 10 or 12 miles an hour, and the horn blown. Just as they reached Lake avenue they saw the car of appellant running at 20 or 25 miles an hour coming down the avenue making directly at them on the southeast corner. To avoid the collision, which seemed certain because they were so close upon one another, the car of appellee was swerved to the left in the endeavor to allow the car of appellant to pass on right of appellee; but the appellee's car was struck at about the right rear wheel and upset, fastening all the occupants beneath. The car of appellee was a seven-passenger touring car of the Packard make, and had cost the appellee $5,000 six months before. An expert mechanic from the shop of the manufacturer testified, after having examined the car the day of the accident, that it would have cost $1,000 to have repaired the broken and injured parts, giving in detail the broken parts and the cost price of each. The appellee traded the broken car in for a new one, at a valuation of $2,500. That the car was in excellent condition before the accident. One thumb of appellee was broken in three places, cannot be flexed, and is permanently injured; a finger nail was torn out; a gash, to the bone, in the thumb extending its length; and one leg hurt. The doctors' bills amounted to $98.

The testimony of appellant, and four of the five other occupants of his car, was to the effect that they were running down the grade of Lake avenue, on the right-hand side, at a speed of 4 or 5 miles an hour. That as they reached the cen-

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ter of Falls road the car of the appellee was coming north at a speed of 25 miles an hour, and instead of keeping to the right of the road the car of appellee turned to the left in front of appellant's car, and thus was struck. A witness, with experience at repairing cars, testified that he had examined the damaged car and gave as his estimate $476 for the cost of repairing it. Five witnesses were produced by the appellee who testified in corroboration of the occupants of appellee's car as to the speed of the respective cars, one of whom put the speed of the appellant's car as high as 45 miles.

Four prayers were offered by the appellee, and six by the appellant; all being granted but one of the appellant's. There were no exceptions taken to the ruling on the prayers. The issues were based upon the provisions of sections 144, 145 and 154 of Article 56 of the Code (Bagby's), and negligence claimed in that the provisions of those sections, dealing with speed, control, and manner of turning automobiles at intersections of streets, were violated. The prayers fairly, clearly and correctly stated the law applicable to the facts of the case.

A judgment was entered by the Court for $1,510, and the claim of the appellant to a reversal rests upon exceptions to testimony.

We have carefully considered each exception. They all deal with the admission of testimony for the appellee, and none with the exclusion of any of the appellant's.

In the short foregoing recital of the testimony we have studiously avoided giving any testimony which involved any of the exceptions. We deem it unnecessary to set out the exceptions, for we have reached the conclusion that, although there was error committed in some of the rulings, we, nevertheless, are of the opinion that there was no prejudice done the appellant thereby. It is firmly and almost universally established that to justify a reversal it must be apparent that some injury was done the party complaining by the erroneous ruling. We will therefore affirm the judgment.

Judgment affirmed, with costs to appellee.

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CLARA WHITTINGTON
vs.
THE COMMISSIONERS OF CRISFIELD.

Streets: dedication; intention of grantor; reference in deeds to streets as boundaries; acceptance by municipal authority; delay in—; user by public.

The dedication of a street to the public use by plats or deeds does not make it a public highway; such conveyance does not become final and irrevocable unless there has been an acceptance of it on the part of the public authorities. p. 392

Where user or prescription is relied upon to establish a public highway, it must be an uninterrupted user by the public for at least twenty years; and such a user for a less period of time will not suffice. p. 393

Where a municipality never formally accepted a street that had been so dedicated and laid out, and never made any repairs on it or exercised control over it, and where the use the public made of it had been but slight, it was *held,* that there was no evidence sufficient to justify the inference that the street had been accepted as a public street or highway. p. 393

Mere delay in the acceptance of a dedication will not bar the right of a municipality to control or open such a street p. 393

But where a street that has been dedicated to the public had never been accepted by the municipality, it was *held,* that one who had for forty years occupied a dwelling in the bed of the street could not be dispossessed thereof or the building removed, without just compensation. p. 393

An appeal will not be dismissed for failure to transmit the record in time, when it appears that the delay was attributable to the Clerk of the Court. p. 395

Decided June 26th, 1913.

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Appeal from the Circuit Court for Somerset County, in Equity (JONES, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

James E. Ellegood, for the appellant.

Miles & Myers and *Clarence P. Lankford,* submitted a brief for the appellee.

BURKE, J., delivered the opinion of the Court.

Upon a bill filed by the appellant the Circuit Court for Somerset County issued an injunction restraining the appellee, a municipal corporation, its servants, and agents from entering upon and trespassing upon the property mentioned in the bill, and from removing therefrom any of the buildings thereon or otherwise damaging the same. An answer was filed by the appellee. The case was heard upon the bill, answer, replication and testimony, and from the order of the Court below dissolving the injunction this appeal was taken.

It is alleged in the bill that the appellant is the owner in fee of a lot of ground in Crisfield fronting on Main street, and extending back sixty or seventy feet to the line of the New York, Philadelphia and Norfolk Railroad; that the lot is improved by a dwelling house and store erected thereon thirty-five years ago; that she and those under whom she claims have been in the continuous, exclusive, notorious, and adverse possession of the lot for more than thirty-five years as well as holding the same by patent from the State and by mesne conveyance and inheritance; that the defendant in 1908 had entered upon the premises and removed therefrom a small building, and had notified her in writing to remove the remaining building within sixty days from November

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30th, 1909, otherwise it would remove the same at her expense.

The answer of the appellee denied that the plaintiff is the owner of the lot, and asserted that it was a public street or highway, and from time to time had been so used during the period mentioned in the bill, although obstructed for many years by the building erected thereon; that the land had been dedicated to public use by its owners; that the defendant had accepted said dedication, and exercised the rights of user thereof, and has claimed and still claims the same to be a public street or highway.

There are many other allegations contained in the bill and answer presenting the conflicting claims of the parties, but the statements we have made indicates sufficiently the real question in this case. It is this: Is the lot of ground claimed by the appellant a public street or highway? Before the appellee should be permitted to enter upon the premises and remove the appellant's buildings, its right to do so should be established by clear and convincing facts. The law will not permit such an act where the right is doubtful, or where it would be against equity and good conscience.

The record contains a great deal of testimony. We have given it careful consideration, and, without discussing it in detail, we will refer to those facts which we consider essential to the decision of the controlling question presented by the pleadings.

About the year 1858 a patent was issued by the State to Michael Somers, Hance Lawson and John W. Crisfield for a tract of low or marsh land on which the town of Crisfield is now in part built, and about the year 1868 they had the land surveyed and platted into lots and proposed streets. One of the streets shown on the plat, which was recorded in the office of the clerk of Somerset County, was called Cross street (now known as Seventh street), which ran from Somer's Cove on one side to Annamessex River on the other, and crossing also the Eastern Shore Railroad, now known as

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the New York, Philadelphia and Norfolk Railroad, and extending about one-fourth of a mile across the marsh land to the river.

Another street, now called Main street, is shown on the plat. This street runs practically east and west, and in close proximity to the railroad.

Cross street, as shown upon the plat, is sixty feet wide, and the lot of ground in dispute, in this case, constitutes the bed of what is claimed to be Cross street between Main street and the railroad.

After making the plat, the owners had another plat made which narrowed Cross or Seventh street from sixty feet to fifty feet, and stopped the street at the intersection of Main street opposite the land in controversy.

Hance Lawson, one of the owners of the land, erected a store building in the bed of Cross street as shown on the plat of 1868. The exact date when this building was erected, whether before or after the making of that plat, is not certainly fixed by the evidence,—one witness, Elijah T. Somers, testified that it was built by his father for Mr. Lawson about 1867 or 1868. Afterwards some improvements to the store were made by Mr. Lawson, and during this work some dispute or question seems to have arisen between him and the Commissioners of the town as to his rights in the premises and John W. Crisfield who was a member of the bar, was called in, and at a meeting held on the ground the matter was apparently settled in favor of the right of Mr. Lawson to make the improvement on the lot. This occurred, according to the evidence of one of the witnesses, about twenty-five years before the institution of this suit. The building erected by Mr. Lawson was used as a dwelling on the second floor and as a store below, and one of the witnesses testified that he had been living on the property for thirty-five years continuously.

John W. Crisfield, one of the patentees and owners, conveyed his one-third undivided interest in the property to

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Thomas J. Dixon and William H. Roach, who held as tenants in common with Somers and Lawson. Mr. Roach died in 1888, and upon appropriate proceedings had in the Circuit Court for Somerset County a decree was passed for the sale of all the property held in common, and N. Walter Dixon was appointed trustee to make the sale. He sold the lot now in dispute at public sale on the 18th day of January, 1890, after it had been, so far as the appellee is concerned, in the continuous and undisputed possession of Hance Lawson for about twenty-two years, to John H. Holland, and reported the sale to the Court. The sale was finally ratified, the purchase price paid, and a deed executed and delivered by the trusteee to the purchaser.

In the trustee's report of sale the property sold was described as follows:

> "All that lot north of Main street, where stands store house occupied by Noah Sterling, and lying between the premises formerly belonging to Elijah Maddrix and the premises formerly belonging to George L. Moore, and extending from Main street to the railroad premises, building not included, it being the personal property of Hance Lawson's estate. And your trustee sold said lot to John H. Holland at and for the sum of two hundred and fifty-five dollars, he being at that sum the highest bidder therefor. And the said Holland elected the all-cash terms of sale, and has fully paid said purchase money. And your trustee reports that by agreement with Emiline Lawson, widow of Hance Lawson, he sold all of said real estate clear of any incumbrance of her dower, she electing to take in lieu thereof a sum to be allowed by the Court; which agreement in writing is filed herewith."

In February, 1891, Mr. Holland bought from the administrator of Hance Lawson the building upon the property consisting of the store house and dwelling. He built a shoe shop on the lot, which the appellee has removed, and he also

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put up a back building and made other improvements to the property. He died in 1905, intestate, leaving as his only heirs at law two daughters,—the appellant and Mrs. Mannie L. Somers, and by a deed dated July 15th, 1905, from Mrs. Somers and her husband this property, with the improvements, was conveyed to the appellant, and she has since, through her tenants, been in the possession of the same. The property was assessed by the appellee to Lawson, Holland and the appellant during their respective possession and these taxes were paid by the several owners. The combined possession of these owners have extended over a period of forty years.

The evidence is conflicting upon the question as to whether Hance Lawson and John H. Holland recognized the right of the public to the use of Seventh street at the point in dispute; but it strongly tends to support the appellant's position that they claimed the absolute title to and ownership of the property. But the appellee claims that the building is located in the bed of a public highway of the town of Crisfield, and constitutes a nuisance which it has the right to abate. It maintains that Seventh street was dedicated to public use by the plats and deeds offered in evidence, and that this dedication has been accepted by the public, and that the obstruction of the highway is a public wrong which can never grow by prescription into a private right, and that no facts or circumstances are shown from which an equitable estoppel against the public in favor of the appellant can arise. It may be conceded that by the plats and deeds offered in evidence Seventh street was dedicated by the owners to public use. But the dedication of the street to public use by the plats and deeds does not make the street a public highway. Such a conveyance does not become final and irrevocable until there has been an acceptance of it on the part of the public authorities. *Baltimore* v. *Broumel,* 86 Md. 153; *Valentine* v. *Hagerstown,* 86 Md. 486; *New Windsor* v. *Stocksdale,* 95 Md. 212.

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It is said in *Kennedy* v. *Cumberland,* 65 Md. 514, that "any individual may lay out a thoroughfare through his land, but such dedication does not impose upon the county or municipality the duty of improving it or keeping it in repair. There must be an aceptance of the dedication before this duty can arise."

"Not only is such an acceptance necessary, but it must be proved by the party who asserts the way to be a public way; and it may be proved when expressed by the record, or it may be implied from repairs made and ordered, or knowingly paid for by the authority which has the legal power to adopt a street or highway, or from long user by the public." *State, use of James,* v. *Kent County,* 83 Md. 377. Where user or prescription is relied on to establish a public highway, it must be an uninterrupted user by the public for at least twenty years, and such user for any less period of time will not suffice. *Kennedy* v. *Cumberland, supra.*

The defendant never made any repairs to this portion of Seventh street, and never in any manner exercised any control over the same, until the controversy in this case arose, when a few cart loads of cinders were placed upon the street by its direction. No other act of acceptance on the part of the town authorities has been shown, and the character of the user made by the public is wholly insufficient to justify the inference that it had been accepted as a public street or highway.

Mere delay in the acceptance of a dedication will not bar the right of the municipality to assume control or open a street. But upon the facts disclosed by this record the appellee should not be permitted to dispossess the appellant and remove her building without making just compensation.

It is said in 9 *Amer. & Eng. Ency. of Law* 50: "The acceptance may immediately follow the dedication by the owner, and the dedication be completed at once, for no particular time is necessary to establish a dedication. An immediate acceptance, however, is not necessary in order to secure

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the rights of the public and prevent the owner from recalling his offer, although the offer of dedication must be accepted within a reasonable time or the public will be estopped from asserting any rights to the land offered by the owner for public uses. What is a reasonable time is a question of fact and depends upon all the circumstances of the case. Where a new town is laid out it is not expected that all the streets and parks will be needed by the public at once. Acceptance by use and improvements whenever the growth of a town demands it will be sufficient; and the owner cannot deny the dedication or object that it was not accepted within a reasonable time unless the municipality has shown affirmatively an intent not to accept, or has allowed the owner to make valuable improvements without objections so that he would be materially injured were the dedication insisted upon."

The store and dwelling were erected by Mr. Lawson many years ago with the knowledge and acquiescence of the defendant. It has assessed it as private property, and collected taxes upon it for approximately forty years. The defendant had full notice for all this time that the appellant and those under whom she claims were in possession claiming title, and it was its duty under the circumstances to have interposed to save its rights, and it is now estopped to accept the dedication to public use and inflict the injury it proposes to do upon the plaintiff.

JUDGE DILLON, in his work on *Municipal Corporations,* 4th Ed., sec. 675, states the rule which we think should be applied in this case: "It will, perhaps, be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public. But if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitations enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitations statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing

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the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the Courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require."

There is nothing in the record to identify the fifty foot strip of land mentioned in the deed from Hance Lawson and others to the appellee dated September 2nd, 1875, or to show whether the building which the appellee seeks to remove is located on that land.

A motion has been made by the appellee to dismiss the appeal, because the transcript of the record was not made and transmitted to this Court within three months from the time of the appeal prayed, as required by section 33, Article 5 of the Code. The order for appeal was entered on December 30th, 1912, and the record was filed in this Court on April 3rd, 1913. On the 22nd of February, 1913, the appellant's counsel sent written instructions to the clerk as to what papers he wished to be included in the transcript. An examination of the affidavits and exhibits show that the clerk had about five weeks to make up and transmit a record of about one hundred and seventy-five pages. This would appear to have been ample time for doing such work, and the transcript at any rate would have been filed here in time had not the clerk stopped the work upon it while waiting for certain papers suitable for plats, and to do other work. It cannot be said that the delay in the transmission of the record was due wholly to the appellant, or that she or her counsel has been guilty of such *laches* as to forfeit her right of appeal, and, therefore, the motion to dismiss is denied.

Order reversed and cause remanded, with directions that the injunction issued by virtue of the order of the 29th of January, 1910, be made perpetual, the appellee to pay the costs above and below.

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JAMES M. MUNROE AND JOHN S. STRAHORN

vs.

MARY L. WHITAKER ET ALS.

Attorney's fees: when not chargeable to fund.

Before a fee for legal services can be sustained as a charge against the fund, there must be a contract for services, expressly made, or implied by law from the facts of the case. p. 404

Otherwise the party who engages counsel must pay for the services. p. 404

The mere fact that the services were a benefit to all the parties concerned is not, of itself, sufficient to justify the charge out of the fund. p. 404

Certain parties employed counsel to represent them in certain proceedings, and certain other parties employed other counsel, who conducted proceedings in opposition to the wishes of the former parties, and, as these claimed, even against their interest, and which proceedings such parties did not even sanction by inaction, but actively opposed; it was *held*, that in such a case the attorneys could not be paid their fees out of the common fund, but must look for their pay to the parties employing them. pp. 405, 406

Decided June 26th, 1913.

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Appeal from the Circuit Court for Cecil County, in Equity (ADKINS and HOPPER, JJ.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER and STOCKBRIDGE, JJ.

Frank Gosnell and *Robert Moss,* for the appellant.

Frederick T. Haines, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The single question presented in this case, is whether the Court below committed an error in refusing to allow a counsel fee of ten thousand dollars to the appellants out of the common fund of the trust estate of George P. Whitaker, late of Cecil County, deceased, upon the facts disclosed by the record now before us.

The question is raised by exceptions to the report and account of the auditor filed on the 10th day of May, 1912, in the case of *Updegraff et al.* v. *Whitaker et al.*, in the Circuit Court for Cecil County, distributing the trust estate among the descendants of the devisees and legatees named in the will of Mr. Whitaker.

On the 18th of January, 1912, the appellants filed a petition in the case asking the Court, "to allow them a reasonable compensation for their services as solicitors and attorneys in the case to be paid out of the portion of the estate to be distributed under the order of the Court."

The petition sets out the grounds upon which they rely for compensation, and was accompanied by a recommendation of certain members of the bar of the State named on the certificate, that the fee was a moderate compensation for their

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services, and was a proper one to be allowed, and to be paid out of the estate.

Upon this petition and recommendation, the Circuit Court for Cecil County, on the 5th day of March, 1912, directed the fee to be allowed by the auditor in the account, thereafter to be stated, subject to all proper exceptions and directed a copy of the petition and order to be served upon each of the parties in interest or their attorneys before the audit was filed.

On the 18th of September, 1912, the report and account of the auditor as stated was finally ratified and confirmed, except as to the counsel fees allowed in the audit, and they were reserved for the future action of the Court.

Subsequently, on the 3rd of March, 1913, two agreements were filed, by the attorneys representing the appellants and the appellees, wherein it was agreed, that the formal taking of testimony on the petition, and the exceptions to the audit, should be waived, and the testimony set out in the agreements should be substituted therefor, and used at the hearing, in lieu of the usual taking of testimony.

On the 17th of March, 1913, the Court below upon hearing and after arguments, sustained the exceptions to the allowance by the auditor of the fee in question and directed the fund to be distributed to the parties entitled. From this decree, this appeal has been taken.

The material averments of the petition are substantially as follows:

First—That upon employment by certain of the parties in interest the petitioners instituted proceedings in the Circuit Court for Cecil County by a proper bill in equity to require an accounting by the executor and trustee, Joseph Coudon, and to require a bond of the executor and trustee, which bond had never been given, and to require a distribution of the large amount of money which had accumulated in the hands of the executor and trustee undistributed, as required by the will, over and above the amounts set aside under the terms

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of the will for the maintenance of the widow of the testator during her life or widowhood.

Second—That the cause was prosecuted successfully in the Circuit Court for Cecil County, in Equity, and also in the Court of Appeals of Maryland, the decree of the lower Court ordering the relief prayed for in the bill of complaint having been affirmed by the latter Court.

Third—That the result of the efforts of the petitioners has inured to the benefit of all parties interested in the estate, by securing an order requiring the surviving executor and trustee, Coudon, to give bond for the faithful administration of his trust, and by securing an immediate distribution of the estate of George P. Whitaker, in accordance with the provisions of his will, the amount now in hand for distribution amounting to about $325,000.

Fourth—That the whole estate for which the executor, Coudon, as trustee is responsible, and for which no bond whatever had heretofore been given, amounted to $370,-978.28, as shown by the 17th and last account filed by the executor, Coudon, December 13th, 1911, as of January 1st, 1911; so that the actual assets now in the hands of the executor and trustee amount to about the sum of four hundred thousand dollars ($400,000.00).

Fifth—That all the parties who are to participate in the distribution ordered by the Court in this case are equally beneficiaries of the services rendered by the petitioners.

The appellees, who were the defendants in the suit and who represented four-fifths of the estate, resisted the payment of the fee, and assign the following reasons in their brief filed in this Court, against its allowance:

(1) Appellants were employed by the plaintiffs and should look to them for their compensation.

(2) There was no contract expressed or implied between the defendants and the appellants, and in the absence of such contract no additional fee can be allowed out of the estate.

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(3) The defendants did not employ the appellants, nor countenance their employment in any way.

(4) The defendants were opposed and hostile to the litigation and the objects sought to be attained by it, as being against their interests and contrary to their wishes and desires in the matter.

(5) That the defendants were not benefited in any particular by the results accomplished in the litigation.

(6) That the defendants vigorously contested the whole proceeding, and it would be unjust and inequitable to require them to pay for services which they did not want nor acquiesce in, services that resulted in a litigation which they strenuously opposed, and the result of which was not beneficial or agreeable to them.

(7) There was paid to said appellants in accordance with their contract a fee that was full and ample compensation for all of the services performed.

The evidence upon the part of the appellants as set out in the agreement No. 2 filed in the case, is to the effect:

(1) That they were employed in this case solely by the plaintiffs.

(2) That they had an agreement with their clients to prosecute their suit for them for five per cent. (5%) of whatever amount was paid to their clients under any distribution brought about through their efforts in the suit.

(3) That on September 23rd, 1912, they received from their clients the sum of $3,821.89, being the amount due them under the agreement out of the sums paid to the plaintiffs on that date.

(4) That they did not agree that this amount should be their sole compensation in the cause, but on the contrary it was their expectation to ask for a fee from the whole estate, as had been done; provided, their clients were not in any way affected thereby.

(5) That at the time they asked for the fee of $10,000.00 they agreed with their clients that of whatever fee was al-

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lowed them under their petition for same the share thereof which would otherwise be awarded to their clients, if no such fee was paid out of the whole estate. would be returned to their clients.

(6) That at the time of the payment of $3 821,89 a formal assignment of the portion of the fee (being 1/5 thereof) was made to the plaintiffs, so that in any event, only $8,000.00 of the fee can come into the hands of the appellants.

The evidence upon the part of the appellees as incorporated in agreement No. 1, filed in the case, is to the following effect:

(1) That each of the defendants has a legal or equitable interest in a considerable number of the shares of the capital stock of the Whitaker Iron Company and the Whitaker-Glessner Company, and each of their male defendants is a director in and the same are officers in either one or both of the companies; the companies being those mentioned in the bill of complaint.

(2) That each of the defendants has not been benefited by the decree passed in this cause and the distribution made thereunder.

(3) That each was familiar with the facts in connection with the estate, the investment of its funds and the condition of its affairs, and was perfectly willing to allow the same to remain as they were until the death of Mary L. Whitaker. the life tenant, and that each of the defendants did not want any distribution of any portion of the estate prior to her death, and was at the time of the institution of this suit and ever since opposed to the distribution or partial distribution being made.

(4) That upon the institution of this suit all of the defendants joined in retaining George A. Blake and Frederick T. Haines as their solicitors to represent and appear for them in this litigation and to oppose vigorously the prosecution of the suit by the plaintiffs and to do everything that could

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legally and properly be done to defeat a distribution as sought in the bill filed in the cause.

(5) That at the time the suit was begun and ever since, the defendants desired the residuary estate of George P. Whitaker, deceased, to remain undistributed until the death of Mary L. Whitaker, because they believed it was to the advantage of the residuary legatees under the will of the deceased, for the reason that the estate's funds were invested in a way that they considered safe, and that produced a much higher income than could otherwise be obtained; that the investment was in their opinion most desirable and advantageous, and it is a fact that it caused the residuary estate to grow in twenty years from thirty thousand dollars ($30,000) to three hundred thousand dollars ($300,000); that the investment was particularly pleasing to them for the additional reason that it was with the above-named companies in which these defendants were stockholders and with the affairs and business of which these defendants were perfectly familiar; that they did not have need of their respective shares of the residuary estate or any part thereof at the time of the institution of this siut nor since, nor of the income therefrom, but preferred, because of the excellent investment of the same and the consequent great increase thereof, to have said residuary remain where and as it was until the death of said Mary L. Whitaker; that said Mary L. Whitaker is now at least eighty years of age.

That the defendants did not employ the solicitors of the plaintiffs, to wit, James M. Munroe and John S. Strahorn, nor either of them, nor agree to become in any manner responsible for their fees, or any portion thereof; that they did not desire, solicit or sanction their services, and now state most emphatically that the solicitors have not done anything for them, nor benefited them in any particular in this litigation, or in any other manner, but on the contrary, what the solicitors have accomplished, to wit, the distribution of a portion of the residuary estate, is against the interest of the

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defendants, contrary to their wishes and constitutes that which they did not want to occur until the death of Mary L. Whitaker; that they do not owe said solicitors anything, and object to paying the fee of ten thousand dollars ($10,-000.00) asked for, or any portion thereof; that the solicitors were employed by the plaintiffs in this cause, and said employment and the institution of this suit was hostile to the defendants and each of them, and against their interests and without their consent or approval, and that they were opposed to the object of the suit and vigorously resisted it, and did not willingly accept said distribution, but were compelled by order of Court to do so.

Upon the facts which we have stated, and those disclosed by the record, we concur in the conclusion reached by the Court below, that the appellants are not entitled to be compensated out of the common fund for the services rendered, as the attorneys for the plaintiffs, as claimed by them.

The counsel fee in controversy in this case, we think, comes within the principles laid down and announced by this Court in *McGraw* v. *Canton,* 74 Md. 554, and *B. & O. R. R. Co.* v. *Brown,* 79 Md. 442, and are decisive of the questions presented on this appeal. These cases have been cited and approved by this Court in the more recent cases of *Lyon* v. *Hires,* 91 Md. 416; *Title Co.* v. *Burdette,* 104 Md. 666; *Griffith* v. *Dale,* 109 Md. 700, and *Walker* v. *Waters,* 118 Md. 208, and are clearly controlling upon the facts of this case.

The cases of *Davis* v. *Gemmell,* 73 Md. 530, and *Terminal Freezing and Heating Company* v. *Whitelock et al.,* 120 Md. 408, relied upon by the appellants, are unlike this and were decided upon a dissimilar state of facts and upon principles not applicable in this case.

In the case at bar, it is not disputed, that the appellants were employed exclusively by the plaintiffs, who owned one-fifth of the estate, and they have been paid a fee of $3,821.89

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for the services rendered by them out of the fund distributed to their clients in accordance with their contract. They were not employed by the defendants nor were their services either accepted, adopted or acquiesced in by the defendants.

The testimony of the appellants themselves is, that they had an agreement with their clients to prosecute their suit for them for five per cent. (5%) of whatever amount was paid to their clients under any distribution brought about through their efforts in the suit, and they have been paid this sum.

The result of the allowance of the fee, on the facts of this case, would be to require the plaintiffs to pay the sum of two thousand dollars out of the $76,435.70 of their distributive share, and the defendants, the owners of four-fifths of the estate, to pay the sum of $8.000.00. Practically this conclusion would refund to the plaintiffs' clients the sum of $1,821.89, paid them out of the fee of $3,821.89, and would allow the appellants an additional sum of $8,000.00 to be paid by these defendants. As was said by JUDGE PAGE in *Lyon* v. *Hires,* 91 Md. 418, "It is difficult to perceive any ground according to well established principles, upon which these attorneys' fees can in this case be made a charge upon the common fund. It is true the suit resulted in a common benefit to both appellees and appellants, but that alone is not sufficient. Before a legal charge can be sustained there must be a contract of employment, either expressly made or superinduced by the law upon the facts of the case, *McGraw* v. *Canton,* 74 Md. 559. Unless such contract express or implied can be established, the party who engages counsel must pay for his services." He further said: "The appellants in this case acted solely for themselves in prosecuting the New Jersey suit. Their object was to recover the legacy for their own benefit, and having done so without any arrangement in fact, or to be implied by the circumstances. with the appellees, the latter can not be called upon to contribute out of their share of the fund to the payment of

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counsel fees." And to the same effect are the cases of *Carter* v. *Wake,* L. R. 4 Ch. Div. 605; *Wilson* v. *Kelly,* 30 S. C. 483; *Ex Parte Lynch,* 25 S. C. 193; *Hand* v. *R. R. Co.,* 21 S. C. 178; *Grimball* v. *Cruse,* 70 Ala. 544; *Hill* v. *Childress,* 18 Tenn. 515; *Roselius* v. *Delachaise,* 5 La. (Annual Rep.) 481.

In *Koenig* v. *Ward,* 104 Md. 566, it was said: The purpose and object of the proceedings were, not to recover the estate or to protect it from spoilation, but to determine who should get it, and in what proportions. The practical question litigated and settled was one of distributive right, to wit, whether the estate should be divided between the beneficiaries under the will or the heirs-at-law and distributees of the decedent. It was not an issue between the estate and third parties, but one *inter partes,* those claiming to be interested in the distribution. Under these circumstances, it was held in that case that counsel fees should not be allowed out of the estate.

In the case at bar the proof shows that the defendants employed counsel to represent them in the litigation, and the proceedings were conducted on the part of the plaintiffs in opposition to their wishes and as claimed, adverse to their interest. They did not stand by and sanction the services, but interferred and objected, and now claim that they were not benefited by the litigation in any particular, except that an existing fund has been distributed a very few years earlier than it otherwise would have been, in accordance with the wishes of the plaintiffs and in opposition to the wishes of the defendants, and they would have received it later on, even if said litigation had not been instituted.

The fact that a bond was required of the trustee, although none was directed by the will, was a matter entirely within the power of a Court of Equity, after having assumed jurisdiction of the estate, according to the circumstances of the case. It must be assumed that a Court having charge of a fund, will do what is necessary or proper to protect it, either upon direct application or when it appears that the circum-

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stances of the case require it. *Smith* v. *Michael*, 113 Md. 18; *Myers* v. *Safe Deposit Co.*, 73 Md. 413; *Oesterla* v. *Gaither*, 90 Md. 40.

It will be seen that the principal relief sought by the bill filed by the plaintiffs in this case was a distribution of the funds of the residuary estate of Mr. Whitaker, and a construction of his will, and this was determined in *Coudon* v. *Updegraf*, 117 Md. 71.

The position of the plaintiffs on the record in that case was one of absolute antagonism and hostility to the defendants, and the plaintiffs were opposed by all of the defendants in the litigation.

We have been referred to no case in this, or any other jurisdiction, where counsel fees have been allowed out of a common fund for legal services rendered on a state of case as disclosed by this record.

We must deal with the case as presented by the record, and on the well settled principles of law established by the decisions of this Court, and so treating it the order of the Circuit Court for Cecil County disallowing the fee will be affirmed.

Order affirmed, with costs.

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THE BALTIMORE & OHIO RAILROAD COMPANY

vs.

LOUIS SILBEREISEN.

Injunction: order restraining the complainant pending the final proceedings; Code, Article 16, section 199; Court to retain jurisdiction pending trial of issues as to legal title; protection of railroad travel. Trespass q. c. f.: railroad embankments; encroachments of—. Ejectment: title of plaintiff.

One who owned land adjacent to and bordering along a railroad embankment filed a bill, alleging that the railroad was encroaching upon his land by extending the embankment and by placing dirt, or letting it fall and extend beyond the railroad's lines, and prayed for an injunction to restrain the railroad from such acts; pending the injunction proceedings, the complainant began to cut away part of the embankment that he claimed encroached upon his land. The railroad filed a petition alleging that such cutting away of the embankment weakened the structure and disturbed the stability of the ties and rails, and endangered the lives of the traveling public, and prayed for an order restraining the complainant from interfering with the embankment until the final hearing, and further

prayed that in the meanwhile it might be given leave to make and maintain the embankment in a safe condition for the traveling public and for other relief; at the final hearing, the injunctions and the petition were dismissed without prejudice to any proceedings at law either party might be advised to take. On an appeal by the railroad from the order dissolving the injunction and dismissing the petition, the cause was remanded, (as it was impossible for the Court of Appeals, from the record, to determine the true location of the parties' lines) without affirming or reversing the order appealed from, the Court below to continue the injunction, with the relief prayed by the railroad and to provide for further proceedings at law to have the title determined within a day to be named in its order. p. 420

An action of trespass *quare clausum fregit* will lie to determine questions of title. p. 419

An action of ejectment may involve simply the question of title to a piece of land in regard to the location and boundaries of which there is no dispute, or the contention may be whether the land in controversy, truly surveyed and located, is within the lines of the plaintiff's or defendant's title papers. p. 419

But the plaintiff can only recover provided the title to the disputed tract is in him. p. 419

Under section 199 of Article 16 of the Code of 1912, the Court may, at any stage of the cause or matter, on the application of any party thereto, or party in interest, issue an injunction commanding any party to such a cause or matter to do or abstain from doing any act or acts, etc. p. 413

Decided June 26th, 1913.

Appeal from the Circuit Court for Howard County (FORSYTHE, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

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Francis Neal Park (with whom was *James A. C. Bond* on the brief), for the appellant.

John E. Dempster and *Edward M. Hammond,* for the appellee.

Boyd, C. J., delivered the opinion of the Court.

On November 28th, 1910, the appellee filed a bill of complaint against the appellant, in which he alleged that the railroad company had from time to time dumped a large quantity of earth and cinders upon his land which adjoins its right of way, and had negligently and knowingly allowed a great quantity of earth and cinders to be shoved and forced upon his land because of the failure of the defendant to properly protect the embankment along its right of way. It then alleges that several days before the bill was filed the railroad company did by its agents and employees enter upon a part of the plaintiff's land and was engaged in digging a ditch upon his property, into which they were preparing to place a pipe about thirty inches in diameter, that they were about to cut down and destroy valuable trees on said land, the destruction of which would do great and irremediable mischief and injury to the plaintiff, his property and estate. The bill prayed that the company be restrained and enjoined from entering or digging upon his property, or from cutting down or destroying the trees or any part thereof.

An injunction was issued as prayed, and on January 17th, 1911, an answer was filed, in which the defendant denied the allegations of the bill and demurred to the whole bill, because on its allegations the plaintiff had a plain, adequate and complete remedy at law. Whether the answer overruled the demurrer is now immaterial, as the Court below dismissed the bill and no appeal was taken. Nothing further was done until January 10th, 1913, when the railroad company asked to have the motion for the dissolution of the injunction set down for hearing. An order was passed setting it down for hearing on January 16th, with leave to both sides to offer evidence, but on that date the company, with leave

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of the Court, filed a "motion or petition" consisting of twelve paragraphs, in which it is alleged that on December 9th, 1835, the company acquired by purchase the parcel of land for its right of way and other corporate purposes which is set out in a copy of a deed filed; that it took possession of it and appropriated it to its corporate purposes and uses and constructed over it a high embankment of an average height of about twenty feet to secure the necessary grade, and built its railroad tracks thereon; that it has since the date of the deed held and had possession of the whole of said parcel of land, within the bounds thereof as described in the deed, and has maintained the embankment and tracks and has used and enjoyed the whole extent thereof, without any interference or disturbance until the filing of the injunction by the appellee; that at no time has the company invaded, or in any manner encroached upon the property of Silbereisen by its embankment, works or other railroad structures, and that any change in width or height or in position of said embankments has always been and is now within the limits of the property lines of the company; that on or about November 28th, 1910, in the necessary care and upkeep of the said embankment, and for the purpose of discharging its duty and obligation to provide safe, convenient and quick transportation of its passengers and freight, and wholly within the limits of its own property, it began to lay a drain or pipe line to carry off the surface water, when the injunction was obtained on the untrue and unwarranted statement that the drain and ditch were on the land of the plaintiff, and would cause him irremediable mischief and injury.

It is then alleged that although the defendant company had filed its answer denying the allegations of the bill upon which the injunction was issued, and although the plaintiff did not proceed thereafter in said equity cause, yet on the ——— day of December, 1912, and on divers other days, between that day and the filing of the motion or petition, the plaintiff entered upon the land of the defendant and wrong-

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fully dug up and hauled away the earth and soil for the distance of three hundred feet along the western line of said lot, of the width of four or five feet and of a depth of three feet,—all said acts having been done wholly within the lines of said lot of defendant which was then in its possession; that the plaintiff claims title to a portion of the original tract under a common owner or grantor with the defendant, James Hill, but said Hill conveyed the parcel of ground to defendant in 1835, and did not convey the land which plaintiff claims until December 14th, 1851; that notwithstanding the possession of said lot with the embankments thereon by defendant, and in disregard of the terms of his own deed, and in violation and defiance of the rights of defendant for so many years possessed in undisturbed possession, the plaintiff made the said cut and built a line of fence upon defendant's land; that said cut was made without any previous notice or warning to defendant and whilst the injunction was still outstanding, and that said cut has removed and destroyed the toe of the slope of the embankment and deprived it of the support, stay and anchorage afforded and given since 1835, so that it is now without proper support and stay, and is developing large cracks and fissures because of the removal of the toe of the embankment; that he has given notice to defendant that he will make further encroachments and invasions upon its land by cutting down, digging up and removing more of the embankment.

It is further alleged that since the issuance of the injunction, although it is to be laid upon and through its property, it has not proceeded with the laying of said pipe line, and that the water is damaging and injuring the embankment and property of defendant, and rendering the same unfit for its railroad purposes and uses; that the excavating, removing and hauling away the earth and soil from the said embankment and the action of the surface water upon it, by reason of the wrongful acts of the plaintiff, will, if not restrained, destroy the proper and safe grade for the opera-

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tion of the trains of the defendant and deprive the ties and rails of the tracks of a safe, secure and stable support, "so that public travel, and the movement of freight and trains and engines will be rendered unsafe, uncertain, interrupted and irregular by the sinking and sliding of the said embankment from the causes aforesaid; and will utterly and irreparably ruin and destroy the said embankment for the corporate purposes for which the defendant corporation for so many years past has been, and is now using and employing it," etc.; "that it is absolutely imperative and essential in the discharge of the duties of the defendant corporation as a public carrier of freight and passengers under its charter powers and obligations that leave be granted to the said defendant corporation to repair the mischief and harm done by the said wrongful acts of the plaintiff, by taking the necessary steps and precautions to secure the said embankment from any further sinking, sliding and disintegrating by reason of the said wrongful acts of the said Louis Silbereisen."

The petition then prays (1) that upon final hearing said Silbereisen, his agents, etc., be perpetually enjoined from excavating, removing or hauling away the earth, soil and other material from any part of the said embankment and from any part of the land of defendant corporation within the lines of the deed from James Hill to it; that the said defendant corporation may be quieted in its right to the enjoyment of said land as above set forth, and be decreed to have the right to use and enjoy the same, etc. (2) That in the meantime, and until this cause can be fully heard and determined said Silbereisen be restrained from excavating, removing or hauling away the earth, soil and other material from said embankment, and from any part of the land of defendant contained within the lines of said deed. (3) That in the meantime and until this cause can be fully heard and determined that the railroad company be given leave and

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permission to make the aforesaid embankment safe for public travel, and (4) for general relief.

An order was passed on that, directing that an injunction be issued as prayed in the second paragraph of the prayer for relief and that "Leave be and the same is hereby given to the said Baltimore and Ohio Railroad Company to make the aforesaid embankment safe and secure for public travel and use by the said railroad company in whatever way may be necessary within the limits of the property rights of the said Baltimore and Ohio Railroad Company, provided, however, that if the said Baltimore and Ohio Railroad Company shall, in so doing, encroach upon or enter upon the land of the said Louis Silbereisen, it shall be responsible therefor to him in damages, unless the said company shall otherwise agree with the said Louis Silbereisen."

That petition was filed under section 199 of Article 16 of the Code of 1912, which provides that, "The Court may at any stage of a cause or matter, on the application of any party thereto, or party in interest, by motion or petition, or of its own motion, order the issue of a mandate (affirmative injunction) or injunction, directing and commanding any party to such cause or matter, or any party properly brought before it under the existing practice, to do, or abstain from doing any act or acts," etc. The case of *Horner* v. *Nitsch,* 103 Md. 508, and others cited in the notes to that section, sufficiently sustain the right of the Court to issue an injunction in a case of this kind, and to avoid the necessity of discussing it.

The plaintiff (appellee) filed an answer to the petition in which he denies that the embankment, as at present constructed, is of the same grade, width, slope or elevation it was when originally constructed, and alleges that the railroad company has been constantly moving over its road bed and expanding its embankment. He also alleges that all he did was on his own land and he only removed earth that was on his property. He admits that he has no claim to

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any part of the land conveyed to the defendant by the deed of James Hill. The whole property originally belonged to James Hill and as the deeds under which the appellee claims expressly limit the conveyance of his land to the lines of the property conveyed by said Hill to the railroad company, it is not contended by him that he has any right to the property so conveyed to that company, but the controversy is as to where the dividing lines between the properties are. By agreement the case was set down for final hearing and decree on the bill of complaint, motion or petition of defendant, answers and testimony filed and taken. A large amount of testimony was taken in open Court and on February 27th, 1913, the Court decreed that the orders filed on November 28th, 1910 (granting an injunction to the plaintiff), and January 16, 1913 (granting an injunction to the defendant) be rescinded, and that the petitions upon which they were passed be dismissed without prejudice to any proceedings at law that either of the parties may be advised to take. From the order or decree dissolving the injunction and dismissing the petition of the railroad company it took this appeal.

It will not be out of place to remark that this is the kind of case which could be settled more satisfactorily out of Court than in it, if each party is inclined to recognize the rights of the other. The land in controversy must be of very little value, and while the railroad company has no right to encroach upon the property of the appellee without first acquiring the right to do so by legal means, the evidence tends to show that the drain pipe it was laying when the plaintiff obtained the injunction would have been to the advantage of both parties. If it be conceded that the embankment has spread beyond where it was when first built, that does not in any way settle the correct location of the divisional lines, but if the railroad company has encroached upon the appellee's property, and it is necessary for its charter purposes, it should be purchased or condemned.

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Without deeming it necessary to discuss the evidence on the subject, we are satisfied that we cannot determine from the plats and testimony now before us where the divisional lines in fact are. The locations of neither party as made are sufficiently well established to justify a Court of Equity in passing a decree fixing them. The question therefore to be determined is, whether under the evidence and circumstances the Court ought to have held the case until the lines can be properly established. We cannot agree that the evidence did not show danger to this embankment by reason of the acts of the appellee. It may be that the slide will not be dangerous if it is taken care of, but if the appellant is to be limited to the line claimed by the appellee, it may also be that it cannot be properly taken care of without an interruption to the running of the trains, and in railroad construction at a place which is ordinarily difficult to protect there should not be added to it other difficulties which may endanger the lives of the employees of the company and of the traveling public. There is ample evidence in the record to show that the water had been backed up into and against the embankment, which, together with the removal of what is spoken of as the toe of the slope, has caused cracks in the embankment, one of which is from twelve to eighteen inches wide, and about thirty feet long. Unquestionably those cracks were caused, at least in part, by acts of the appellee. It is not contradicted in the record that they came a few days after the toe of the slope was removed. The testimony of Messrs. Zepp, the track supervisor, Staubitz, the track foreman, and Trench, the division engineer, undoubtedly tends to show a dangerous condition of this embankment, caused in part at least by the acts of the appellee and there is nothing we find in the record to the contrary, as we do not understand Mr. Trench's testimony to be subject to any other interpretation. It is true that the order of the Court granting the injunction at the instance of the appellant gave it leave, "to make the aforesaid embankment safe and secure for public travel and use by the said railroad company in whatever way may be necessary

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within the limits of the property rights of" that company, but the very question in controversy was where those limits were.

The proviso at the end of the order—that if the railroad company "shall, in so doing, encroach upon or enter upon the land of the said Louis Silbereisen, it shall be responsible therefor to him in damages, unless the said company shall otherwise agree with the said Louis Silbereisen"—could scarcely be said in view of the previous part of the order which expressly said "within the limits of the property rights of" the company to release it from the effect of the injunction which was issued at the instance of the appellee, in so far as the land in dispute is concerned. If it was so intended, it ought to have said so, as those taking steps to make the embankment safe and secure for public travel and use of the railroad company might well have supposed they could not go upon the disputed strip without violating the injunction. But at any rate that order was rescinded on February 27th—only six weeks after it was passed—by the one now appealed from. That time might or might not be ample to do the necessary work, if the injunction did not prohibit the agents of the company from going upon the disputed strip, as that would depend upon what had to be done, the condition of the weather and other circumstances. There is ample authority for the continuance of the injunction issued at the instance of the appellant, at least until the rights of the parties can be settled at law, and we think that course should have been pursued.

In *White* v. *Flannigain*, 1 Md. 525, CHIEF JUDGE LE GRAND, after reviewing some earlier cases, said on page 543 that a Court of Equity will interfere: "1st. To prevent irreparable mischief or ruin. 2nd. To prevent a multiplicity of suits; and 3rd, where it is required by some peculiar circumstances;" and again, he referred, with approval, to what CHANCELLOR KENT said in *Jerome* v. *Ross*, 7 Johnson's Chancery, 315: "1st. That an injunction will not be granted to restrain a trespasser, *merely because he is a trespasser.*

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2nd. But that an injunction will issue when the injury is irreparable; *or* where full and adequate relief cannot be granted at law; *or* where the trespass goes to the destruction of the property as it had been held and enjoyed," etc. Those principles were again announced by JUDGE BRISCOE, in *Long* v. *Ragan,* 94 Md. 462. It would be difficult to find a case where an injunction would be more demanded "by some peculiar circumstances" than this, or "where the trespass goes to the destruction of the property as it had been held and enjoyed" more than it did in this instance—even if it be said that the damage would not be irreparable within the correct meaning of that term. Such a controversy as this, where the owner of land contiguous to a railroad claims it is encroaching upon him, is liable to arise at any time, and if it must be held that Courts of Equity have no power to restrain such owners from cutting away a part of an embankment, or removing some other structure necessary for the safety of the road which they claim to be on their land, because the railroad company has its remedy for damages at law, the traveling public and the employees of such company will indeed be subject to great dangers, without taking into consideration the loss inflicted upon the railroad company's property. The conditions in this case are such as make it peculiarly one for equitable interference until the rights of the parties to the land in question can be properly determined, especially as the appellee had on January 8th, 1913, through his attorney, notified the division engineer "to immediately remove the said embankment from Mr. Silbereisen's land; and if the same is not done by Saturday afternoon, January 11th, 1913, Mr. Silbereisen will have it removed at the expense of the railroad company."

In the first volume of *Equitable Remedies, Supplementary to Pomeroy's Eq. Juris,* there is an instructive and able discussion of the subject of "Injunctions against Trespass," covering a number of sections of that work. In Section 503 the author says the reason, which sustains the holding that even

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as against a defendant in possession a temporary injunction will issue, if, pending litigation, there will otherwise be such serious acts of trespass that damages will not be an adequate remedy, "has never been more forcibly and clearly stated than in *Duvall* v. *Waters*," 1 Bland, 569, and he then quotes at length from CHANCELLOR BLAND'S opinion in that case. In section 505 he says: "No argument or discussion will be necessary to show that when the plaintiff is in possession claiming title, he should be granted a temporary injunction, pending the litigation over title, against all trespasses, such that, from their nature or the surrounding circumstances (as for example the defendant's insolvency) he cannot have an adequate legal remedy for them." Then after pointing out in section 506 the meaning of the statement that "the plaintiff's title must be admitted, or be established by a legal adjudication, and the threatened injury must be of such a nature as will cause irreparable damage," he goes on to show that Courts of Equity can investigate the title themselves and finally dispose of the case, but adds: "Courts of Equity, however, more usually send the question to be tried at law, but this is from reasons of policy rather than of jurisdiction. If the plaintiff's title is clear, though denied by the defendant, a permanent injunction may issue at once. If the Court decides to have the question tried at law it may procure diligence in the prosecution of the ejectment suit by framing an issue as an incident to its own proceedings, and sending the parties to law with it; or by granting the temporary injunction to a plaintiff out of possession on terms that the injunction shall continue only if he begins and prosecutes his action of ejectment with diligence; or if the defendant is the party out of possession, and therefore the proper person to bring ejectment, by a provision that the injunction shall be made permanent, if he failed to do this within a reasonable time."

The methods suggested by that author seem to us to be wise and clearly within the powers of Courts of Equity. We would add in connection with his suggestion that in

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this State the action of trespass *quare clausum fregit* is also frequently adopted to determine titles, and hence in imposing such conditions the Court of Equity can provide for either that action or ejectment, whichever to it seems best under the circumstances.

It was argued by the appellant that the question of title was not involved, and that it was merely a confusion of boundaries, but we think it is clear that the title to this strip is involved. If the line be as contended by appellant the title to it is undoubtedly in it, but if the appellee's locations be the true lines then it is in him, unless it has been so held by the defendant as to give it title by adverse possession. An action of ejectment, "may involve simply the question of title to a piece of land, in regard to the location and boundaries of which there is no dispute, or the contention may be whether the land in controversy, truly surveyed and located, is within the lines of the plaintiff's or defendant's title papers." 2 *Poe,* sec. 469. It is true the latter is called an "Ejectment Upon Location," but the plaintiff can only recover provided *the title* to the disputed tract is in him. Cases have frequently arisen, and still arise, particularly in the western part of this State, where the title depended upon the correct location of the division lines, and, as we have seen, the action of trespass *quare clausum fregit* is often resorted to in trying titles to land, and in actions involving locations it is much more satisfactory to have a warrant of resurvey, such as is provided for in sections 80, etc., of Article 75 of the Code, or a survey of that kind.

In this case it would be very difficult, if not impossible, for the Court to determine which is the correct line under the surveys that have been made, and therefore we do not deem it proper to attempt to do so. When the case is remanded, the lower Court can, in its discretion, frame an issue and send it to a Court of law, or can require one of the parties to institute a proceeding at law, to have the title

determined within a time to be named in its order. Whichever is done by the Court we would advise that it require the locations to be made as under a warrant of resurvey and by a disinterested surveyor. If the county surveyor is disqualified by reason of his connection with the appellee, another surveyor can of course be chosen.

In the meantime such steps as are necessary for the protection of the embankment should be permitted, if the parties can not agree, as it is to be hoped they can. The costs are already considerable and will be still larger if the litigation be continued. We regret that we do not feel at liberty to decide the question of the true location of the lines, and end the litigation, but a due consideration by each party for the rights of the other will readily enable them to avoid further costs, and it is for them, and not for the Court, to decide whether additional costs shall be incurred.

We will remand the cause without affirming or reversing the order appealed from, the Court below to continue the injunction as it did by its order of the 8th of March, 1913, and to provide for such proceedings at law as are authorized by this opinion. If after such reasonable time as the Court may allow, the title is or is not determined at law, this case can then be finally disposed of.

Cause remanded, without affirming or reversing the order appealed from, for further proceedings in accordance with this opinion, the costs to abide the final result of the case.

In overruling a motion for a modification of the decree, the Court said:

We carefully considered the questions raised by the appellant, in its motion for a modification of the decree, before filing the opinion and passing the decree. We concluded, and

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still think, that the disposition of the case made by us was the proper one, and there is no difficulty about continuing the injunction. The order of the lower Court had the effect of continuing the injunction, upon the filing of the appeal bond, until this Court disposed of the question. As we remanded the case without affirming or reversing the decree, in order that the proceedings therein referred to might be had, the case stands, under Article 5, section 38, "as if no appeal had been taken in the cause, *and the decree or order appealed from had not been passed.*" In other words the injunction obtained by the appellant is continued under our opinion and decree as if the order dissolving it had not been passed. If the appellee in any way violates that injunction, it will be the duty of the lower Court to enforce it, or, if necessary, it could supplement its original order for the injunction in order to carry out the directions of this Court, as contained in its opinion.

We deem it proper that the final disposition of the costs be postponed as indicated in the opinion. If the appellee was responsible for them, as the appellant alleges in the motion, that and other questions will be considered when the time comes to finally act on the costs.

Motion for modification of decree overruled.

Filed August 5th, 1913.

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DUDLEY A. TYNG AND COMPANY

vs.

FREDERICK E. WOODWARD.

Pledges of stock: right to redeem; sale and purchase by pledgee at private sale; action for difference of price; pleading. Common counts.

A pledge partakes of the nature of a mortgage, and is subject to the pledgor's equity of redemption. p. 430

A pledgee of stock has, in general, no right to dispose of it at private sale, unless the pledgor has given such authority. p. 431

When stock is not listed or dealt in on the exchange, but is only sold by certain firms or parties dealing in it by correspondence, telegrams, etc., with brokers or others owning or interested in the stock, such stock may be sold privately, provided that the sale be fair, and the mere fact that, in such a case, the pledgee buys the stock himself does not make the sale invalid. p. 436

Whether a sale, under such circumstances, was actually made to a third party for himself, or to him for the benefit of the pledgee, is always open to judicial examination, as it reflects on the question of fairness. p. 436

When a prayer of the defendant recites that, under the pleadings, there is no evidence in the case legally sufficient to entitle the plaintiff to recover, on appeal all the pleadings are open for review. p. 437

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Syllabus.

In such a case, if any count in the declaration is sufficient to support a verdict under the evidence for the plaintiff, the prayer ought to be revoked. p. 437

When upon the refusal of a purchaser to take or pay for stock bought for him at his request, the vendor resells the same at a less price and sues the purchaser for the difference, a common count for goods bargained and sold is not sufficient. pp. 437-438

In such a suit a common count, reciting that the defendant purchased stock from the plaintiff at a price named, and agreed to pay the price thereof to the plaintiff, and that the plaintiff offered and tendered the stock to the defendant, who refused to pay for the stock or any part thereof, is bad. p. 438

A count which, to the aforegoing, adds that the plaintiff, after due notice, sold such stock, in the usual way, for a certain sum named, less than the purchase price, it being the best price then obtainable for the stock, is bad unless it is further alleged that the plaintiff refused and still refuses to pay the difference. p. 438

Unless the "money" counts of the common counts in a declaration be preceded by the words "for money payable by the defendant to the plaintiff," they are demurrable. p. 438

When a judgment, found by the Court of Appeals to be correct, is based on grounds with which the Court of Appeals does not concur, the judgment may be affirmed, but the cause remanded, under section 22 of Article 5 of the Code of 1912, for a new trial. p. 438

In a suit by a broker against one who refuses to accept or pay for stock that had been purchased for him at his request, the broker may offer in evidence the unpaid draft that he had drawn on the purchaser, and to sustain the fairness of the transaction, where he sells and himself purchases the stock at private sale, he may offer in evidence letters from other brokers who dealt in the stock to show its market price on the day of the sale. pp. 436, 439

Decided June 26th, 1913.

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Appeal from the Court of Common Pleas of Baltimore City (ELLIOTT, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Horace S. Whitman and *Thomas F. Cadwalader*, for the appellant.

Arthur L. Jackson and *C. H. Millikin*, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from a judgment rendered in favor of the appellee, in a suit brought against him by the appellant, on a verdict rendered in pursuance of an instruction granted by the lower Court. The declaration originally included six common counts and four special counts and it was amended by adding an additional one. The foundation for the suit is the claim by the appellant that it sold to the appellee fifty shares of the capital stock of the Burroughs Adding Machine Company at four hundred dollars per share, and upon his refusal to accept and pay for them it resold them at $301.00 per share,—the suit being for the difference between the contract price and the amount realized at the resale.

As the appellant claims that it is entitled upon the evidence in the record to recover upon the first, seventh, ninth and the additional (eleventh) counts and does not contend that the others apply, we will briefly state what they are. The first is the common count "For goods bargained and sold by the plaintiff to the defendant." In the seventh it is simply alleged that the defendant purchased from the plaintiff the fifty shares of stock at $400.00 per share and the defendant agreed to pay said sum for the same, and the plaintiff offered

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and tendered them to the defendant but he refused to pay for them or any part thereof. The ninth alleges that the defendant offered to pay the plaintiff $400.00 per share for fifty shares of that stock and the plaintiff accepted the offer and tendered them to the defendant, who thereupon refused to accept and pay for them. The eleventh count is substantially in the language of the ninth with this addition: "and the plaintiff then, after due notice to the defendant, sold said fifty (50) shares of stock in the usual and customary manner in which said stock is sold in the market for the sum of three hundred and one dollars ($301.00) per share, being the best price then obtainable for the same by the plaintiff." The defendant filed the general issue pleas of never indebted and never promised. There are eleven bills of exception containing rulings on evidence and the twelfth contains a prayer granted at the conclusion of the plaintiff's case, instructing the jury "that the plaintiff has offered no evidence in this case legally sufficient under the pleadings to entitle the plaintiff to recover, and therefore the verdict of the jury must be for the defendant." We will first consider that prayer.

The theory of the appellee in offering that prayer seems to have been that the resale was invalid because there was no public sale and no such notice given to the public as justified the resale. For that he relies on a number of decisions of this Court, which we will refer to. In *Maryland Fire Ins. Co.* v. *Dalrymple,* 25 Md. 242, the plaintiff sued the insurance company for damages for the sale and conversion of certain shares of stock of the B. & O. R. R. Co., which he had pledged to secure the payment of a sum of money lent to him by the defendant. It was agreed by the parties that if the loan was not promptly paid the president of the insurance company could, without further notice, sell the collaterals for the purpose of satisfying the loan. Notice was given the plaintiff to return the loan by the 14th of November, 1860, and on the 20th of that month the defendant procured the stock to be sold at the Board of Brokers, and became the purchaser thereof at $55.00 per share—the stock

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having from the date of loan to November 15th, varied in price from $79.00 to $56.50 per share. The stock was held by the defendant until the spring of 1862, when it was sold publicly at the Board of Brokers, fairly and in the usual way, in parcels to different persons at prices ranging from $60.00 to $67.00 per share—the ruling market prices. It was held that under the terms of the contract the notice given on the 13th of November was sufficient to entitle the defendant to sell on the 20th, that a sale "publicly and fairly made" at the Board of Brokers to a third person would have been a legal sale under the contract, but that the doctrine that persons holding fiduciary relations are incompetent to purchase the property held by them in trust was applicable to the relation of pledgor and pledgee. The sale on the 20th of November, 1860, therefore did not operate to vest the title in the defendant as purchaser, or to work a conversion of the stock—the plaintiff not having elected to treat that sale as a tortious conversion. But it was also held that as the bailment continued and the defendant caused the stock to be sold publicly at the Board of Brokers and transferred to the several purchasers, the latter sales were valid. It was said that no further notice was required by the contract, and no valid objection could be made to the place and mode of sale—not being impeached on the ground of unfairness or bad faith.

In *Balto. Marine Ins. Co.* v. *Dalrymple*, 25 Md. 269, some of the same questions were involved. Certain of the stock held by that company was sold to other persons, after notice of such intended sales at the Board of Brokers, but 770 shares of the B. & O. R. R. Co. stock was bought by the defendant through the agency of a broker employed for the purpose. On the next day the defendant sold the 770 shares to a Mr. Denison, and it was held "the defendant had not the legal right to dispose of the stock at private sale. The sale so made to Denison on the 21st of November, 1860, was therefore contrary to the duty of the defendant as pledgee and in law tortious, for which the plaintiff is entitled to maintain his action either in trover or case."

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In *Bryson* v. *Rayner,* 25 Md. 424, in which there was a bill in equity to compel the appellee to return 19 shares of stock transferred to him as collateral security for the repayment of loans, it was held that a sale of nine of those shares made by a broker at *private sale* was valid—the appellant having authorized the appellee "to give the stock to any broker to sell on said day" in case they were not redeemed by a certain time named, but as to the other shares which the pledgee purchased, he still maintained the character of bailee and they could be redeemed. It was said: "In the absence of this special authority, according to the rulings of this Court in the cases referred to (*Dalrymple cases, supra*), it would have been the duty of the pledgee to have disposed of the stock at public sale, after a reasonable notice to the public of the time and place of sale, or at the public stock board."

It may be well, in order to avoid any misunderstanding, to refer at this point to *Manning* v. *Shriver,* 79 Md. 41, where it was said: "We agree that one being a trustee, executor or agent, or in any other like fiduciary relation, will not be allowed to purchase property sold by him in that character. The rule is one of general application, and the reason of the rule is, that one will not be permitted to purchase an interest where he has a duty to perform inconsistent with the character of purchaser. We agree too that both upon reason and authority the relation of pledgor and pledgee comes within the operation of this rule." The opinion then went on to say: "But it is equally well settled that this rule does not apply where the pledgor expressly authorizes the pledgee not only to sell the pledge, but to purchase it in his own right. * * * The purchase by a pledgee in such cases is exempted from the operation of the general rule upon the same ground that a mortgagee will be allowed to buy at his own sale, if the mortgagor so agrees. In this case it will be observed that the plaintiff was authorized to sell as agent, but at the same time he was authorized to buy in his own right."

In *Rosenstock* v. *Tormey,* 32 Md. 169, the appellee, a stock broker in Baltimore, was ordered upon October 4, 1866,

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by N. Hoflin to buy 100 shares of Illinois Central Railroad stock on the joint account of Louis Rosenstock, J. Hoflin, and himself. Tormey immediately and, as he stated, "according to the course of trade and the regular custom of the business" directed his correspondents, who were brokers in New York, to make the purchase, which they did at $128.00 per share, and Tormey paid the purchase money ($12,825.00) therefor. The defendants failed to pay him, and on April 16th, 1867, "after notice to the defendants, and according also to the due course of trade and the custom of the particular business" the plaintiff directed his correspondents to sell the stock in New York, which they did and realized only $11,-400.00. The suit was to recover the difference between the amount paid on the purchase and that realized from the resale of the stock. The Court said the plaintiff had the right to make the purchase through correspondents, brokers or sub-agents in New York, and having made the purchase and expended his money, it was his duty to notify the principals of the fact and request them to receive the stock and pay him the price he had paid for it, with usual and reasonable commissions for making the purchase. Upon receiving the notice it was the duty of the defendants to pay for and receive the stock, and on their failure to do so the plaintiff had "the clear right after a reasonable time, and after giving notice to that effect to the defendants, to direct it to be sold in New York, and upon showing, by legal and competent proof, that it was actually sold by his agents, *either at public sale in market overt, or at a sale publicly and fairly made at the stock exchange or stock board, or a broker's board, where such stocks are usually sold,* at its fair market value, on the day of sale, he is entitled to recover from the defendants the amount, if any, of the resulting loss."

In *Worthington* v. *Tormey*, 34 Md. 182, the suit was also to recover the difference in the price of stock purchased by appellee for appellant and the amount at which it was resold, together with commissions and interest. The appellee purchased for appellant 200 shares of stock of the Canton Com-

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pany through his brokers in New York. Notice of the purchase was sent by mail to the defendant at Reisterstown on March 10th, 1868, who some days afterward called at the office of plaintiff in Baltimore and refused to recognize the transaction but requested him to do nothing until he could see Mr. Jenkins. The plaintiff held the stock until the 17th instant when defendant notified him he would have nothing to do with the transaction. Immediately after the interview, plaintiff wrote to the defendant that he would sell the stock, without naming the place of sale, on or after the 19th instant, unless he deposited with him sufficient margin, and also told him he was prepared to deliver the stock on the tender of the purchase money, commissions and interest, and would hold it subject to his orders until the 19th. The letter reached Reisterstown next day, but possibly by reason of the plaintiff having asked the postmaster in Baltimore to send it to the postmaster at Reisterstown with request that he would note its delivery to the person addressed, it was not delivered until the 24th instant. In the absence of any response to his letter of the 17th, the plaintiff on the 21st sold the stock in New York through the brokers who had purchased it for him. It was held that the letter of March 17th addressed to the defendant at his postoffice was a sufficient notice to bind him, notwithstanding he was in Baltimore on that day, and a personal notice might by the exercise of reasonable diligence have been served on him, and it was said: "It was not necessary to name the *place* of sale in the notice, even if, in the sales of other kinds of stocks held in pledge, it is necessary to do so. But we think that in the case of sales of stock by bailees, it is not obligatory upon them to give notice to the bailor of the *place* of sale."

In *Regester* v. *Regester*, 104 Md. 1, the plaintiff advertised and sold 200 shares of the capital stock of the J. Regester Sons Co., which the defendant had agreed to buy from him but failed to pay for it, by public auction at the sales rooms of some auctioneers in Baltimore City. The suit was to recover the difference between the contract price still un-

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paid and the net amount realized from the resale of the stock. The declaration alleges amongst other things that "after due notice to the defendant and after due advertisement thereof, the plaintiff sold said two hundred shares of stock at public auction for the sum of nineteen hundred dollars." How or when such sales could be validly made was not discussed in the opinion, but it was said by JUDGE BURKE, who spoke for the Court, that "The plaintiff's second prayer asserted a sound legal principle, and he was entitled to a verdict, if the jury found the facts therein stated. The doctrine upon which the instruction rests is abundantly supported by authority." Of course it was only necessary in passing upon that prayer to determine whether what was done was sufficient, and the Court was not called upon to say, and did not say, whether such a sale made in any other way than by public auction after a public advertisement would have been sufficient, although the method adopted in that case was distinctly approved. It was also said that "whether an unpaid seller has exercised reasonable diligence in the conduct of a resale upon the default of the buyer is a question of law for the Court on facts to be found by the jury."

It will be observed that the cases in 25 Md. cited above were all between pledgor and pledgee. In that class of cases it has been distinctly decided that the pledgee has not the right to dispose of such stock at private sale, although that would be subject to the same modifications made in reference to the pledgee becoming purchaser at his own sale, for if the pledgor had agreed that the sale could be made privately it could be done, provided of course it was fairly done. The relation of pledgor and pledgee differs materially from that of seller and purchaser. A pledge partakes of the nature of a mortgage and is subject to an equity of redemption. The terms of sales made by pledgees are now in most cases fixed by the parties, as the use of collateral notes is so general that it is unusual to meet with such loans where the conditions under which sales can be made are not prescribed, and although in the absence of agreement it has been held that

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goods pledged cannot be sold at private sale, yet they may be so sold by agreement of the parties.

This Court has not, however, decided that such a sale as we are now concerned with cannot be made at private sale. It is true that in *Regester* v. *Regester* we approved of the sale at public auction, but we did not say that was the only way such sales could be made. In *Rosenstock* v. *Tormey, supra,* we have pointed out several ways, other than by public auction, in which they could be made. It would necessarily result in a great sacrifice if stocks had to be sold at public auction and could not be "where such stocks are usually sold." The stock now in question was not listed on any exchange, according to Mr. Andrews, who is connected with the plaintiff, and he testified: "It is either bought and sold by mail or telegram or long distance telephone with the individual holders or other brokers representing the individual holders," and in answer to the question how they advertised that stock when they had it for sale, he said: "We have a list of stockholders and brokers who deal in it, and we send out bids and offerings to this list." His company was in the regular business of dealing in unlisted bonds and stocks, and amongst others they had dealt in the stock of the Burroughs Adding Machine Company for about seven years. He named brokers in Chicago, New York and Detroit (the home of the Burroughs Company) who dealt in it.

The testimony shows that the appellee had previously dealt with the appellant in this stock. On August 31st, 1911, the appellant company sent out a circular offering 20 shares of this stock at $418.00 and requesting parties in the market to buy at or near that price to communicate with them. A return postal was enclosed and the appellee on September 2nd, 1911, wrote that he was interested in that stock and would like to be advised as to any changes in the market, and added "I would buy some shares at what I consider right prices, but not at 418." On September 5 plaintiff telegraphed him, "Please wire best bid and amount Burroughs Adding Machine," to which he replied, "Four hundred dol-

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lars per share, any part of fifty Burroughs." Mr. Andrews called him by long distance telephone and said he could deliver at $405.00 and he was working on his order to buy at $400.00. He said appellee replied he would not give over $400.00, and that he would give them until the next day to fill the order. That afternoon appellant wired appellee, "Sold you 50 Burroughs Adding, 400 net. May possibly get 50 more in morning. Can you use?" The same day he wrote to appellee quoting the telegrams that passed between them, confirming the sale, and enclosed blank for him to sign. Two or three days afterwards they received from appellee a letter having on it letter heads of the Burroughs Adding Machine Co., Baltimore office, 12 St. Paul St., and dated September 6, 1911, in which he said that they were to wire him regarding the price at which they could obtain the stock before committing him, and the person who was to put up the cash "has exercised the privilege of a change of mind." The appellant replied by telegram on September 8th, in which after stating they had sold him the stock at $400.00 and had paid for it, they said, "It is in shipment. We must insist upon your taking up draft. Otherwise stock will be sold at first bid and we will recover difference from you. We know nobody in this transaction but yourself." In ordinary course of mail they received a letter from the appellee dated September 8th—same date as the appellant's telegram—in which appellee said the draft had been refused because in his telephone communication he did not authorize them to purchase the stock on his account. On September 11th the appellant sent him a long letter in which it said: "We will have to sell the stock out and collect the difference from you through due process of law," and, "We will carry this matter through to the bitter end, and it looks as if we would have to sell this Burroughs out at a heavy loss if it is sacrificed at the present time." Mr. Andrews went to Baltimore to see the appellee. He said he explained to him that the bank had given them credit for the draft, and would compel them to sell it out, and as the market on Burroughs was a very wide market,

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they probably would have to sacrifice it. He asked appellee if he would not make some kind of proposition to help to take care of the matter; that perhaps they could carry it along and not have to sell it out right away if he could raise some money to protect it. At the railroad station as he was leaving, he told the appellee "if he wouldn't do anything, I simply would have to sell it out when I got back; that I would have to make good with the bank; that we would be overdrawn twenty thousand dollars and I would have to sell it, and if there was any difference we would have to sue him for the difference." He replied they could sue him if they wanted to, that he was "judgment proof," and Mr. Andrews replied, "If that is the kind of man you are, I will sue you whether you are good or not, and I went home and sold the stock out." On September 15th, which was apparently the day after he was in Baltimore, he wrote. "On my return I found no better bid than $300.00 for Burroughs Adding Machine, and the bank demanded that we immediately take up your protested draft. I finally found a purchaser for 50 shares at $301.00 per share today, and, therefore, sold the stock for your account."

He said he had sent an offering of the stock "To all the brokers that I knew handled the stock and to all the stockholders in the company," that he had called up a man in St. Louis who bid $300.00 and also another party who held some of the stock offered $300.00. He called up White & Co. of New York but did not get any bid from them and the two bids mentioned above were the only "firm bids" he got. He said he had spoken to his aunt who was living at his house a few nights before about it and had told her if it went cheap he would advise her to get it. He called her up at his house in Evanston, near Chicago, and told her of the bids he had received and advised her to make a better bid. She authorized him to use his own judgment and he placed a bid with the appellant at $301.00 and confirmed the sale that day. The circular the appellant sent out was as follows:

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"Dudley A. Tyng & Co., Brokers, 108 S. La Salle Street, Chicago. Chicago, Sept. 12, 1911. Important. Sacrifice Sale of 50 Shares Burroughs Adding Machine Co.

"On Sept. 5th we sold 50 shares of Burroughs Adding Machine Co. to one of the company's agents at $400.00 per share. The draft has been protested, owing to the buyer's inability to care for same, and the stock has been thrown back on our hands.

"This stock will be sold by us to the highest bidder for his account.

"We have no bid whatever at this writing, and we urge you to submit us one. The stock has to be sold, so don't be backward about bidding, even if your bid is a low one. Bids may be wired at our expense. Very truly yours, Dudley A. Tyng & Co."

What we have stated shows how and to whom the sale was made, and the notices the appellant had given the appellee. We do not feel justified in holding as a matter of law that the sale was invalid. To have offered the stock at public auction under the circumstances might have resulted in a greater sacrifice than was made of it. There are many cases in which a sale at public auction will necessarily result in a sacrifice of the property, and if Mr. Andrews' testimony is correct, that this is the way this stock is sold—not being listed and hence not being sold on an exchange—it may be that better results can thus be obtained than could possibly be at public auction. Our own decisions have not held that a sale thus made by a seller, and not made at public auction, is invalid, and as many Courts of high standing have distinctly said that there is no rule of law making it necessary for such sales to be by public auction, and this Court has fully recognized the right to sell stocks as they are customarily sold, we are of the opinion that the jury should have been permitted to pass on the facts under proper instructions from the Court. In the prayer approved in *Regester* v. *Regester* the Court left to the jury to find whether the "notice of sale was fair and

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reasonable," that "said sum was the highest price the plaintiff could obtain at said auction sale, and that the plaintiff in making said sale acted with fairness and in good faith," etc.

The law is thus stated in 35 *Cyc.* 523: "The manner of sale is within the reasonable discretion of the seller; but it should be made in good faith and in the mode best calculated to produce a fair price for the goods, and as the seller acts as agent of the original buyer, he is held to the same degree of care, judgment and fidelity as an agent in possession of goods with instructions to sell to the best advantage. Although the sale may be by public auction, it is not necessary that it should be, unless that is the usual mode of selling that particular kind of goods, and thus ordinarily the resale may be by private sale if it is conducted fairly, but if the custom is to sell through a broker, the goods should be offered through a broker's agency. The sale should be for cash. Slight irregularities in making the sale will not invalidate it, and the mere fact that the seller bought in a portion or all of the goods himself is no ground of objection if the price obtained is a fair one." In 24 *Am. & Eng. Ency. of Law* 1142, it is said: "The authorities lay down no particular rule as to the manner in which a resale must be made; but since the measure of damages is to be ascertained by this means, it is essential that the seller act in good faith and under such circumstances as will be best calculated to produce the fair value of the property."

In *Sands* v. *Taylor,* 5 John. 395, cited in *Regester* v. *Regester,* the sale was made at auction, but in *Pollen* v. *LeRoy,* 30 N. Y. 549, the Court, in speaking of that fact, said: "But there is nothing in the opinions delivered by the judges in that case, requiring or insisting upon such course." In *Van Brocklen* v. *Smeallie,* 140 N. Y. 70, it is said: "Where the second method is adopted and the vendor chooses to make a resale, that need not be at auction, unless such is the customary method of selling the sort of property in question, nor

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is it absolutely essential that notice of the time and place of sale should be given to the vendee." It was said in that case that, "The adjudged rule covers every species of personal property." In *Clews* v. *Jamieson,* 182 U. S. 496, the Supreme Court approved of a sale of stock at auction—the stock exchange being closed from August 3rd until November 5th—but it did not say that method was necessary in all cases. In *Camp* v. *Hamlin,* 55 Ga. 259, trees, plants and vines were sold at public auction, but the Court reversed the case because the circumstances of the sale were not shown—saying: "The plaintiff should enter into a more full and minute accounting as to the auction, in order to use it as a final test of value." In *Brownlee* v. *Bolton,* 44 Mich. 218, the Court said: "It is now sufficient to say generally that the vendor's right of resale must be exercised in good faith and in such time and manner and under such circumstances and by such methods as would be best calculated to produce the fair value of the property, and that in case he seeks to avail himself of it before a jury it is incumbent on him to adduce the necessary facts to show that in exercising the right this manner was observed." In *Sedgwick on Damages* (281) (6 ed.) it is said: "Though perhaps more prudent, it is not necessary that the sale should be at auction; it is only requisite to show that the property was sold for a fair price." See also *Pratt* v. *S. Freeman & Sons Mfg. Co.,* 115 Wis. 648, S. C. 92 N. W. 368; 2 *Des Passes on Stock Brokers,* 909.

Under these and other authorities which might be cited, we cannot say that the record shows that the sale was invalid, because not made at auction, or that it was not sufficiently advertised. Whether or not it was the proper way to make the sale under the circumstances, whether it was fair and produced the market value will be for the jury to say under instructions of the Court as to what diligence was required. Of course it will be admissible to inquire into the question whether the sale was really made to Mrs. Dutton or to the company itself, as that reflects upon whether the sale was fair. What is said in *Steelman* v. *Weiskittel,* 88 Md. 519,

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about the sale to the attorney of a pledgee who afterwards sold them to the pledgee may reflect upon the question, although that was a case of pledgor and pledgee. As this record stands Mrs. Dutton, and not the appellant, would seem to be the purchaser, but if the jury should find that the appellant was in reality the purchaser then the sale to it was not valid unless fairly conducted and the full market price was realized.

The grounds relied on by the appellee to sustain this prayer did not in our judgment authorize it being granted. We must, however, under the form of the prayer examine the pleadings, which under our practice a prayer thus referring to the pleadings requires us to do. We will as briefly as we can refer to the different counts, for if any one of them was sufficient to support a verdict under the evidence for the plaintiff the prayer ought to have been rejected. The appellant contends that the first, seventh, ninth and additional (eleventh) counts are sufficient. The first is not. It is said in 19 *Ency. of Pl. and Pr.* 21, that, "After a resale by the vendor an action for goods bargained and sold will not lie, but the proper remedy is by an action for damages for non-acceptance." In the case of *MacLean* v. *Dunn,* 4 Bing. 722, cited by the appellant, BEST, C. J., said: "It is a practice founded on good sense to make a resale of a disputed article, and to hold the original contractor responsible for the difference * * * Where a man in an action for goods sold and delivered insists on having from the vendee the price at which he contracted to dispose of his goods, he cannot, perhaps, consistently with such a demand, dispose of them to another." It is true he spoke of the count for "Goods sold and delivered," and not for those "Bargained and sold," but the same principle and reasoning would apply. The same may be said of the seventh and ninth counts. As the evidence shows that the stock had been sold by the plaintiff they are not such counts as are applicable to those facts. For all that appears in them, the plaintiff might have made a large profit out of the stock by reason of defendant's refusal to pay for them, and the

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defendant had no notice by either of those counts that the plaintiff had sold the stock. The plaintiff could store the goods for the defendant and sue for the contract price, or it could keep the goods as its own and sue for the difference between the contract price and the market price, or it could resell them at the vendee's risk, and sue for the difference between the contract price and the resale price. No one would suppose from those counts that the plaintiff had elected to do the latter.

The eleventh count was right as far as it went, but it ought to have gone further and have alleged that the defendant refused and still refuses to pay the difference, or something to show some indebtedness. All that the count alleges may be true and yet the defendant may have paid the plaintiff the difference and may not have owed it one dollar when the suit was brought. Our system of pleading is very liberal, but even the common money counts must be preceded by "Money payable by the defendant to the plaintiff" and are demurrable, if not; (*Merryman* v. *Rider,* 34 Md. 98); and the form given in the Code for a suit on a promissory note concludes by the averment, "but did not pay the same." The count was therefore in our judgment technically bad, but inasmuch as the prayer was apparently based on grounds which we do not concur in, we will, under section 22 of Article 5 of the Code, affirm the judgment but remand the case for a new trial, unless there be some reason in the other exceptions for a reversal.

This requires us to pass on the exceptions to rulings on the evidence, which can be briefly done. The draft referred to in the first bill of exceptions should have been admitted in evidence. The plaintiff had the right to let the jury see that it still had it, and also that it was not made payable at a time subsequent to the date of the resale. We see no error in the rulings in the second, third, fourth, fifth, sixth and eleventh bills of exception. They were relevant in inquiring into the fairness of the sale. The letter from White & Co. in the seventh bill of exceptions was properly admitted. Mr.

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Andrews said he thought he had received it. It was dated two days before the resale of the stock and stated: "We quote the market today on Burroughs Adding Machine Company; 380 bid, offered at 395." Mr. Andrews said White & Co. were amongst the brokers who dealt in this stock and the letter was clearly relevant as reflecting upon the question whether the plaintiff was acting in good faith and doing what was best calculated to produce the best price for the stock. The inquiries in the eight, ninth and tenth exceptions were also relevant, as under the circumstances it was proper to ascertain whether Mr. Andrews' aunt, who was at his house, was the purchaser or whether it was put in her name, although really purchased for the plaintiff. It must be remembered that the plaintiff claims to have sold this stock to the defendant on September 5th at $400.00 per share, and a few days before he had asked $418.00, and as it was sold on the 15th at private sale to an aunt of Mr. Andrews who was acting for the plaintiff in the transaction—that aunt then being at his house—at $301.00, the circumstances demand a full and thorough investigation and great latitude should be allowed in the examination of the witnesses.

The only ruling on the exceptions to the evidence as to which we differ with the lower Court is that in the first bill but as it was immaterial when the prayer which took the case from the jury was granted, and as the plaintiff was not injured by the ruling, we will not reverse the judgment but will follow the course indicated above. When the case is remanded the appellant can amend the declaration to cure the defect in the eleventh count pointed out by us.

Judgment affirmed and cause remanded for a new trial under Section 22 of Article 5, the appellant to pay the costs in this Court and the costs below to abide the result of the case.

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EDWARD J. MEISTER

vs.

ELIZABETH K. MEISTER.

Wills: construction; life tenant, with full power to sell and convey; purchaser's rights; application of purchase money.

A will left all the estate to E. J. M. for and during her natural life, with full power to sell any part of the property or estate so devised and bequeathed to her, and to reinvest the proceeds for her use or benefit during her life; *held,* that under this provision, E. J. M. had ample power to make a conveyance of the property, and that the purchaser was not bound to look to the application of the purchase money. p. 444

Decided June 26th, 1913.

Appeal from the Circuit Court No. 2 of Baltimore City (GORTER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Charles Lee Merriken, filed a brief for the appellant.

Charles F. Stein, filed a brief for the appellee.

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THOMAS, J., delivered the opinion of the Court.

Charles J. Meister left a will in which he made the following provision for his wife: "After the payment of all my just debts and funeral expenses, I give, devise and bequeath all my property of every kind and wheresoever situated to my wife, Elizabeth Katherine Meister, for and during the term of her natural life, with full power to sell any part or all of the property or estate so devised and bequeathed to her and to reinvest the proceeds for her use and benefit for and during her life."

On the first of March, 1913, Mrs. Meister, in pursurance of the power contained in the will, sold a part of the property so devised to her for life, consisting of a lot of ground in Baltimore City, to Edward J. Meister, for the sum of fifteen hundred dollars, which, by their agreement under seal, he agreed to pay her not later than the fifteenth of March, 1913.

On the 27th of March, 1913, Mrs. Meister, the appellee, filed a bill in the Circuit Court No. 2 of Baltimore City, in which, after setting out the provisions of the will and the agreement for the sale of said property, she alleged that said purchaser had refused to comply with the terms of said sale on the ground that she was not clothed with sufficient power under the will to convey a good title to the property. A copy of the will and of the agreement was filed with the bill. The defendant answered, admitting the execution of the agreement, but averring that while he was ready and willing to perform his part of the contract of sale he was advised that it was not within the power of the plaintiff to convey a good title to the property. By an agreement signed by the plaintiff and defendant and filed in the case, they agreed that the object of the proceedings in this case was to have the Court determine whether by the exercise of the power in the will the plaintiff can convey to the deefndant a valid fee simple title to the property named in the contract of sale, without the purchaser being required to see to the application of the purchase money.

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The case having been submitted and the Court below being of opinion that the plaintiff could convey a good title to the property, without the purchaser being required to see to the application of the purchase money, a decree was passed requiring the defendant to perform the agreement of sale.

In that view we entirely concur. In his brief the appellant cites the cases of *Russell* v. *Werntz,* 88 Md. 210, and *In re Bauernschmidt's Estate,* 97 Md. 35. In *Russell's Case* the provision of the will construed was as follows: "I give unto my preesnt wife, Virginia Russell, all the residue of my estate, including all my property, both real, personal and mixed, to have and to hold and dispose of as she may see fit while she remains single, and after her death or marriage, the remaining property is to be equally divided between my two daughters, Grace A. Russell and Jesse V. Russell." The Court in that case held that the manifest intention of the testator was to give his wife a life estate only, and that the words "to have and to hold and dispose of as she may see fit," had reference to that estate, and did not confer upon her power to dispose of the estate in fee. In the *Bauernschmidt Case* the will contained the following provision: "I give, devise and bequeath unto my wife, Margaret Bauernschmidt, all the rest, residue and remainder of my estate, of which I shall be possessed or be entitled to, of every kind and wheresoever situated, for the full term of her natural life, with full power to her hereby granted, to sell, mortgage, lease, transfer and due conveyance make of said property or any part thereof, in her sole name and to invest and reinvest the said property and the rents, profits and revenues thereof, or otherwise in any manner to change, dispose of, use and deal, with the said property and the rents, profits and revenues thereof, for her sole benefit and at her sole discretion as fully as I could do." By subsequent clauses of the will the testator disposed of his property after his wife's death to other members of his family. Mrs. Bauernschmidt executed a deed of trust to the Baltimore Trust and Guarantee Company by which she conveyed to said Company upon certain trusts some of the se-

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curities belonging to the testator's estate, and she also conveyed to the Baltimore Realty Company certain mortgages that stood in the name of the testator. By the terms of the deed of trust the property thereby conveyed was disposed of in a manner different from the way the will provided it should be disposed of after her death, and the mortgages were transferred to the Realty Company, not for the purpose of changing the investment, but for the purpose of putting the title to them in the company, in which she claimed to be the largest shareholder. The Court, while distinctly recognizing her right under the power conferred upon her by the will to dispose of the property for the purpose of changing the investments, held that she could not so dispose of it as to defeat or change the interest of those entitled to the estate after her death, and that the deed of trust and the assignment of the mortgages were therefore void. CHIEF JUDGE MCSHERRY after stating that the will gave her only a life estate, said in reference to the provision of the will giving her power to dispose of the property: "The bulk of his wealth seems to have been invested in stocks and bonds whose values constantly fluctuate in the market, and it was eminently wise to make some adequate and liberal provision by which the life tenant would be clothed with ample power to change those and other investments and property as fully as the testator himself might have done, whenever and as often as the occasion should require."

In the case at bar the will, unlike the will in *Russell's Case,* but like the will of Mr. Bauernschmidt, gives the life tenant full power to dispose of the property and to invest the proceeds, and there is no reason why she may not exercise a power thus expressly conferred. She cannot, of course, so dispose of the property as to defeat the purpose of the testator clearly expressed in the other provisions of the will, but the power was given to her in order that she might have the full enjoyment of his estate during her life, and for the purpose of protecting and preserving it for those entitled to it after her death.

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This case is within the class of cases to which the case of *Keister* v. *Scott*, 61 Md. 507, belongs. There the property of the testator was given to his wife for life with a provision disposing of it after her death. His wife was authorized to sell and convey the property and to invest the proceeds. She sold a part of the estate and the purchaser refused to comply with the terms of sale because, as he claimed, she could not convey it so as to relieve him of the necessity of seeing to the application of the purchase money. The Court held that the purchaser should be required to perform the contract, and after reviewing some of the authorities, said in conclusion: "It is unnecessary to multiply the citations of authorities, because the very recent case of *Van Bokkelen* v. *Tinges*. 58 Md. 57, seems to determine the question. In that case the Court, adopting the language of the notes to *Elliott* v. *Merryman*, 1 White & Tudor's Lead. Cases in Eq. 118, 119, said: 'All the cases seem to agree, that where the disposition of the proceeds depends in any material particular, upon the discretion of the trustee, or where an interval must or may properly elapse between the sale and the application of the purchase money, the purchaser will be freed from liability by a payment to the trustee, and will not be responsible for a subsequent misappropriation by the latter;' and it is further added 'that where a trustee is required to sell and reinvest for the same trusts or purposes, the purchaser will be discharged from responsibility for the application of the money paid by him to the trustee.'" In addition to the authorities cited by the Court in the last mentioned case, we refer to *Hughes* v. *Drovers' Bank*, 86 Md. 418, in support of the same view.

We think the appellee in this case had ample power to make the sale in question to the appellant, and that the purchaser is not required to see to the application of the purchase money. We will, therefore, affirm the decree of the Court below.

Decree affirmed, with costs.

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EDWIN M. WILMER

vs.

MARGARET TRUMBO.

Judgment: death of defendant; scire facias; new judgment.
Injunctions: papers to be filed; the reason not
existing, rule not applied.

Where, after the death of the defendant, a *scire facias* to revive a judgment is issued against his personal representatives, the new judgment thus obtained binds only the decedent's assets. p. 447

If the applicant for relief by way of injunction has in his possession, or can produce, authenticated copies of papers or instruments in writing on which his equity rests, they must be exhibited in support of the bill, so that the Court may see that he is entitled to the relief prayed. p. 448

Where the reason for a rule ceases to exist, the rule is not to be applied. p. 448

Through a mistake in identity, an order of *scire facias* to revive a judgment that had been rendered against a defendant since deceased, was served upon one, as his personal representative, who, while having the same name, was not the right person; *held,* that in such a case the party was entitled to equitable relief to prevent a sale of her goods under the writ, even though she had not taken the proper legal steps in the *scire facias* proceedings, except to show that she had no interest in them; in such a case a bill for an injunction should be granted, although it was not accompanied by exhibits of the judgment, order of *scire facias,* or the complainant's deed for the property which had been seized. p. 448

Decided June 26th, 1913.

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Appeal from Circuit Court No. 2 of Baltimore City (GORTER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER and STOCKBRIDGE. JJ.

David Ash, for the appellant.

Alexander H. Robertson, for the appellee.

URNER, J., delivered the opinion of the Court.

By the bill of complaint in this case the following facts are alleged: On April 30, 1900, the appellant, Edwin M. Wilmer, obtained a judgment for $43.98 against John J. Spellman before a justice of the peace of Baltimore City. The judgment debtor subsequently died. In 1912 a writ of *scire facias* was issued at the appellant's instance for the purpose of renewing the judgment. The writ was served upon the appellee, Margaret Trumbo, as the personal representative of the deceased debtor. She appeared before the justice of the peace who issued the writ and testified that she was not Spellman's personal representative and had no knowledge of his affairs; that he had a daughter by the name of Margaret Trumbo, but that she was then dead. This was the only testimony taken before the justice. The appellee was not indebted in any capacity to the appellant, and in view of the uncontradicted proof that she was not the personal representative of the judgment debtor she believed that so far as the was concerned the case was dismissed. A judgment, however, was, without her knowledge, entered in the case by the justice against Margaret Trumbo, personal representative of John J. Spellman, for $90.60, and it was placed on record in the office of the Clerk of the Superior Court of Baltimore City. In January, 1913, the appellee filed the bill now under review setting forth the facts just stated, and alleging further

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that the appellant had caused a writ of *fieri facias* to be issued on the judgment, and that in the execution of the writ the Sheriff of Baltimore City had levied upon and was proposing to sell certain lots of ground of which the appellee was the owner. It was charged that the judgment was obtained by fraud and that to subject the appellee's property to its payment would be unconscionable. The bill prayed that the execution be restrained by injunction. The appellant demurred to the bill and this appeal is from the order of the Court below overruling the demurrer with leave to answer.

Upon the allegations of the bill, which are admitted to be true for the purposes of the present inquiry, the appellee is clearly entitled to equitable relief. The judgment sought to be enforced is against Margaret Trumbo, personal representative of John J. Spellman, and it is conceded by the demurrer that the appellee does not answer to that description. The service of the writ of *scire facias* upon her was plainly due to a mistake as to her identity. There was ample ground for her belief, under the circumstances stated in the bill, that the error having been proven without dispute no action could be taken in the case by which she would be in any way affected. It would be subjecting her to an unreasonably strict and rigorous rule to deny her the aid of a court of equity merely because she failed to give further attention to a proceeding in which she was formally shown to have no interest of any kind and to appeal from a judgment by which, as she was fully justified in believing, she could not possibly be bound. Even if the appellee were in fact the executor or administrator of the deceased debtor, the judgment could not be executed as against her individual property. Where a *scire facias* to revive a judgment after the death of the defendant is issued against his personal representative, the new judgment thus obtained binds only the *decedent's* assets. *Tiers* v. *Codd,* 87 Md. 447; *Poe's Prac.,* sec. 593. The writ requires the defendant in the *scire facias* "to show why the plaintiff should not have execution of the debt or damages to be levied of the goods and chattels which were of the testator or intestate at

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the time of his death in the defendant's hands to be administered." *Tidd's Prac.* 1119; 2 *Harris' Entries,* 730. This limitation is altogether disregarded by the execution here sought to be restrained. It attempts to appropriate for the payment of the decedent's debts property which admittedly does not constitute part of his estate, but belongs to the appellee in her individual right and capacity. The prosecution of such a proceeding by the appellant, under the conditions described in the bill, would be a fraud and imposition which a court of equity could not hesitate to restrain.

It is objected that the bill is not accompanied by exhibits of the judgment, the writs of *scire facias* and execution, and appellee's deed for the property which has been seized. The rule is that if an applicant for relief by way of injunction "has in his possession or can produce authenticated copies of papers or instruments of writing on which his equity rests," they must be exhibited in support of the bill "in order that the Court may see that he is entitled to the relief prayed." *Nagengast v. Alz,* 93 Md. 525; *Water Co.* v. *Hagerstown,* 116 Md. 509; *Baltimore* v. *Keyser,* 72 Md. 115; *Gottschalk* v. *Stein,* 69 Md. 51. Where the reason thus stated for the production of exhibits does not exist the rule is not applied. *Webb* v. *Ridgely,* 38 Md. 369; *Didier* v. *Merryman,* 114 Md. 438. The appellee's equities do not *rest* upon the *scire facias* and execution proceedings, nor is there any question of title involved. The object of the suit is to prevent the appellant from enforcing a claim which *he* is asserting against property of which the appellee is the conceded owner. The exhibits demanded by the appellant are not necessary to enable the Court to see the obvious equities of the case stated in the bill.

Order affirmed, with costs, and cause remanded.

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CASPARIS STONE CO.

vs.

ALISANDRO BONCORE.

AND

ALISANDRO BONCORE

vs.

CASPARIS STONE CO.'

Negligence: damages; gist of action; breach of some duty; burden of proof. Quarrying: explosion of dynamite.

In an action for damages for injuries received from the alleged negligence of the defendant, whatever the facts and circumstances may be, unless there is some evidence of negligence, or evidence from which negligence may be legally inferred, as the result of some act or omission on the part of the defendant, the case should be withdrawn from the consideration of the jury. p. 450

The defendant, by offering evidence after the refusal by the Court to grant his prayer taking the case from the jury on the ground of lack of evidence, thereby waives his right to object to the rejection of such prayer. p. 450

In an action of damages against a quarry company for injuries received by a workman who was employed in tamping dynamite and earth in a hole preparatory to a blast, it did not appear by any evidence, except the conjecture of an expert, that the shape or kind of tool complained of had any connection with the accident; *held,* that the case should have been withdrawn from the consideration of the jury. p. 456

To entitle an employee to recover against a master on the ground of negligence, the foundation of the right rests upon the negligence of the master, and unless there has been some breach of duty on his part there can be no liability because there has been no neglect. p. 454

Decided June 26th, 1913.

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Two appeals in one record from the Circuit Court for Harford County (HARLAN, J.).

The facts are stated in the opinion of the Court.

The causes were argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

Joseph N. Ulman and *Clarence A. Tucker* (with whom were *Samuel J. Harman* and *Charles H. Knapp*, on the brief), for the Casparis Stone Company.

Fahey & Brown and *J. J. Archer*, for Alisandro Boncore.

STOCKBRIDGE, J., delivered the opinion of the Court.

This is an action for damages for personal injuries received by the plaintiff under a chain of circumstances of unusual character. The important question to be decided is whether the facts as proven make out a case of negligence upon the part of the defendant sufficient to entitle the case to be submitted to a jury at all. Whatever the facts or circumstances may be, unless there is some evidence of negligence, or evidence from which negligence may be legally inferred, the result of some act of omission or commission on the part of the defendant, there is nothing which calls for the submission of the case to the jury. At the conclusion of the plaintiff's evidence a prayer was offered by the defendant asking an instruction in its favor upon the plaintiff's evidence, and this having been refused the prayer was renewed upon the conclusion of all the testimony in the case. At this time the Court is only concerned with the prayer as offered at the conclusion of the entire testimony, because as has been repeatedly held by this Court the defendant by offering evidence in its behalf waived any right, which it would otherwise have had, to rely upon the prayer as offered at the conclusion of the plaintiff's evidence. *Knecht* v. *Mooney*, 118 Md. 583.

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The facts as they appear from the record are:

The Casparis Stone Company was operating two quarries, designated respectively as the old and the new, near Havre de Grace, in Harford County. The point where the accident to the plaintiff occurred was near the new quarry. For some months the defendant had been engaged in drilling holes in which to place the dynamite for the blasting to be made. These holes ranged in depth from forty to one hundred and five feet, the larger ones being approximately five inches in diameter. The explosive to be used was dynamite known as 60%. which is an explosive of extremely high power, consisting of sixty parts nitro-glycerine to forty parts infusorial earth, the function of which was to hold the nitro-glycerine together. The general foreman employed on the job was a man by the name of Devitt, and immediately under him was James Boncore, a brother of the plaintiff who was known as the powder boss. His duties were to attend to the loading or charging of the borings which had been made, and apparently also to superintend, if he did not actually perform the work of igniting the blasts. Being desirous of expediting the work, a second gang of men was brought from the old quarry to the new, to perform the same duties of charging the borings with the explosive. At the head of this second gang was Alisandro Boncore, the plaintiff in this case.

The process of charging the holes consisted in dropping or pouring into them a certain amount of dynamite, and then tamping it down firmly in place ready for ignition, either by an electric current or by means of a fuse and cap, the latter being known as mud capping, and ordinarily employed where the blasting operation was to be carried on out in the open, for breaking up into smaller pieces the larger fragments of rocks which had been dislodged. For the purpose of this tamping the defendant company provided wooden poles. some sixteen or eighteen feet in length. fitted with a sleeve so that they might be successively joined together when a greater depth was required to be reached than the length of a single

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pole. These poles appear to have had a diameter of approximately two inches. Instead of using this appliance James Boncore had, and was using for tamping purposes an instrument made by taking a piece of iron pipe into one end of which was inserted a conical wooden plug driven in with a maul. This plug projected somewhere from three to five inches beyond the end of the pipe. The other end of the pipe was open, but in some manner a handle was attached to it, so that it could be suspended by means of a pulley rigged on a tripod, then lowered into the boring and by means of the other end of the rope, which passed over the pulley, raised some three or four feet for the purpose of tamping, or entirely withdrawn. There is a conflict of evidence whether this form of an implement for tamping was provided by Devitt, the general foreman, or by James Boncore; but if by the latter, its use was continued with the knowledge and apparently with the sanction of Devitt. When the second gang was brought from the old to the new quarry, under the charge of Alisandro Boncore a similar instrument for tamping was made for use by him. It apparently differed in one respect only from the one first made. namely, in that the handle at the open end was attached to the pipe by means of bolts and nuts which projected a quarter of an inch or thereabouts on the outside of this tool. On the morning of the day of the accident, and while using this second tamper, smoke and flame, but unaccompanied by any explosion, burst from the boring in which the tamping was being done. As soon as this subsided, the tamping tool was withdrawn from the hole, and James Boncore believing the fire to have been caused by the projecting bolts striking the sides of the boring, to which some particles of the nitro-glycerine had adhered, thereby causing sufficient friction to ignite these particles of nitro-glycerine, directed one of the workmen to take the instrument to the blacksmith shop a short distance off, and have the projecting bolts removed. There was at this time in the neighborhood of ten to twelve feet of water in the bottom of the

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boring into which the nitro-glycerine was poured. By reason of the greater specific gravity the nitro-glycerine would readily settle to the bottom, and the water being deeper than the length of the tamping pipe, the pipe of course became filled with water and particles of sand, so when James Boncore caused the pipe to be withdrawn from the boring in order to have it sent to the blacksmith shop, he had the pipe emptied of whatever sand and water it contained. When the pipe was delivered to the blacksmith he removed the bolts, as directed, and then in furtherance of what he understood to be his instructions, started to close the upper end of the pipe by heating and welding the iron sides together. Accordingly having heated this end of the pipe to a welding heat he placed it upon his anvil, and with his hammer proceeded to mash the ends together. This not having been fully completed before the iron was cooled, he inserted it a second time in his fire, and a second time with his hammer went through the process of welding it upon his anvil. In the meantime Alisandro Boncore had been sent by his brother James to the blacksmith shop to get and bring back the implement as soon as the work on it was completed, and while waiting for it Alisandro was standing in the doorway. For a third time the blacksmith inserted the end of the pipe in his fire for the continuation or completion of the welding process, and as he removed it let fall the other end, *i. e.,* the end in which the wooden plug was, upon his anvil and instantly there was an explosion, which seriously injured the plaintiff, knocked down the blacksmith and broke some of his bones, and partially demolished one side of the blacksmith's shanty. It is for the injuries so suffered by the plaintiff that this suit was brought.

In all such cases as this the foundation of the right to recover rests upon some negligent act on the part of the master. Unless there has been some breach of duty there can be no liability, because no negligence; so in the case of *Gans v. Byrnes,* 102 Md. 230, where the injury complained of was the falling of a wall; it was held that the mere falling of the

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wall was not sufficient evidence of negligence on the part of the appellant, and this excluded any inference of negligence from the naked act which caused the injury. *Serio* v. *Murphy,* 99 Md. 545; *So. Balto. Car Works* v. *Schaefer,* 96 Md. 105; and applied to the present case no inference of an improper or dangerous tool can be drawn from the mere fact of the explosion, unless it be assumed that it would not have exploded if it had been a proper tool, but to assume that would be to assume as true the precise thing to be proved, and that assumption when adopted would then be substituted for evidence tending to establish the fact to be proved. Such a process would permit negligence to be inferred from the simple happening of the accident. In a case like this that cannot be done. This same principle was applied in the case of *Joyce* v. *Flanigan,* 111 Md. 481; *Buttner* v. *Steel Car Co.,* 101 Md. 168; and *Eyre Shoemaker Co.* v. *Mackin,* 116 Md. 63. The theory of the declaration is that the plaintiff was furnished by the defendant with a rammer constructed unsafely and with defective and improper materials, and that it was in an unsafe condition and unfit for the purpose for which it was furnished, which the defendant knew, or by the exercise of ordinary care could have known, but of which the plaintiff was ignorant; and by the second count, that the defendant negligently and carelessly furnished the plaintiff with an unsuitable and unsafe rammer for said work, and by the third count, that the defendant negligently and carelessly furnished the plaintiff with an unsuitable, defective, unsafe and dangerous rammer with which to do said work. When, however, the evidence is considered, to ascertain the respect in which the rammer, assuming it to have been furnished by the defendant, was constructed with defective and improper material, or was unsuitable, defective, unsafe or dangerous, the prominent fact is that the accident did not occur, and the plaintiff was in no wise injured, while the rammer was being used for the purpose for which it is claimed to have been made. On the contrary, the first rammer made out of

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iron pipe appears to have been used throughout the entire operation, both before and after the accident out of which this case arises, without the slightest evidence or indication that it was in any manner unsuited for the work, improper to be used or dangerous in its use. While in the case of the second rammer, even if its original construction rendered it an unsafe appliance, the fire, which was occasioned by it in the boring, did not cause or in any manner contribute to the accident by which the plaintiff was injured.

Thus far the assumption has been that the tool in question was ordered to be made by the foreman Devitt, with regard to which as already noted there is conflict of evidence; but inasmuch as the phase of the case now under consideration is the refusal of the defendant's prayer to withdraw the case from the jury, the plaintiff is entitled to the assumption most favorable to him warranted by the evidence. The plaintiff claims the tool in question to have been unsuitable, improper and unsafe upon a very ingenious theory, namely, that when the rammer in question was plunged into the water, all of the dynamite had not been precipitated to the bottom of the boring, and that some of it was carried by the water and sand inside of the pipe, where it then settled in the bottom and was retained there by reason of the cone shape of the plug; that the inverting of the rammer for the purpose of emptying out whatever might be in the pipe, did not remove the nitro-glycerine collected between the plug and the sides of the pipe, and that the concussion caused by the falling of the pipe on the anvil was the cause of the explosion, and that, therefore, the proximate cause of the accident was the method, the faulty method, of the construction of the instrument. But there is an insuperable objection to the adoption of this view—first, the evidence discloses, so far as it discloses anything, that the pipe was thoroughly emptied before being taken to the blacksmith's shop, and this is proved by the plaintiff's own witnesses; but, independently of that, to adopt the theory of the plaintiff, requires, first, the assumption or inference that all of the nitro-glycerine in the boring had not been precipi-

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tated to the bottom, but that some of it was still in a state of suspense; second, that the nitro-glycerine being thus suspended passed into the pipe during some period of its submergence and was then precipitated to the bottom of the pipe between the wooden cone and the side of the pipe; third, that the pipe was not, as testified, entirely emptied, but that there remained in it some amount of the explosive; and, fourth, that it was the concussion incident to the dropping of the pipe upon the anvil which occasioned the blowing to pieces of the pipe; of none of which facts is there any evidence, except the conjecture of the expert, Janney. Therefore, to sustain the recovery, it must be done entirely upon hypotheses without evidence to support them. It is proper to say that the decisions in this country are very far from being uniform, and the cases of *Brownfield* v. *Chicago R. I. and P. Ry.*, 107 Iowa, 254, and *Brown* v. *The W. Riverside Coal Co.*, 28 L. R. A. n. s. 1260, are prominent examples of cases which take the opposite view; but whatever may be the law elsewhere, the cases in this State are too clear to admit of any conclusion other than that no sufficient negligence upon the part of the defendant has been shown to entitle the plaintiff to recover, and that, therefore, the second prayer of the defendant should have been granted.

There was much stress laid in the argument, and many authorities are cited upon the briefs of the counsel with regard to the assumption of risk, but in the view which this Court takes of the case it is unnecessary to discuss this point, and it also becomes unnecessary to deal with the question of the admissibility of certain expert testimony offered on behalf of the plaintiff, and which constitutes the basis of the cross-appeal.

For the reasons indicated the judgment below will be reversed without a new trial.

Judgment reversed, without a new trial, with costs to the appellant in the original appeal.

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THE STATE OF MARYLAND, TO THE USE OF NATA MELITCH, SURVIVING WIDOW OF VELKO MELITCH, DECEASED,

vs.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, A BODY CORPORATE.

Death by negligence: release of claim; effective against equitable plaintiff under Article 67, section 1 of the Code.

Where a party, injured by the negligence of another, dies, but, before dying, for a valuable consideration executes a release to the defendant for all claims that he had, or might have, because of such injury, no suit can be brought by the State for the use of the equitable plaintiffs for damages, under Article 67, section 1 of the Code of 1904, because of such injury. p. 463

The distinction drawn between this Act and the provisions of sections 103 and 104 of Article 93 of the Code of 1912. p. 463

Decided June 26th, 1913.

Appeal from the Baltimore City Court (HARLAN, C. J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

William J. Ogden (with whom was *Slyvan Hayes Lauchheimer,* on the brief), for the appellant.

J. Pembroke Thom (with whom was *Wallis Giffen,* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

The equitable plaintiff in this case is the widow of Velko Melitch, who was injured on the 25th of October, 1910, by the alleged negligence of the defendant, and died on the 8th day of March, 1911. This suit was brought under Article 67, sections 1, 2, 3 and 4 of the Code (1904), to recover damages sustained by her as the result of his death.

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On January 13th, 1911, Velko Melitch, by deed, for a valuable consideration, released the defendant from all and every claim and demand which he might or could possibly have for or on account of his injuries. There is no question in this case as to the validity of the release. The defendant plead this release in bar of this action. The conclusiveness of this release as a bar to the suit was raised by demurrer, and the Court, being of opinion that it constituted a complete defense, a judgment was entered for the defendant.

The sole question presented by the record is this: Does the release constitute an effectual bar to a recovery in this case? The sections of the Code to which we have referred are taken from the Act of 1852, Chapter 299, and are almost a literal transcript of Lord Campbell's Act passed in 1846 (9 and 10 Vic. Chapter 93). In *Coughlan* v. *B. and O. R. R. Company,* 24 Md. 84, the Court said: "The General Assembly of this State, in the year 1852, finding the common law maxim, 'Personal actions die with the person,' unsuited to the circumstances and condition of the people, enacted a law entitled, 'An Act to compensate the families of persons killed by the wrongful act, neglect or default of another person.' To make this design more obvious, the fourth section provides, 'the word person shall apply to bodies politic and corporate,' and 'all corporations shall be responsible under this Act, for the wrongful acts, neglect or default of all agents employed by them.' The material provisions of this Act, as well as its title, are derived from the ninth and tenth Victoria, and are embodied in Art. 65 (title Negligence) of the Code (1860). The American cases, arising upon Acts varying in language, necessarily lead, as observed by JUDGE REDFIELD, to a diversity of decisions. We have no better guide than the construction of a statute originating in the same policy, and expressed in the same words, by enlightened jurists, distinguished for their independence and jealous regard for the rights of suitors."

In *Read* v. *The Great Eastern Railway Company,* L. R. 3 C. Queen's Bench, 555, the husband was injured on a railroad, as a passenger, and before he died from the effects of the in-

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jury compromised his claim against the railway company. His widow brought suit under Lord Campbell's Act to recover damages which she had sustained by his death. The Court held that, since the settlement made by the husband would have precluded him from recovering "if death had not ensued," the widow by the terms of the statute could have no better right. This interpretation of Lord Campbell's Act has been without question uniformly followed by the English Courts, and if we are to be guided by the construction placed upon the statute by those Courts, the release set up in this case constitutes a complete bar to the action. All the American States have passed Acts providing for compensation to families of a deceased person killed by the wrongful act, neglect or defaults of others, and the books are full of cases dealing with those statutes, and whenever the Courts have had occasion to deal with Lord Campbell's Act, they have approved the construction placed upon it by LORD BLACKBURN in *Read* v. *The Great Eastern Railway Company, supra.* It is not necessary to review the many cases upon this subject, but a reference to two or three cases will sufficiently show the general consensus of the American Courts upon the question here presented.

In *Brown* v. *Chicago and N. W. Ry. Company,* 77 N. W. Rep. 748, which was cited and approved by this Court in *Stewart, Administrator,* v. *United Electric Light and Power Company,* 104 Md. 332, the Court said, referring to *Read's case, supra*: "The decision there is only to the effect that if an injured person has satisfaction of his claim before death, the subsequent death from the injuries does not confer a right of action upon surviving relatives; that such right exists only where there is an injury to a person and there is an existing claim for damages therefor at the time of his death. JUSTICE BLACKBURN, who delivered the opinion, said, in substance, that the proper construction of the statute is that it gives a right of action to certain surviving relatives of a person when death was caused by the wrongful act of another, where he had not received satisfaction in his lifetime, and that

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to go further would be straining the language of the law. That seems plain. The language of our statute is that liability of the wrongdoer exists where the deceased could have recovered if death had not ensued. That clearly excludes the idea that where the decedent receives satisfaction for his injuries, the condition requisite to the right of surviving relatives may exist notwthstanding. There is nothing in *Read* v. *Railway Company* in conflict with *Blake* v. *Railway Co.,* 10 Eng. Law & Eq. 443, where, in a very instructive opinion by COLERIDGE, J., it is said that Lord Campbell's Act does not transfer to the surviving relatives mentioned, the claim for damages previously possessed by the deceased, but gives them an independent cause of action for damages peculiarly incident to their relation to the deceased. The two cases are often cited to opposite views, but are in fact, when correctly understood, in perfect harmony. The one holds that the right of the relative named in the statutes is separate and distinct from that possessed by the deceased; and the other, that the right of the relatives is contingent on the death of the injured person without having satisfied his claim for damages."

In *Hecht* v. *Ohio and M. Ry. Co.,* 32 N. E. Rep. 302, the Supreme Court of Indiana, in construing the statute of that state which provided, that when death is caused by a wrongful act, the personal representatives of the decedent may sue therefor if the decedent might have maintained an action had he lived, said: "It is contended that the section of the statute (section 284, *supra*) gives a new right of action in favor of the administrator for the benefit of the widow and children, if any, or the next of kin. This is true in a certain sense. Without the statute, the action could not be maintained; but, in order that it may be maintained, the intestate must have had a right of action against the person whose wrongful act or omission caused the injury which he could have maintained had he lived, and when as in this case, the injured person has prosecuted his action for damages on account of the injury to final judgment, and the judgment has been satisfied prior to his death, he, if he had lived, could not have

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prosecuted an action against the person causing the injury for the same act or omission. The construction we have given to this section of the statute is well supported." The Court then referred to *Read* v. *Great Eastern Railway Company, supra; Griffiths* v. *Earl of Dudley,* 9 L. R. Q. B. Div. 357; *Haigh* v. *Steampacket Co.,* Law J. 52 Q. B. Div. 395, 640.

In *Littlewood* v. *Mayor, Etc., of New York,* 89 N. Y. 24, the plaintiff's intestate during his lifetime brought suit against the defendant for injuries sustained by him, and recovered judgment, which was paid by the defendant. Suit was afterwards brought by his administrator for the benefit of the next of kin under a statute substantially like our own. The Court, in a strong opinion delivered by JUDGE RAPALLO, decided that he could not recover. In the course of the opinion the Court said: "The language of the act plainly indicates, I think, that the framers had in view the common law rule, *"actio personalis,"* etc., and that their main purpose was to deprive the wrongdoer of the immunity from civil liability afforded by that rule. The entire gist of the first section is that the wrongdoer "shall be liable to an action for damages *notwithstanding the death of the person injured* and though the death shall have been caused under such circumstances as amount in law to a felony." It does not provide that the wrongdoer shall be liable notwithstanding that he shall have satisfied the party injured, or notwithstanding that the latter had recovered judgment against him, or notwithstanding any other defense he might have had at the time of the death, but merely that the *death* of the party injured shall not free him from liability; showing that this is the point at which the statute is aimed. The condition upon which the statutory liability depends is declared to be, "that the act, neglect or default is such as *would* (if death had not ensued) have entitled the party injured to maintain an action and recover damages," etc.

This language is accurate if the act was intended to apply to the case of a party who, having a good cause of action for

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a personal injury, was prevented by the death which resulted from such injury, from pursuing his legal remedies, or who omitted in his lifetime to do so. It precisely fits such a case, but it is singularly inappropriate to the case of one who has in his lifetime maintained the action and actually recovered his damages. The form of expression employed in the act shows that the Legislature had in mind the case of a party entitled to maintain an action, but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action and recovered his damages.

This still more strongly appears by reference to the words of the act which describe the wrongdoer against whom a right of action is given. He is not described by any language which is applicable to a party against whom judgment has been obtained by the deceased for the injury, but as "the person who would have been liable if death had not ensued." And the enactment is that this person shall be liable notwithstanding the death. It seems to us very evident that the only defense of which the wrongdoer was intended to be deprived, was that afforded him by the death of the party injured, and that it is, to say the least, assumed throughout the act that at the time of such death the defendant was liable. In the present case the defendant does not answer the description of "the person who would have been liable if death had not ensued." It would not have been liable if the injured party were living, for the former judgment would be a complete bar. The statute may well be construed as meaning that the party who at the time of the bringing of the action "would have been liable if death had not ensued" shall be liable to an action notwithstanding the death, etc.

It is argued, and the adjudications sustain the argument, that the condition that the wrongful act, etc., must be such as would have entitled the party injured to maintain an action, has reference to the circumstances of the injury, and the character of the act, including the question of contribu· the purport of the language. But it does not follow that it

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can have no further effect, and that it cannot be considered for the purpose of determining whether the right of action created by the statute was intended to be given in cases where the deceased had in his lifetime actually recovered damages for the injury, or only in cases where he could have recovered them had he lived, but had not done so.

There is nothing in these cases in conflict with the decision of this Court in *Stewart, Administrator,* v. *The United Electric Light and Power Company, supra,* or with the reasoning of JUDGE MCSHERRY in that case. That suit was not brought under the Act of 1852, and it was not pretended that the plaintiff could have recovered under that Act. The injuries sustained by the deceased resulted in his death a few hours after the accident. He had made no settlement with the defendant, and the single question before the Court, as stated by JUDGE MCSHERRY, was: "Did the cause of action, which, according to the averments of the *narr.* accrued to the deeased in his lifetime from the alleged wrongful act and negligence of the defendant abate when he died or did it survive so that suit upon it might be instituted and maintained by his administrator? Upon a full review of the legislation in this state relating to the survival of actions, the Court decided that under section 104 of Article 93 of the Code of 1888 (appearing as section 103 of Article 93 of the Code of 1904), the plaintiff, as administrator of the deceased, could commence and prosecute a suit for injuries sustained by him as set forth in the *narr.* The Court distinguished the measure of damages in a suit brought under the provisions of the Code referred to from one brought for the benefit of the family under the Act of 1852, and was careful to say that "we are now speaking of the effect of a settlement made by the injured person in his lifetime." While the Court stated the settled rule of law of Maryland to be that the Act of 1852 created a *new* cause of action, it held that the right of the relatives named in the statute to recover "is contingent upon the death of the injured person without having his claim for damages satisfied."

Judgment affirmed, with costs.

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THE TRUSTEES OF ST. CHARLES COLLEGE, A BODY CORPORATE,

vs.

ROBERT G. HARPER CARROLL.

Trusts: to corporations not empowered to hold property under other conditions. Estates upon condition: defeasance; right of re-entry. Deeds: grantor's right to impose conditions.

By Chapter 50 of the Act of 1829, a corporation was formed under the name of the Trustees of St. Charles College, for the purpose of educating young men of the Roman Catholic religion for the ministry. In 1830 Charles Carroll of Carrollton conveyed to the corporation a certain tract of land, to it and to its successors forever in trust for the uses and objects set forth in the act of incorporation. The deed contained the proviso that the tract of land should never be sold or aliened by the said corporation or its successors, but that they should forever apply the proceeds of the land to the use, objects and trusts in the Act of Assembly referred to, and also that the Trustees of St. Charles College should, as soon as they came into possession of the tract of land, and their funds would allow, cause to be erected on the same the buildings proper and necessary for the trust; and also that said trustees and their successors should forever continue the seat and location of said college upon the premises conveyed; and provided that upon the breach of any of the conditions it would be lawful for the grantor, his heirs and assigns to re-enter into the premises conveyed and enjoy the same as in his former estate, and that in such a case the deed should thenceforth be void and of no effect in law or in equity. In 1911 the college, which had been erected and maintained on the property conveyed for the purpose of the trust, was destroyed by fire, and another set of buildings was erected by the college at another location. In an action of eject-

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ment brought by one of the assignees and devisees of the grantor to recover his undivided interest in the tract of land, it was *held,* that the language employed in the proviso was plain and unequivocal, and that it created a condition subsequent, and that the successors of the grantee in the original deed, by abandoning the premises as the seat and location of the college, had committed a breach of the covenant, and the heirs of the grantor had the right to re-enter and take possession of the property under the deed of 1830. p. 478

Where by a deed or will property is conveyed or devised to a corporation capable of taking it for its charter purposes, some of which purposes are precisely those indicated in the deed or will as the ones to which the funds or property is to be devoted, the conveyance or bequest is to be considered as not to the grantee or devisee *in trust,* but to it for its legitimate corporate uses, and is free from restrictions other than the conditions that may be by the deed or will imposed; and such conveyance or bequest is not to be construed as a trust, even though words capable of *creating a trust* may be used in the instrument. pp. 471-474

A grantor has the right to dispose of property under any terms he pleases which do not contravene some principle of public policy or positive rule of law. p. 475

An estate upon condition is one which has a qualification, or by which, on the happening of a particular event, it may be created, ended or destroyed. If set forth, the condition is express; if it allows the estate to vest, and then to be determined in consequence of the non-observance of a requirement, it is a condition subsequent. p. 477

Conditions subsequent are not favored by the law, because on breach there is a forfeiture; but they may be annexed to a grant, and when the intention of the parties is clear it should be respected. p. 478

Decided June 26th, 1913.

Appeal from the Circuit Court for Howard County (FORSYTHE and BRASHEARS, JJ.).

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The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Edgar H. Gans and *Harry M. Benzinger* (with whom was *Daniel M. Murray* on the brief), for the appellant.

Edward M. Hammond and *Joseph L. Donovan,* for the appellee.

PATTISON, J., delivered the opinion of the Court.

On the 17th day of August, 1912, the appellee, who is one of the heirs at law of Charles Carroll of Carrollton, instituted an action of ejectment in the Circuit Court for Howard County against the Trustees of Saint Charles College, a body corporate, to recover a tract of land lying in that county containing two hundred and fifty-four and a half acres of land. The case was tried before a jury in that Court and resulted in a verdict and judgment for the plaintiff for a one-eleventh undivided interest in the land sued for, and from that judgment the defendant has appealed.

The appellant was incorporated by the Act of 1829, Chapter 50, by the name of the Trustees of Saint Charles College, and the purpose of its creation was the education of young men of the Roman Catholic religion for the ministry of the Gospel. The preamble to the Act recited that Charles Carroll of Carrollton, having it in contemplation to found a seminary to prosecute such work, had applied to the General Assembly for leave to convey to certain named persons and their successors forever a tract of land in trust for the purposes aforesaid. The first section of the Act declared the persons named to be a body corporate, and that they and their successors should have perpetual succession. Power was granted to the corporation "to receive and hold the said donation, deed and gift of the said Charles Carroll of Carrollton, as designated in the preamble of this Act, and to receive and

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hold any property, real and personal, acquired either by purchase, gift, grant or devise, not exceeding the whole yearly value of six thousand dollars, in trust for the purpose designated in the preamble hereto."

By the fifth section of the Act it was provided: "That all property which shall be received, and held by the said corporation, as well real as personal, and whether derived by gift, devise, bequest, purchase or otherwise, shall be held by them, to and for the only purpose, and in trust exclusively for the education of pious young men of the Catholic persuasion for the ministry of the Gospel."

Section eight provided that the corporation should have full and perfect control over all the property belonging to it for the purpose of the trust aforesaid; provided, that none of its funds or property, of which it should become possessed, should be appropriated otherwise than for the trust declared in the Act.

On the 27th of March, 1830, Charles Carroll of Carrollton executed a deed to the Trustees of Saint Charles College by which he granted and conveyed to it the land which is the subject-matter of this suit. The deed referred to the Act of Incorporation and recited its power to receive and hold in trust for the purpose therein declared and to the extent and amount therein limited, any property, real or personal. It then, in consideration of the trust therein mentioned to be performed and of the sum of five dollars, granted and conveyed unto the Trustees of Saint Charles College the tract of land containing two hundred and fifty-four and a half acres and which is described by metes and bounds, courses and distances. This is the same land described in the declaration. The land in express terms was granted to the Trustees of Saint Charles College and their successors forever in trust and for the uses and objects set forth in the Act of Incorporation.

The deed contained a proviso which is here transcribed:

> "Provided always that the tract of land and premises hereby conveyed shall never be sold or aliened by

the said Trustees of Saint Charles College, or their successors, but that they shall forever faithfully apply the proceeds of said land to the uses, objects and trusts in said Act of Assembly before referred to specified and set forth, and also that the said Trustees of Saint Charles College shall as soon after they come into possession of said tract of land as their funds will allow cause to be erected on the premises hereby conveyed such buildings as may be proper and necessary to the purposes of this trust; *and also that said Trustees of Saint Charles College and their successors shall continue the seat and location of said College upon the premises hereby conveyed forever;* and provided lastly that *upon the breach of any of the conditions above stated it shall and may be lawful to and for the said Charles Carroll of Carrollton, his heirs and assigns,* into the premises hereby conveyed or unto any part thereof in the name of the whole *to re-enter and the same to have again,* possess, occupy and enjoy as in his former estate, and then and in such case this deed and clause, matter and thing therein contained *shall from thenceforth be utterly void and non-effect in law and equity."*

The appellant took possession of the property under the deed in 1830, and has ever since remained in possession of it. It erected a fine college building, chapel, and other valuable improvements upon the property. The teachers and the entire body of students resided permanently at the college from about the year 1848 until March 16th, 1911, on which date the college was destroyed by fire.

The questions of rebuilding and the cost of construction were taken up by the college authorities, and the matter was referred to his Eminence Cardinal Gibbons. He was at first decidedly in favor of rebuilding upon the old location, but when it was pointed out to him that the cost of transportation of material to the old site would be so great and the greater length of time it would require to complete the work

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in Howard County, he concluded not to insist upon his preference to relocate the college upon its former site, and remitted the question of a new location to the judgment of the trustees, and they decided to locate the college at Cloud Cap, in Baltimore County, which place is about ten miles distant from its original location. The reason which induced the location at Cloud Cap is thus tersely stated by Mr. O'Connor, the builder: "Upon estimates being made, we found that the cost of rebuilding there (the old location) would really be prohibitive, and under the most favorable conditions it would cost at least $60,000.00 more to build a college there instead of at Cloud Cap near Catonsville. It would take two or three times as long to get there, it would take a great deal longer to build there, and the desirable help would have to be paid more to go there to work. It really would have cost about $100,000.00 more to build there than at Cloud Cap."

There is no question in this case of any breach of trust on the part of the Trustees of Saint Charles College. They have faithfully and scrupulously applied all its funds, property and income to the trust declared in its charter and in the deed mentioned. But the evidence is clear and full to the point that, because of the prohibitive cost of erecting the new building on the old location in Howard County, they have permanently abandoned *"the seat and location of said college upon the premises"* granted by the deed of March 27th, 1830. Does this fact by a true construction of that deed cause a forfeiture of said land whereby it has reverted to the heirs of the grantor? If it does, then the plaintiff had a right to recover his undivided interest in the property.

We think it perfectly clear, upon the authority of *Bennett* v. *Humane Imp. Society,* 91 Md. 10; *The Woman's Foreign Missionary Society* v. *Mitchell,* 93 Md. 199; *Baltzell* v. *Church Home,* 110 Md. 244, and other cases in this Court, that the deed from Charles Carroll of Carrollton to the Trustees of Saint Charles College was in all respects valid, and that it passed title to the property conveyed to the grantee for the clearly defined corporate purpose mentioned

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in its charter, subject, however, to the legal operation and effect, if any, of the provisos contained therein.

In *Woman's Foreign Missionary Society* v. *Mitchell, supra,* the Court had under consideration the construction of the will of Maria A. Sherman. Two questions were presented for decision: first, whether the appellant society was the devisee and legatee intended to be named and actually described in the residuary clause of the will; and secondly, whether that clause was valid. That clause was in these words: "I direct that my two houses and lots in Mountain Lake Park, Garrett County, Maryland, and my lots in Covington, Kentucky, and the stock in the Southern Building Association held in care of W. G. Hay, of Hagerstown, Maryland, and all other property, both real and personal, other than that already bequeathed, be sold, and the proceeds thereof, together with whatever monies I may die possessed of, be held in trust by the Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church of the United States of America for the following purposes: After all my debts, bequests and provision for my burial, etc., be paid, that sufficient be used to educate as Bible readers in India six girls, one to be named "Dorcas Sherman"; one "Avis Cecil Sherman"; one "Mary Jane Sherman"; one "Sarah Jennie Sherman"; one "Jennie Smith"; one "Grace Mabel Sherman"; the money remaining after that set aside for the education of the aforesaid Bible readers to be applied to the purchase of a building to be used for the education of girls in India to be called the "M. Adelaide Sherman Home" and the location of said building to be left to the decision of Bishop Thoburn or his successors."

This clause was assailed upon the ground that it created a trust whose objects were indefinite and uncertain. The Court decided, upon the facts before it, that there had been a *misnomer* of the devisee and legatee, and that "the Woman's Foreign Missionary Society of the Methodist Episcopal Church" was the corporation intended by the testatrix, though *misnamed* in her will, to take the residuary estate. It then

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consulted the charter powers of the society, and found "that the particular business and object of said society is to engage and unite the efforts of christian women in sending female missionaries to women in foreign mission fields of the Methodist Episcopal Church, and in supporting them and native christian teachers and Bible readers in those fields," and that India was one of those fields. JUDGE MCSHERRY, speaking for the Court then propounds this question: Is the residuary clause void by reason of its creating a trust whose objects are vague, indefinite and uncertain?

"Not a great deal need be said in disposing of this inquiry. If there is no trust created, or if none was intended to be created, as to this *residuum,* then there can be no trust that is void by reason of the objects of it being indefinite and uncertain. So, clearly, the first question to be determined is whether there *is* a trust which has been actually created pursuant to an intent to create one? It is true the testatrix declared that the property should 'be held in trust by the Board of Managers, etc., for the following purposes.' These purposes, it is alleged are, after the payment of debts, bequests and funeral expenses, 'that sufficient be used to educate as Bible readers in India six girls' to be named as directed in the clause, and that 'the money remaining after that set aside for the education of the aforesaid Bible readers' should 'be applied to the purchase of a building to be used for the education of girls in India to be called the "M. Adelaide Sherman Home," and the location of said building to be left to the decision of Bishop Thoburn or his successors.' Excluding the sums applicable to the payment of debts, legacies and funeral expenses, there is and can be no trust at all. If there be a manifest design *not* to establish a trust, then no trust will be declared though the words employed would or might but for the contrary intention, be sufficient to create a trust. *Bennett* v. *Balto. Humane So.,* 91 Md. 10. Now, perhaps, had the precise phraseology, which is found in the will before us, been used in making a like devise and bequest to a natural person, it might be said

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that the design was to create a trust, because the purposes indicated are not those ordinarily performed by an individual; but when it is remembered that the very end which the corporation here made the beneficiary was organized to effect is the education of Bible readers and the instruction of girls in foreign lands, it becomes evident that the property was given to the corporation not in trust for indefinite objects, but that it was given to it to be used for its recognized and clearly defined corporate purposes. The specific design of the gift is that the proceeds of the property shall be used, that is spent, by the beneficiary for *its* chartered ends and not for some one else's benefit. The corporation is not to hold the fund for the use of others, but it is to spend that fund in the prosecution of its missionary work. The declaration by the testatrix that the funds should be used to educate six Indian girls as Bible readers impresses no trust upon the fund, because the education of the girls, whether six, or more or less, as Bible readers is precisely the purpose to which the funds would have been applied had the gift been made to the same devisee and legatee without these superadded words. It may and probably would be accurate to say that the provision requiring *six girls* to be educated who are to be *named* as in the will indicated, is a condition annexed to the gift as contradistinguished from a trust impressed upon the gift. The testatrix could have had no object in creating a trust, since without a trust precisely the same application will be made of the funds under the charter of the society as if there had been or could be a valid appropriation of them to these identical ends by means of a trust. If it were held that the words of the will attempted to create a trust which trust when created would be denounced as void for uncertainty, and which, therefore, would be called into existence only for the purpose of being considered as *not* in existence, a Court, ought to hesitate before putting such a construction on the words, if another construction which treats them as creating a condition instead of a trust and therefore which upholds the decedent's intention, is equally available and accurate.

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The whole scheme of the testamentary disposition contemplates imposing upon the beneficiary in declaratory language precisely the duty which its charter would have required it to perform with respect to this property had such declaratory language been omitted; save as to the *number* and *names* of the girls to be educated. These exceptions constitute, we think, not evidence of an intention to establish a trust but they denote simply a condition which has been annexed to the gift; and this condition relates not to the *vesting* of the property but to the *expenditure* of it. Much of the reasoning employed in the recent case of *Bennett* v. *Humane So., supra,* is pertinent to this branch of the controversy. As that case was decided less than a year ago we do not deem it necessary to quote from it now."

"What has been said in relation to the six Indian girls is also applicable to the remaining portion of the clause respecting the purchase of a building to be used for the education of girls in India. This is a gift to the society, the property given to be used in the line of that society's mission work. The use is a corporate use within the limits of its charter powers. In effect, the testatrix said by her will to the society: 'You have power under your charter to educate females in far-off lands; in prosecuting this work you have authority to build or buy houses, as houses are necessary in carrying on schools. Now, I give you these funds—the proceeds of this resdiuary estate—to be used by you for these corporate purposes, but the building you purchase with the money I give you must be called the M. Adelaide Sherman Home.' Can it be pretended that such a declaration would create a trust, and a trust too that would be void because the objects of it are indefinite? Obviously it amounts merely to a gift for corporate uses coupled with the condition that the building when purchased or constructed should bear the benefactor's name. Without questioning any judgment heretofore pronounced by this Court, we say that *this* will create no trust because none was intended to be created; and the evidence that none was intended to be created is furnished by the

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fact that the gift, whatever the language used in making it, was to a corporation capable of taking for its chartered purposes, some of which purposes are precisely those indicated in the will as the ones to which the funds were to be devoted. The gift is, therefore, not to the society in trust, but to it for its legitimate corporate uses and is free from restrictions other than the conditions that have been indicated."

The case before us falls within the principle of the above case, which sustains the validity of the deed of March 27th, 1830, to the appellant as a deed to the corporation for its chartered and corporate purposes.

The crucial question in the case is the legal effect, under the facts in evidence, of the third proviso, or condition, contained in the deed. The plaintiff's case rests upon the breach of *this* condition. There has been no breach of either of the other conditions, and it may well be conceded that the restraint upon alienation imposed by the first condition would be held void, if the case depended upon the validity of that restraint. But it does not. It evidently was not the intention of the parties that the third proviso should be treated as a mere restraint on alienation. They had already provided for that contingency, and the third condition was introduced for an entirely different purpose for reasons which the grantor deemed sufficient. That provision not only imposed a positive duty and obligation upon the corporation "to continue the seat and location of said college upon the premises hereby granted," but in clear and unmistakable language declared that upon a breach of the condition the grantor, his heirs and assigns might re-enter and take possession of the granted premises "as in his former estate," and "in such case this deed and clause, matter and thing herein contained shall from *thenceforth be utterly void and non-effect in law and equity.*"

It is impossible to escape the plain meaning and force of this language. The parties to the deed must have understood—for they have so declared—what would be the effect upon the grantee's title of a breach of this condition. The

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grantor had a right to dispose of the property upon any terms he pleased which did not contravene some principle of public policy or positive rule of law. The corporation had the power to receive and hold the property, and was not prohibited from accepting it upon such lawful conditions as the grantor might impose.

In *Austin* v. *Cambridgeport Parish,* 21 Pick. 215, a lot of ground had been granted on the condition that it should be held for the support of the first and all succeeding ministers who should be settled by a religious society to preach in a meeting house on another lot, and all other meeting houses which should subsequently be built on the same site; and in default of the appropriation of the rents and profits thereof to that purpose the deed was to be void, and the lands to remain in the grantor and his heirs as though the conveyance had never been executed. The proprietors of a meeting house lot, to whom the parsonage lot above mentioned had been transferred, took down the meeting house and erected a new one on a different site, having voted however that the meeting house lot should be reserved for the erection of a meeting house at some future period when they might deem it expedient, and this lot had remained vacant three years and a half when an action was commenced to recover the parsonage lot for a breach of the conditions. It was held, that there had been a forfeiture by reason of the breach. The Court said: "The terms used in this deed are those indicating in the most direct and unequivocal manner, that the grantees were to take an estate upon condition subsequent. The present tenants derive their title under the grantees in this conveyance, and take it with the like conditions. Has there been a breach of the condition of this deed? It is admitted by the tenants that the meeting house situated on the lot conveyed by Rufus Davenport and others, was taken down in the year 1833 by order of the tenant, and that no other meeting house has since been built or is now building on the same site, but the tenants have caused another meeting house to be erected on a different lot, in which they have their religious

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worship. There is therefore at the present time no such appropriation of the land conveyed to them under this deed, as was required by the terms of the grant, and the only remaining inquiry on this point is, whether there has been such an abandonment of the former location as a site for a meeting house, as will cause a forfeiture of the estate granted by the deed of Benjamin Austin and Jonathan L. Austin. A destruction of the house by tempests, or other casualty, or the taking it down for the purpose of rebuilding on the same site, obviously would not have affected the rights of the tenant. The law would in such case preserve their estate, and give such a construction to the deed as would afford a reasonable opportunity for rebuilding a house on the same site whenever it should become necessary. But the tenants contend, that having occasion to make extensive repairs to render the house on the old site suitable and convenient as a place of public worship, they had the right to cause the same to be taken down, to erect a new meeting house upon a different lot, and to remove to the same as their stated and regular place of worship, without causing any breach of the condition upon which they held the premises demanded, and especially as the tenant, when they voted to change the location of their meeting house, also voted, "that the lot formerly occupied for a meeting house be reserved for the erection of a meeting house for some period hereafter, when said parish may deem it expedient."

"These conditions will not, in our opinion, save the breach of the condition annexed to the deed. An actual removal without any present intention of returning, and accompanied as it is by the strong presumptive evidence as to proposed future course, by the erecting on a different site an edifice designed to be used as a substitute for the old one, and a dedication and an actual adoption of it as such, are facts too significant in their character to be controlled by the circumstances relied upon by the tenants in their defense. Their vote "reserving the lot for the erection of a meeting house at

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some period hereafter, when said parish may deem it expedient, "leaves the event altogether too contingent. Such a vote might be but a dead letter, and cannot avail to save the forfeiture of an estate given on the express conditions of applying the profits of it to the use and support of a minister who should preach in a meeting house to be placed on the lot thus in effect abandoned."

It is said in *Blanchard* v. *Detroit, Lansing & Lake Michigan Railroad Company,* 18 Am. Rep. 142, that, "An estate upon condition is one which has a qualification annexed, by which, on the happening of a particular event, it may be created, enlarged or destroyed. If set forth, the condition is express; if it allows the estate to vest, and then to be defeated in consequence of non-observance of a requirement, it is a condition subsequent. 2 *Bl. Com. Ch.* 10; 4 *Kent's Com. Ch. "Of Estates on Condition"; Coke on Lit.* 201a, 215a, 215b, 233b, 234b, 251b; *Bac. Ab., Tit. Con.; Com. Dig. Tit. Con.; Shep. Touch. Ch.* 6 *"Of Conditions."*

The question whether there is a limitation or a condition, or whether there is a condition precedent or subsequent, or whether what is to be expounded is a condition or covenant, or something capable of operating both ways, frequently becomes very perplexing in consequence of the uncertain, ambiguous, or conflicting terms and circumstances involved; and the books contain a great many cases of the kind, and not a few of which are marked by refinements and distinctions which the sense of the present day would hardly tolerate.

Where, however, the terms are distinctly and plainly terms of condition, where the whole provision precisely satisfies the requirements of the definition, and where the transaction has nothing in its nature to create an incongruity, there is no room for refinement, and no ground for refusing to assign to the subject its predetermined legal character. In such a case the law attaches to the act and ascribes to it a definite significance, and the parties cannot be heard to say, where there is no imposition, no fraud, no mistake, that, although they de-

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liberately made a condition and nothing but a condition, yet they meant that it should be exactly as a covenant.

It is stated in sec. 2, *Wash. on Real Prop.* (5 ed., page 3), that: "Among the forms of expression which imply a condition in a grant the writers give the following: 'On Condition' —'Provided Always'—'If It Shall So Happen'—or 'So long that he the grantee pay, etc., within a specified time'; and grants made upon any of these terms vest a conditional estate in the grantee. And it is said other words make it a condition, if there be added a conclusion with a clause of re-entry, or without such clause, if they declare that, if the feoffee does or does not do such an act, his estate shall cease or be void. If a covenant be followed by a clause of forfeiture, and it is broken, it will be construed to be a condition."

Conditions subsequent are not favored in the law, because on the breach thereof there is a forfeiture of the estate, and the law is adverse to forfeitures. But they may be annexed to grants, and when the intention of the parties is clear the Court is bound to respect it.

The language employed in the proviso we are dealing with is so plain and mandatory that we are constrained to hold that it created a condition subsequent and that the appellant, by abandoning the premises as the seat and location of the college, has committed a breach of the covenant, and that the heirs of the grantor have a right to re-enter and take possession of the property under the deed of 1830.

The prayers granted at the instance of the plaintiff are in harmony with the views we have expressed and were properly granted and there was no error in rejecting the defendant's prayers.

The judgment will be affirmed.

Judgment affirmed, with costs to the appellee.

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MUNICH RE-INSURANCE COMPANY

vs.

UNITED SURETY COMPANY,

AND

RECEIVERS OF THE UNITED SURETY COMPANY

vs.

MUNICH RE-INSURANCE COMPANY.

Surety companies: re-insurance agreements; accounting; construction.

In a re-insurance agreement between two surety companies, a certain kind of business was excluded from a general accounting between the parties; when proceedings were had to terminate the contract, there was an agreement as to the apportionment of overhead charges, executive costs, etc.; in the absence of any other evidence or method of apportionment, it was *held,* that an apportionment of such charges according to the volume of the business excluded, although probably liberal, could not be held to be erroneous. p. 487

Two surety companies had entered into a re-insurance agreement, but owing to litigation between them no settlement had ever been had under the contract; in proceedings for an account-

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ing between them, it was *held,* that in construing their mutual obligations, the accounting should include the ascertainment of the annual profits and losses required to be made during the currency of the contract, and also the final settlement for which the contract provided, after a notice of withdrawal should be given. p. 488

The agreement of the parties was that both the premium "reserve for unexpired risks at the end of the previous year" and the "reserve for unadjusted claims" at the end of the previous year, should be charged as disbursements in accounting for the five-year period antecedent to any notice of termination, and that the profits and losses so determined should be in the proportion and manner provided in the contract; *held,* that such being the effect of the contract and the direction being positive as to the immediate payment of the annual balance so ascertained, interest was to be allowed on those sums from the time they were respectively due. p. 494

In the re-insurance agreement it was provided that one of the companies should receive as "reimbursement for good will" 5% of its share of the net premiums for the five years previous to the termination of the contract; the fact that that company instituted legal proceedings which ended in the termination of the contract did not prevent it from being allowed the 5% commissions so provided for. pp. 495-496

Decided June 26th, 1913.

The facts are stated in the opinion of the Court.

Cross-appeals from the Circuit Court of Baltimore City (BOND, J.).

The two appeals were argued together before BOYD, C. J., BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

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Edgar H. Gans and *R. E. Lee Marshall* (with whom was *Arthur Geo. Brown* on the brief), for the Munich Re-Insurance Company.

Joseph C. France and *Stuart S. Janney* (with whom were *Albert C. Ritchie* and *Robertson Griswold* on the brief), for the receivers of the United Surety Company.

URNER, J., delivered the opinion of the Court.

An agreement executed in the early part of 1906 between the Munich Re-Insurance Company and the United Surety Company, contained the following clauses upon whose construction the questions raised by this appeal depend:

"Article I. The 'United' agrees to cede to the 'Munich,' and the 'Munich' agrees to accept, a one-third ($\frac{1}{3}$) share of the amount insured or renewed under every bond, policy or guarantee which shall be issued by the 'United' in the territory of the United States, for indemnification against loss under the three classes of insurance known as Surety, Fidelity and Burglary Insurance."

"Should the 'United' decide at any time during the currency of this agreement to carry on any casualty or other business, it is agreed that the 'United' will offer to the 'Munich' a participation in such business under the terms of this agreement, and the 'Munich' has the right to accept or refuse the participation in such business."

"Should the 'Munich' elect not to participate in such business, the income and proper charges connected with that business shall not be an item of the account with the 'Munich'."

"Article V. The 'United' shall charge the 'Munich,' and the 'Munich' shall be liable for the original commissions and brokerage paid by the 'United,' * * * and the 'Munich' further agrees that it shall be charged with one-third ($\frac{1}{3}$) of all management and office expenses connected with the business included under this contract," such expenses to "embrace a *pro rata* charge of a rental of ten thousand dollars ($10,000.00) per annum for the office of the 'United'."

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"Article VIII. The 'United' will render to the 'Munich' within two months after the close of each year a detailed account, and such accounts shall include all income and disbursements in accordance with the books of the 'United,' and shall be specific on the following items:

"Income:—1. Gross premiums. 2. Reserve for unadjusted claims at the end of the previous year. 3. Reserve for unexpired risks at the end of the previous year. 4. Interest received, excluding $4\frac{1}{2}\%$ interest on the Capital Stock.

"Disbursements:—1. Return premiums and rebates. 2. Re-insurance premium. 3. Claims paid, less salvage and re-insurance in other companies. 4. Commissions and brokerage allowed. 5. Salaries, fees and all other charges of officers, clerks, agents and other employees. 6. Taxes, license and insurance department fees. 7. Rental of offices and all other disbursements, itemized as follows: (a) Advertising. (b) Printing and stationery. (c) Legal expenses. (d) Miscellaneous expenses. 8. Premium reserve for unexpired risks. 9. Reserve for claims. The above shall only include expenses incident to the Surety, Fidelity and Burglary Insurance business."

"Article IX. If the account provided for in the preceding article shows a profit, the 'Munich' shall receive one-third ($\frac{1}{3}$) thereof as its share under the terms of this agreement. If the said account shall show a loss, the 'Munich' will pay one-third ($\frac{1}{3}$) of said loss to the 'United'."

"The account shall be examined within one month after its receipt, and any balance due by either party shall be paid immediately upon receipt of confirmation by New York draft, or its equivalent."

"Article XII. This agreement shall take effect as of the second (2nd) day of January, 1906, and shall continue for a period of five (5) years from said date, and shall be tacitly renewed for further periods of five (5) years thereafter, unless written notice of a desire

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to terminate same be given by registered letter from either party one year previous to the expiration of any term of five (5) years * * * The 'Munich' continuing to participate in all insurance coming within the terms of this agreement, granted or renewed by the 'United' during the currency of any notice of cancelment, and remaining liable for its share of the claims arising out of such insurance and out of insurance in force at the time of the notice being given until expiration of the liability thereon."

"Article XIII. It is especially agreed that in case notice of termination is given by either party under this agreement, the 'Munich' shall receive as reimbursement for good-will five per cent. (5%) of its share of the net premiums, *i. e.*, premiums less cancelments, of the last five years previous to the expiration of the notice of termination of this agreement."

"In case of notice of termination by either party, the accounts shall be made up not later than two years after the expiration of the notice. Such account shall not be charged with any premium reserve. If claims are still outstanding, the proper reserve shall be charged, and after the final settlement of each of such claims, the 'Munich' will be paid any difference in its favor, and pay any difference in favor of the 'United'."

The contract from which these clauses are quoted was sustained in 113 Md. 200 as against the effort of the Munich Company to have it annulled upon the theory that its execution by that company had been induced by fraudulent misrepresentations. It was found to be unnecessary to pass upon the question of fraud for the reason that the Munich Company was shown by the evidence to have waived the right of rescission it was then asserting. The decree from which the former appeal was taken dismissed the bill of complaint filed by the Munich Company and provided for an accounting under the agreement as prayed by way of cross-relief in the United Company's answer. Upon the affirmance of this

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decree the cause was remanded for the further proceedings contemplated. In order to facilitate the accounting thus directed the parties entered into an agreement on November 19, 1910, by which they appointed the American Audit Company their agent "to examine the records, books and accounts of the United Surety Company, and therefrom to state an account in annual periods beginning 2nd January, 1906, and ending on January 1st, 1911, applying to the share of the Munich Re-Insurance Company in the business of the United Surety Company" under the contract in question. The agreement authorized the appointment of one delegate for each of the companies to assist in the accounting. It was provided that all amounts passed by the Audit Company, and to which no objection was raised by either of the delegates, should be deemed to be accepted by both parties. It was agreed, however, that the audit should not extend to outstanding liabilities for unexpired risks or claims not yet settled, which were reserved for future adjustment under the terms of the contract. The Audit Company's report, which was to include a separate statement of the items in respect to which a difference of opinion might arise between the Munich and United Companies, was to be adopted as the basis of the accounting under the decree.

The preliminary investigation for which the parties thus made provision was completed in December, 1911. In the report then submitted the Audit Company stated that as the agreement by which it was appointed provided for a statement of the results of the examination in yearly periods it had taken no notice of the question of good-will mentioned in Article XIII of the participation contract, and that no reference was made in the report to Premium Reserves and Reserves for Claims because the agreement under which the auditing was done expressly left these items open for further adjustment. The delegates, Mr. Stuart S. Janney for the United, and Mr. Gustave A. Zieman for the Munich, agreed as to all items covered by the Audit Company's accounting except those relating to a class of business conducted by the

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United Company, known as "Excise Business," involving the execution by it as surety of bonds given to the State of New York by licensed liquor dealers as indemnity against the violation of any of the laws regulating the sale of intoxicating liquors. The question between the delegates in the first instance was whether this business was included in the classes of insurance specified in the agreement. After some discussion, however, they instructed the Audit Company to eliminate the items relating to the excise business. These items embraced the receipts of income from that source and a comparatively small amount of expenses which could be identified as having been incurred in that particular connection. They did not include any part of the office and management expenses, commonly known as "overhead charges," attributable to the prosecution of the United Company's business as a whole. The Munich Company insisted that as the excise business proceeds were to be deducted from the income, with which the United Company was to be charged in the accounting, there should be excluded from the disbursements, for which it was to be credited, a proportion of the overhead charges in the ratio which the excise income bore to the entire volume of the company's premium receipts. This claim was resisted by the United Company on the ground that such a deduction from the disbursements would be in excess of the expenses for which the excise business was actually responsible. It was the understanding of Mr. Zieman that the exclusion of the excise proceeds was made distinctly subject to an allowance for overhead charges, while on the other hand Mr. Janney understood that the elimination of the ascertainable excise items was agreed upon unconditionally and that the question of overhead charges was left open for future determination. In view of the inability of the delegates to agree upon this point the Audit Company prepared two sets of accounts, one including and the other excluding excise business. The report stated that it was impossible from the books of the United Company to separate

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the overhead charges as to the different classes of business conducted, and for that reason statements were made out showing the totals of such charges for each year with a memorandum added as to the net amount of the three classes of business, viz: 1. Fidelity, Surety and Burglary; 2. New York Excise; 3. Casualty.

After the Audit Company had thus reported the parties proceeded with the accounting before the auditor, to whom the decree had referred the case for that purpose. The questions then open and in controversy were: 1. The one already stated in reference to the excise business. 2. Whether premium reserves for unexpired risks and reserves for claims should be included or excluded as disbursements, and if included, whether interest was chargeable upon the Munich Company's share of the apparent losses which the use of those items produced. 3. Whether an allowance should be made the Munich Company for good-will under Article XIII of the contract. The auditor's report disposed of these questions as follows: 1. The excise business was excluded and a *pro rata* deduction was made for overhead charges. 2. The premium reserve for unexpired risks and the reserves for claims were included as disbursements, and interest was charged on the yearly balances. 3. No allowance was made to the Munich Company for good-will. Exceptions were filed by the Munich Company to the action of the auditor in reference to the 2nd and 3rd points indicated, and the United Company excepted as to the disposition of the question first noted. The Court below overruled all the exceptions and ratified the audit, and both parties have appealed.

The issue raised as to the deductions on account of the excise branch of the business under investigation can give us no difficulty. While the nature of the liabilities incurred by the United Company in that connection would seem to place these undertakings in the category of surety business and therefore within the participation contract, yet, as clearly shown by the testimony taken before the auditor, the parties expressly agreed that the excise items of receipts and ex-

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penses should be excluded from the accounting, the only disagreement being in reference to the question whether the expense to be so deducted should include a proportionate part of the overhead charges. It is evident from the record that there is no available basis upon which the disbursements properly chargeable to the excise business can be estimated with any degree of accuracy. This subdivision of the Surety Company's activities undoubtedly had the benefit of the organization maintained for the promotion of its various corporate enterprises, but the books furnish no means of segregating the portion of the general management disbursements attributable to any particular department. The evidence tends to show that the excise business did not require the attention of the executive and office force to the same extent as the other lines of insurance in which the company was interested, and an apportionment of overhead charges according to the volume of the excluded business would appear to be liberal. It is, however, according to the testimony in the record, the only method by which a proper allowance for these expenses can be approximated under existing conditions. In our judgment the Court below correctly disposed of this exception.

The question as to the extent to which the premium and claim reserves should be considered in the accounting requires a reference to the relations of the contracting companies to each other at the time of the preparation of the audit. So far as the annual accounts mentioned in Article VIII of the participation agreement are concerned it is distinctly provided that both classes of reserves shall be included. But there is an equally express provision in Article XIII that if notice of termination is given by either party, the account to be stated after the expiration of the notice shall not be charged with any premium reserve. The privilege of withdrawal was secured to the parties by Article XII, as above quoted, and was exercised by the Munich Company in the manner prescribed, with the result that the contract ceased to be operative, except as to business already subject

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to its terms, when the original five year period expired on January 2nd, 1911. The auditor's account was prepared in December, 1912, nearly two years after the withdrawal of the Munich Company from the agreement. In consequence of the litigation between the parties no settlement ever occurred as to any part of the business to which the contract applied. The present accounting must accordingly include the annual ascertainments of profit and loss required to be made during the currency of the contract and also the settlement for which it provides after the expiration of the notice of withdrawal. The audit as filed is composed of five annual statements in each of which both premium and claim reserves are charged as disbursements. The statement for the final year of the contract will illustrate the method and theory of the accounting for all of the annual periods. It is as follows:

DISBURSEMENTS.

1. Return premiums and rebates		$102,552.66
2. Re-insurance premiums		20,537.74
3. Claims paid, less salvage, and re-insurance in other companies		213,809.28
4. Commission and brokerage allowed		86,726.52
5. Salaries, fees and all other charges of officers, clerks, agents and other employees		71,069.86
6. Taxes, licenses and Insurance Department fees		27,059.48
7. Rental of offices	$13,106.35	
And all other disbursements itemized as follows:		
(a) Advertising expense	7,442.74	
(b) Printing and Stationery	2,433.50	
(c) Legal Expense	9,599.64	
(d) Miscellaneous Expense	42,207.18	
		74,789.41
8. Premium reserve for unexpired risks		185,698.88
9. Reserve for claims		242,420.34
Total Disbursements		$1,024,664.17
Less Excise overhead charges		22,379.48
Total Disbursements charged against the Munich Contract		$1,002,284.69

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INCOME.

1. Gross premiums	$454,844.42
2. Reserve for unadjusted claims at the end of the previous year	66,063.23
3. Reserve for unexpired risks at the end of the previous year	254,951.96
4. Interest received, excluding 4½% interest on capital stock	10,478.72
By excess Disbursements over Income, contra.	215,946.36
	$1,002,284.69

The excess of the disbursements over the income is treated by the auditor as a loss, of which one third is charged to the Munich Company with interest. In each of the preceding annual accounts, except the one for 1908, a loss was similarly ascertained and charged. For the entire period the amounts found to be owing by the Munich Company, after crediting $3,117.12 as its share of the profits for 1908, aggregated $154,338.28 including interest to April 1, 1911.

It is explained by the testimony that the premium reserves for unexpired risks represent a proportion of the annual premiums set apart as unearned until the expiration of the year for which they are paid in advance. At the end of the term for which the premiums are received the reserve is released and becomes available as current income. A new reserve is then created out of the premiums paid for the succeeding period. In the annual accounting for which the agreement provided the gross premiums were to be included in the income, and the proper deduction of the unearned portion was to be accomplished by charging premium reserves among the disbursements. The next accounting, however, would give the parties the benefit of the fund thus reserved by treating it as income under the description of "Reserve for Unexpired Risks at the end of the previous year." The same disposition was to be made with respect to the reserve

for claims, which, as the designation suggests, was composed of amounts estimated for actual but unsettled losses. This reserve was intended to meet a real though unascertained liability to which both parties to the contract were subject in the proportions specified, while the premium reserve had no such purpose, but was provided merely as a suspension to that extent of the right of the Surety Company to use the premiums as ordinary income until the expiration of the full period for which they were received.

In charging the reserves of both classes as disbursements in the annual accounts for the four years prior to the notice of withdrawal the audit is in conformity with the express provisions of Article VIII to that effect. But in the accounting for the business of the last year under the contract we think the terms of Article XIII are clearly applicable. The notice of withdrawal to which that article refers having been duly given, it is directed that the account be made up not later than two years after the contract has been thus terminated and that no premium reserve be charged. If the previous accounting contemplated by the agreement had been effected by the parties, the only business left open for adjustment when the contract expired would have been that which pertained to the final year. It could not have been intended that as to this period there should be *two* accounts, one prepared under Article VIII including premium reserves as disbursements, and a later one under Article XIII from which such a charge should be excluded. The primary purpose of the annual statements was to show the profits or losses which the parties were to share. While the contract was in current operation there was no prejudice to either party in charging the premium reserves as disbursements for the reason that these items would be credited as income in the account for the succeeding period. But when the agreement is no longer in effect and the accounting deals with the last year to which it can apply, the conditions are altogether different. The premium reserve could not in such a situation be used as

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a factor in determining the actual profit or loss upon which the settlement for that year depends because such a reserve as provided under this agreement, represents in fact neither a liability not an expenditure. It was manifestly upon this theory that the contract excluded the premium reserve from the accounting to be stated after its expiration, and in order that credit might not be given for premiums which were not fully earned it provided for an extension of the time for the accounting until this item could properly be treated as income. In our judgment, the audit, which, as previously noted, was filed near the close of the two year period allowed for making up the account of the business for the last year, and at a time when the premiums received for that year were fully earned, should not have charged as disbursements the premium reserve estimated as of January 1, 1911, and the exception which questioned the propriety of such a charge should have been sustained.

The decree overruling the exceptions and ratifying the audit recited that of the $154,338.28 found to be payable by the Munich Company $11,631.88 was a final indebtedness, and $142,706.40 was due to the United Company subject to a further accounting, and it was provided that the latter sum, with interest from April 1, 1911, be paid by the Munich Company to trustees named in the decree to be held and administered under the jurisdiction of the Court in accordance with the intent and meaning of the agreement between the two companies. It does not seem to us that this disposition of the case gives effect to the real purpose of the contract. The amount shown by the audit to be due by the Munich Company on account of the business of the fifth year was $71,982.13. The total of $154,338.28 was produced by adding to the result of the accounting for the last year of the contract period the amounts found to be due for the four preceding years. According to the plain terms of the agreement the Munich Company's shares of the losses shown by the annual accounts were *debts* which it owed absolutely and

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which it was obligated to pay immediately. The explicit provisions on this subject would appear to preclude the theory that there should be any further accounting as to the indebtedness thus determinted. It is only with reference to amounts reserved for outstanding claims in the final account that the agreement provides for a further adjustment after the precise amounts required for the claims have been ascertained by actual settlement. The last in the series of the annual statements, as filed by the auditor, charges $185,-698.88 as premium reserve, and $242,420.34 as reserve for claims. The sum of these two items is $428,119.22, and one-third of this is $142,706.40, which is the exact amount directed by the decree of ratification to be paid to trustees with a view to subsequent accounting. The fund thus proposed to be created was largely in excess of the Munich Company's share of the losses for the last year, as shown by the account, and it was therefore ordered to be reserved out of the total indebtedness of that company ascertained for the whole period. As a result the Munich Company was placed in the position of owing only $11,631.88 as a "final indebtedness" to the United Company, although according to the annual accounts its liability for losses was definitely fixed at $30,-939.35 for 1906, $22,158.99 for 1907, $19,774.14 for 1909, and $71,982.13 for 1910, as against which it was entitled to a credit of only $3,117.12 for profits found to have been earned in 1908. By the terms of the contract the Munich Company's shares of losses or profits were payable promptly upon their annual ascertainment, and if they had been so paid, it is clear that there would have been no occasion to reopen the accounts thus settled, except as to the claim reserves for the final year under the special provision for that purpose.

The United Company is entitled unconditionally to the amounts found to be due it for the four years prior to the notice of withdrawal, as evidently intended by Articles VIII and IX of the contract, and the results thus determined are

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not dependent upon the accounting for the last year of the business, which is placed upon a separate and distinct basis by the provisions of Article XIII. From the account for this final period the item of $185,698.88 as a premium reserve for unexpired risks should be eliminated. The trust created by the decree passed by the Court below would eventually accomplish this object, but we see no reason to require the Munich Company to pay out, even for a limited period, a proportionate part of the large sum just mentioned, when it is certain that the premiums for which the reserve was originally provided have long since become fully earned. The charge for claim reserves should be retained in the accounting, as contemplated by Article XIII. With the premium reserve excluded from the disbursements the account for the fifth year would show a loss of $30,247.48 One-third of this amount will be payable by the Munich Company to the receivers of the United Company as an ascertained liability, the parties remaining accountable with respect to outstanding claims as provided by the agreement.

The question raised by the exceptions as to the allowance of interest must be decided in the light of the provisions of Articles VIII. and IX. of the contract, to the effect that an account should be rendered by the United Company within two months after the close of each year showing the income and disbursements as specified, that the account should be examined by the Munich Company within one month after its receipt, that the Munich Company should receive one-third of the profits or pay one-third of the losses thus shown, and that the amount due by either party should be "paid immediately upon receipt of confirmation by New York draft, or its equivalent." Inasmuch as the time thus allowed for the submission and examination of the account might extend over three months subsequent to the close of the respective annual periods, the audit correctly treated the indebtedness for each year as being due and payable on the first day of the following April. It was contended that no

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interest should be charged because the reserves which entered into the account as disbursements were not proper factors in the calculation of the *actual* profit or loss for any given year, and that but for the use of these items the apparent losses upon which the indebtedness of the Munich Company is based would not have been indicated. The difficulty in the way of our acceptance of this theory is the definite agreement of the parties that both classes of reserves should be charged as disbursements in the accounting for the period antecedent to the notice of termination, and that the profits or losses *thus* determined should be paid in the proportions and manner prescribed. This being the plain effect of the contract, and the direction being positive as to the *immediate* payment of the annual balances ascertained by this method of accounting, we think interest is properly allowable on these amounts from the time they were respectively due.

The Munich Company claims the benefit of the provision in Article XIII. that in case of a withdrawal notice being given, that company should receive as "reimbursement for good-will" five per cent. of its share of the net premiums for the five years previous to the termination of the contract. This credit was disallowed in the audit on the ground that the course pursued by the Munich Company in attempting to rescind the contract and prosecuting a suit for its annulment, which continued during almost the entire period of its operation, had the effect of retarding instead of promoting the development of the good-will of the business to which the agreement related. It is to be observed that the only duties imposed by the contract upon the Munich Company were to meet its proportionate liabilities on the classes of insurance designated and to pay a corresponding share of the losses. It is being held to the full measure of these obligations in the present accounting. The record is by no means conclusive in showing that the exercise by the Munich Company of its legal right to question the validity of the contract so materially prejudiced the United Company's interests as to justify the Court in obliterating one of the

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provisions upon which the two companies definitely agreed. It was in 1906 that the effort to rescind the agreement was begun, and yet the gross premiums of $123,177.90 received for that year from the designated classes of insurance increased to $262,256.74 for 1907, $423,453.97 for 1908, $626,996.71 for 1909 and $454,844.42 for 1910. During these years, which covered the whole of the United Company's active career, the Munich Company was being charged with one-third of the management and office expenses incurred by the former company in the prosecution of its general enterprise. The five per cent. provided by Article XIII. is characterized as a "reimbursement" to be received by the Munich Company, and it was therefore plainly intended as a repayment in part of the disbursements with which that company was charged and which were regarded as contributing to the establishment of the United Company's business and good-will during the early and relatively expensive period of its existence. This provision of the contract is emphasized by its declaration that the parties had "especially agreed" upon the five per cent. reimbursement to which it referred. The conditions presented by the record are not, in our view, of such a character as to justify an adjudication that this formal, positive and unqualified stipulation has become inoperative, while the remaining provisions of the contract are enforceable. It is our conclusion, therefore, that the Munich Company should be credited with five per cent. of its share (one-third) of the net premiums received from the specified classes of business during the period of the agreement. This credit will amount, according to the exhibits accompanying the audit to $25,094.47. The total amount correctly shown by the audit to be owing by the Munich Company as of April 1, 1910, including interest to that date, is $77,983.79. To this the audit added $4,372.36 as interest to April 1, 1911. The indebtedness we have found to be chargeable against the Munich Company in the account for the final year is one-third of $30,247.48, or $10,082.49. The aggregate of these debit items is $92,438.64. Upon this indebtedness the

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five per cent. allowance should be credited as of April 1, 1911, and interest should be calculated and charged on the remainder to the date of payment. The amount thus ascertained will be payable to the receivers of the United Surety Company, as we find no necessity to direct its administration by separate fiduciaries.

The accounting in this case does not affect the ultimate liability of the Munich Company with respect to obligations issued by the United Company and covered by the participation agreement, as to which defaults are not now, but may be hereafter, disclosed. For the protection of potential claims of this nature, as between the United Company and the holders of its bonds and policies, provision has been made in the form of a premium reserve directed in the proceeding reviewed by this Court in *United States* v. *Poe et al., Receivers of the United Surety Company,* 120 Md. 89. The premium reserve there provided, and whose function is clearly and thoroughly discussed in the opinion by JUDGE STOCKBRIDGE, rests upon a different basis from the bookkeeping charge bearing that designation which is stipulated in the contract with the Munich Company as one of the factors in the annual ascertainment of its share of the losses or profits. This item is excluded from the accounting as to the last year of the agreement because there is an express provision to that effect in recognition of the fact that such a reserve is not justly pertinent to the determination of the actual results of the business and of the amount properly payable by one contracting party to the other for the final period. The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the agreement.

Decree affirmed in part and reversed in part and cause remanded, to the end that the audit may be re-stated in accordance with this opinion, the costs of the cross-appeals to be paid equally by the parties.

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GEORGE WHITELOCK, TRUSTEE, ET AL.,

vs.

DANIEL B. DORSEY. (1913)

Trustees: discretion; jurisdiction and authority of Court of Equity; right of trustee to purchase at own sale.

Ordinarily, where a trustee is vested with discretionary power he will not be disturbed in the exercise of it; but if the circumstances show that it is for the benefit of the estate not to permit him to exercise such discretion arbitrarily, the Court will deny him the right. p. 503

In general, trustees may not directly or indirectly purchase the trust property; however fair the sale, the courts will set it aside at the mere suggestion of the *cestui que trust.* p. 502

It is a rule of universal application to all persons coming within the principle, that no party can be permitted to purchase an interest when he has a duty to perform inconsistent with the character of purchaser. p. 502

But in Maryland many exceptions to the rule have long been recognized, where equity treats such sales as voidable only, according to circumstances and as the interest of the *cestui que trust* may require, and are sometimes not allowed to be disturbed. p. 502

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One of two trustees, with his wife, who was the daughter of the testatrix, had long occupied as their home a cottage which the testatrix had remodeled and improved for her daughter, and to which the testatrix wished to give her a permanent right, as she had done in providing homes for other children; the daughter had refused, thinking the whole tract of which the cottage and grounds formed a part would sell better if finally sold as one tract; upon the death of the testatrix, the daughter and her husband, by an agreement with the co-trustee, continued to occupy the house at an annual rent which was its full value, in view of the fact that there was an agreement that they should vacate at any time should the property be sold; it was further agreed that unless sixty days' notice to vacate should be given, they might occupy the cottage for another term. The trustees by the terms of the will had full power "in their discretion," from time to time, to sell, dispose of, assign and convey absolutely or otherwise the whole or any portion or portions of the property or securities" * * * and to invest and hold the proceeds subject to the same trusts the property sold had been held under. The will also directed that the trusts should be administered under the supervision of a court of equity. The cottage had been so occupied for several years after the death of the testatrix, when the appellant W., without any consultation, or reasons given, gave due notice to the other trustee that he and his family must vacate the property at the end of the year; the trustee D. filed a petition reciting the above facts, and prayed the Court to adjust the differences between himself and the co-trustee, and to pass an order authorizing him to continue for another year under the same rental and terms, etc., as the tenancy then provided; the co-trustee, without filing an answer to the petition, satisfied himself with demurring thereto; on appeal from an order overruling the demurrer, it was *held*, that the petition presented facts which called for an answer and that the demurrer was properly overruled. p. 503

If a court of equity is administering a trust, the Court has complete charge of every step. The trustees are merely the officers of the Court to carry out its orders. If the trustees are named in a will with certain powers, not personal, thereunder,

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the moment they submit the administration to a court of equity, then it becomes necessary to have the sanction of that Court for all their acts. p. 503

This authority is not a mere perfunctory authority, but one in which the Court is to exercise its judgment. p. 503

Decided June 26th, 1913.

Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, PATTISON, STOCKBRIDGE and URNER, JJ.

W. H. DeC. Wright and *Joseph C. France,* for the appellants.

George R. Gaither, for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

By the last will and testament of Jane S. Whitelock, deceased, George Whitelock, her son, and Daniel B. Dorsey, her son-in-law, were appointed trustees of the trusts created by said will, with power, under the seventh article thereof, "in their discretion, from time to time, to sell, dispose of, assign and convey absolutely or otherwise the whole or any portion or portions of the property or securities in which the trust funds or any part thereof may then be invested," and to invest and hold the proceeds thereof upon the same trusts as the property sold had been held. Under the same article the testatrix expressly directed that the trusts sould be administered under the supervision of a court of equity.

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On the 22nd day of November, 1911, upon the petition of the trustees named in the will, the Circuit Court of Baltimore City passed the usual order, assuming jurisdiction of the trusts, and directing the trustees to administer the trusts under its direction and supervision.

On February 11th, 1913, Daniel B. Dorsey filed, in the proceeding for administering the trusts, a petition against his co-trustee. The appellant filed a demurrer to the whole of the petition, but the Court overruled it, with leave to answer. The appellant refused to answer and has appealed from the order.

The allegations of the petition, which by the demurrer are to be assumed true if well pleaded, state that a portion of the trust estate, held by the petitioner and his co-trustee, consists of twenty-six acres of land in Baltimore County, improved by a large dwelling house, the home of the testatrix in her lifetime, and a cottage. That for eighteen years immediately preceding the death of the testatrix the petitioner, the appellee, with his wife, a daughter of the testatrix, and their family, occupied this cottage, together with a small parcel of ground adjacent thereto, as a home. That the cottage had been entirely remodeled and improved by the testatrix for the benefit of the appellee's family. And a permanent right to the cottage and grounds had been offered to the wife of the appellee by her mother, upon the same terms as other of her children had been provided with homes by her. That the offer had been refused and the appellee and his wife had requested Mrs. Whitelock not to make such an arrangement, for the reason that it would be for the benefit of the estate to sell the tract of twenty-six acres, including the cottage, as a whole. That immediately after the death of Mrs. Whitelock the appellee agreed with his co-trustee that he should continue to occupy the cottage until January 20th, 1912, for an annual rental, that was agreed upon as proper, of three hundred dollars, and which afterwards was raised to four hundred dollars, with a proviso that the appellee was to vacate

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the property if the tract should be sold; and with the further proviso that if sixty days' notice was not given before the end of the term the appellee should occupy the premises for another year upon the same terms. That on the 19th day of November, 1912, after the appellee had occupied the premises during 1911 and 1912, and without any consultation between the trustees as to the lease, he received notice from his co-trustee to vacate the property on January 20, 1913, and a statement that the lease should not continue after that time. The petition further states that the rent that is being paid is the full rental value of the premises, and is greater than could be received from another tenant with the proviso as to vacating in the event of a sale. He further states that his occupancy of the cottage is a direct benefit to the estate, since it gives him opportunity at all times to supervise the remaining part of the tract. Realizing that he occupies the dual position of trustee and tenant, he prays the Court to adjust the differences existing between him and his co-trustee, and to pass an order authorizing him to continue for another year upon the same rental and terms as to vacating in the event of a sale as the tenancy now provides.

After the overruling of the demurrer three of the six children of the testatrix filed a petition asking to be made parties, and upon an order being passed to that effect, joined with George Whitelock as Trustee, and in his own right, in taking this appeal.

The position the appellants take is, that it is not a case of the validity of the original lease, it having expired, but whether a Court of Equity will compel its renewal against the discretion of the co-trustee and the protest of several of the beneficiaries with no beneficiary advocating it. Their contention is based, of course, on the fundamental principle that trustees cannot deal with trust property in a manner in which they might secure benefits from the property, inconsistent with their duties as trustees. Courts from the earliest times have unfalteringly frowned upon all attempts of trus-

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tees to acquire rights in property of which they were trustees. Out of which grew the rule that if trustees directly or indirectly purchase trust property, Courts will set the sale aside, however fair the transaction may have seemed, at the mere suggestion of the *cestui que trust*. *Dorsey* v. *Dorsey*, 3 H. & J. 410; *Davis* v. *Simpson*, 5 H. & J. 147; *Richardson* v. *Jones*, 3 G. & J. 164; *Rickets* v. *Montgomery*, 15 Md. 50; *Korns* v. *Shaffer*, 27 Md. 83; *Hoffman C. & I. Co.* v. *Cumberland Coal Co.*, 16 Md. 506. It is a rule of universal application to all persons coming within the principle that no party can be permitted to purchase an interest when he has a duty to perform inconsistent with the character of purchaser. *Ins. Co.* v. *Dalrymple*, 25 Md. 266.

While the policy of the administration of equity in this State has been to adhere closely to the principle underlying this rule, nevertheless, it was recognized as early as *Williams* v. *Marshall*, 4 G. & J. 379, that there should, and must, be exceptions to its rigid enforcement, when this Court said, "there are many exceptions to, or modifications of it" and "the trustee will in some cases be protected in his purchase; as if the *cestui que trust* be at full age at the time of the sale, and under no disability and with a full knowledge of the transaction lies by for an unreasonable time" * * * and "notwithstanding the broad language of the rule adopted in chancery, they are practically treated in that Court as voidable only, according to circumstances, and as the interest of the *cestui que trust* may require, and sometimes are not permitted to be disturbed." *Read* v. *Reynolds*, 100 Md. 284.

Notwithstanding this general rule, we are of the opinion that under the circumstances, as alleged in the petition, the trustee Whitelock should have answered with his reasons, other than technical, why his co-trustee should not occupy the property under a lease of such a temporary character. When we consider that the wife of the petitioner is one of the *cestui que trust*, interested in the proper management of the estate, that the property had been fitted up for her use and

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that she had occupied it for twenty years and that the full rental value was being procured for the benefit of the estate, these should all demand that some consideration should be extended the petitioner though he is co-trustee of the property. If a Court of Equity is administering a trust, in this case under an express direction, the Court has complete charge of every step. The trustees are merely the officers of the Court to carry out its orders. If trustees are named in a will with certain powers, not personal, thereunder, the moment they submit the administration to a Court of Equity, then it becomes necessary to have the sanction of that Court for all of their acts. *Abell* v. *Abell,* 75 Md. 64. If this authority is necessary then it follows that it cannot be a mere perfunctory authority, but that the Court is to exercise its judgment. Ordinarily where a trustee is vested with discretionary power he will not be disturbed in the exercise of it, but if the circumstances show that it is for the benefit of the estate not to permit him to exercise it arbitrarily, the Court will deny him the right. *Gottschalk* v. *Mercantile Trust Co.,* 102 Md. 521.

We think the allegations of the petition presented such a set of circumstances as to call for an answer, and therefore the demurrer was properly overruled.

Order affirmed, cause remanded; the costs to abide the final disposition of the case.

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THE PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Equity: *practice; preliminary legal questions. Baltimore City*: *assessments for benefits for local improvements. Fallsway*: *construction; delegation of power to Commission on City Plan, or Commissioners for Opening Streets; special funds provided by Chapter* 110 *of Acts of* 1910; *assessments for benefit. Commissioners for Opening Streets*: *powers and duties. Municipal corporations*: *power from Legislature to delegate authority; discretion.*

Under section 205 of Article 16 of the Code of 1912, a court of equity may have preliminary questions of law determined before the trial of any issue of fact in the case. p. 507

The power to assess property in particular localities to the extent that it is deemed specially benefited by local improvements is one that has been expressly granted to the Mayor and City Council of Baltimore, and one that the City has long exercised. p. 508

Such a right is to be referred to the power of taxation. p. 508

By section 175 of the Charter of Baltimore City, the Commissioners for Opening Streets are required to assess benefits whenever they are directed by ordinance to act in connection with street projects; the exercise of such power is not to be denied the commission merely because of the creation of a spe-

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cial fund for the purpose of providing the costs and expenses of the improvements. p. 510

Exemptions from taxation are to be strictly construed. p. 510

Chapter 110 of the Acts of 1910, relating to the construction of the Fallsway in Baltimore City, did not qualify or restrict the charter power of the City or of the Commissioners for Opening Streets to assess property specially benefited by the undertaking; a City ordinance empowered the Commissioners to condemn and open the thoroughfare by procedure in accordance with the said Act, and in accordance with such of the provisions of the City Charter as might be applicable; it was *held,* that the fact that the Act provided for a fund to meet the cost and expenses of the improvement, had no effect on the power of the City and the Commissioners to assess for benefits. p. 510

The right to assess such benefits does not depend upon the insufficiency of the fund intended to meet the expenditure with which the municipality is primarily chargeable. p. 511

No considerations of public interest or private right make it proper to hold that by the permissive terms of Chapter 114 or Chapter 110 of the Acts of 1910 (as to the creation of the Commission on City Plan), the City of Baltimore was *required* to delegate to the commission the execution of the plan contemplated for the construction of the Fallsway. p. 514

When Acts of the Legislature leave to a municipality the authority to delegate certain powers to different commissions, the discretion as to which agency should be selected is in the municipality. p. 514

The acquisition of the "adjacent land" authorized by Chapter 110 of the Acts of 1910, in connection with the Fallsway, was such as might be incident to the accomplishment of that object. p. 513

Decided June 26th, 1913.

Appeal from the Circuit Court of Baltimore City (DUFFY J.).

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The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, PATTISON, URNER and STOCKBRIDGE, JJ.

John J. Donaldson, for the appellant.

S. S. Field, the City Solicitor, for the appellee.

URNER, J., delivered the opinion of the Court.

The Acts of 1910, Ch. 110, p. 639, authorized and empowered the Mayor and City Council of Baltimore to open, construct and establish a public highway in the city along or over the bed of Jones' Falls, and "to delegate to the Commission known as the 'Commission on City Plan' the duty and power of opening, constructing and establishing" the highway, and to confer by ordinance on the Commission the power to acquire by purchase or condemnation the property to be used in connection with the improvement, and such other powers possessed by the City in relation to the opening and construction of highways and acquiring property therefor as it might deem proper to be so delegated. It was enacted that "for the purpose of providing the moneys requisite for opening, constructing and establishing said highway, and purchasing or acquiring said property, the Mayor and City Council of Baltimore is hereby authorized to issue the stock of the said corporation to an amount not exceeding one million dollars ($1,000,000.00)." The Act required that the question of issuing the stock should be first submitted to the voters of the City, and it directed that before the City should proceed to open and construct the new thoroughfare, an ordinance for that purpose should be passed and the property to be acquired should be designated upon a plat. The approval of the voters having been given to the project, in the manner contemplated by the Act, and by section 7 of Article 11 of the

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Constitution of the State, the Mayor and City Council passed an ordinance (No. 70, approved February 9, 1912) authorizing the *Commissioners for Opening Streets* to condemn and open in pursuance of Chapter 110 of the Acts of 1910 the proposed highway over and along Jones' Falls, to be known as the "Fallsway," in accordance with a detailed description, and a plat duly prepared and filed, indicating the outlines of the improvement and condemnation. A supplemental ordinance (No. 114, approved May 28, 1912) conferred upon the same Commissioners authority to acquire property for the highway by purchase or other voluntary method.

In the course of their proceedings for the opening of the Fallsway the Commissioners for Opening Streets assessed certain sums as benefits against property belonging to the appellant. The present suit was then instituted with a view to having the City restrained from collecting the assessments on the ground that they were illegal and void. The specific points of objection were: first, that the cost of the highway was intended by the Act of 1910 to be paid out of the proceeds of the stock for which it made provision, and that consequently the City had no power to impose any part of the cost upon property owners by way of assessments for benefits; and, secondly, that the only body, to which the powers granted by the Act were authorized to be delegated, was the Commission on City Plan, and that the ordinances attempting to make such a delegation to the Commissioners for Opening Streets were, therefore, invalid and the proceedings of the Commissioners ineffective. These questions, after the filing of the answer and general replication in the Court below, were proposed by the complainant and adopted by the Court as preliminary questions of law which it was convenient to have determined before the trial of any issue of fact in the case, as permitted by section 205 of Article 16 of the Code. The appeal is from an order sustaining the validity of the assessments as against each of the contentions thus submitted.

The objection that benefits are not assessable on account of the improvements because a special fund has been appropri-

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ated for that object is fully met by the decision of this Court in *Lauer* v. *Baltimore,* 110 Md. 447. In that case an assessment for benefits in connection with the opening of a street in the Baltimore City Annex was resisted on the ground that the Acts of 1904, Chapter 274, created a loan of two million dollars which was to "be used only for the purpose of providing the costs and expenses of condemning, opening, grading, paving and curbing the streets, avenues, lanes and alleys" of that portion of the City. This position was held to be untenable. In the opinion, by JUDGE THOMAS, it was said: "The right to assess property in particular localities to the extent that it is deemed specially benefited by local improvements is to be referred to the power of taxation and has been recognized and sanctioned in all the States. The theory on which such assessments are made is that, 'those whose property is thus enhanced, and who thus receive peculiar benefits from the improvements, should contribute specially to defray its cost.' 1 *Lewis, Eminent Domain,* sec. 5 (2nd ed.); *Gould* v. *Mayor, etc., of Baltimore,* 59 Md. 378; *Hagerstown* v. *Startzman,* 93 Md. 609. The power to make such assessments has been expressly granted to the Mayor and City Council of Baltimore and has been exercised by it for a long time. *Alexander* v. *Baltimore,* 5 Gill, 383." The provisions of section 6 of the City Charter (Acts of 1898, Chapter 123) are quoted in the opinion to the effect that the Mayor and City Council are authorized to provide for laying out, opening, extending, widening, straightening or closing any streets, lanes, squares or alleys in the City and to provide for ascertaining damages and assessing benefits resulting from such improvements. The Act of 1904 created the Annex Improvement Commission, and authorized it to exercise certain specified powers in reference to the condemnation, opening, etc., of thoroughfares in the Annex, and such further powers and duties as the Mayor and City Council might deem necessary for the proper execution of the improvements designed, but it was provided that authority might be conferred by ordinance

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upon the Commissioners for Opening Streets, in lieu of the first-named Commission, to carry out the purposes of the statute. By an ordinance passed in pursuance of this Act the Commissioners for Opening Streets were empowered and directed to perform the duties and functions provided by the Act for the Annex Improvement Commission, and it was ordained that the procedure of the Commissioners in the premises should be "that now or hereafter prescribed by law in relation to their ordinary duties and powers of the same nature." The procedure of the Commissioners for Opening Streets was thus generally defined in part by section 175 of the City Charter: "Whenever the Mayor and City Council of Baltimore shall hereafter by ordinance direct the Commissioners for Opening Streets to lay out, open, extend, widen, straighten or close up, in whole or in part, any street, square, lane or alley, within the bounds of this City, the said Commissioners, having given the notice required by law of their first meeting to execute the same, shall meet at the time and place mentioned in said notice, and from time to time thereafter, as may be necssary, to exercise the powers and perform the duties required of them by said ordinance, and shall ascertain whether any and what amount of value in damage will thereby be caused to the owner of any right or interest in any ground or improvements within or adjacent to the City of Baltimore for which, taking into consideration all advantages and disadvantages, such owner ought to be compensated; and the said Commissioners, having ascertained the whole amount of damages for which compensation ought to be awarded, as aforesaid, and having added thereto an estimate of the probable amount of expenses which will be incurred by them in the performance of the duties required of them, as aforesaid, and also of the expenses incurred by the City Register by reason of said proceedings, shall proceed to assess all the ground and improvements within and adjacent to the city, the owners of which, as such, the said Commissioners shall decide and deem to be directly benefited by accomplishing the object authorized * * *."

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The Commissioners for Opening Streets being thus required by the City Charter to assess for benefits whenever they were directed by ordinance to act in connection with street projects, and having been charged in the *Lauer case* with the duty of following the procedure prescribed by law, it was held that they had full power to make the assessments there in controversy, and that the exercise of the authority thus expressly conferred should not be denied merely because of the creation of a special fund "for the purpose of providing the costs and expenses" of the improvement. This conclusion was predicated upon the general rule that exemptions from taxation are to be strictly construed; and since the charter expressly provided for such assessments, and the Act creating the special fund made no reference to the subject, there was found to be no support for the contention that the property affected by the proceedings before the Court was exempt from liability to be assessed on account of the resulting benefits.

The present case is controlled by the same considerations. There is nothing in the Act relating to the Fallsway to qualify or restrict the Charter power of the city or of the Commissioners for Opening Streets as a duly constituted municipal agency, to assess property benefited by such an undertaking, and the ordinance empowering the Commissioners to "condemn and open" this thoroughfare expressly directed that their procedure should be in accordance with the Act of 1910, Ch. 110, and such provisions of the City Charter as might be applicable. The assessments in this case have, therefore, been made under an authority which the Commissioners clearly possessed and were required to exercise, and upon the principle applied in the *Lauer case* we can have no hesitation in holding that the mere creation by statute of a fund to meet the costs and expenses of the improvement does not affect the efficiency of this power of assessment or relieve the appellant's property of a charge to which it is subject under the general and affirmative terms of the law.

It is argued that the *Lauer case* is distinguishable from the one now being considered in the fact that the street improve-

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ments anticipated for the Annex were so extensive as to justify the view that the Legislature could not have expected the proceeds of the two million dollar loan to cover the costs and expenses, while in the present instance the fund provided may be regarded as adequate for the object to which it is to be applied. The decision in the *Lauer case* did not proceed upon such a theory, and we have been unable to accept the distinction thus suggested. The Act of 1910, in reference to the Fallsway, authorized stock to be issued "for the purpose of providing the moneys requisite" for the project, and the Act of 1904, relating to the Annex, directed the proceeds of the loan to "be used only for the purpose of providing the costs and expenses" of the improvements there specified. These provisions are substantially similar, and neither Act purports to deprive the City of the power to assess for benefits or to make its exercise depend upon the insufficiency of the fund intended to meet the expenditures with which the municipality is primarily chargeable.

There was another ground suggested for distinguishing the *Lauer case* from the present. The Act of 1904 authorized the City to confer upon the Commissioners not only the powers granted by the Act, but also such further powers as the Mayor and City Council might deem necessary for the proper execution of the improvement, and the ordinance passed in pursuance of this authority, having imposed upon the Commissioners the duties prescribed by the general provisions of the Charter, including that of making assessments for benefits, it is urged that the situation was entirely different from the one here shown where, it is said, the City had no authority to exercise or delegate any powers beyond those expressly given by the Act of 1910, which did not in terms provide for such assessments. The question whether the City had the right to delegate to the Commissioners for Opening Streets the power and duty to open the Fallsway is one of the issues of law raised in this case, and is yet to be determined, but assuming that the City could legally make such a delegation,

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there can be no doubt, in the absence of any provision to the contrary in the Act of 1910, that the Commissioners in the execution of this work are subject to the requirements already quoted from the Charter as to the procedure to be followed by them *whenever* they are directed by ordinance to open *any* highway within the limits of the City, and this procedure, as already shown, involves the ascertainment and assessment of benefits.

It is insisted that authority to proceed under the provisions of the Act of 1910 could not be validly conferred by ordinance upon the Commissioners for Opening Streets. The argument is that this statute gives to the City the power of acquiring, in connection with the opening of the Fallsway, and of selling after its completion, the land *adjacent to,* but not included within, the proposed highway, and that as the acquisition and re-sale of property so located could not be accomplished independently of the Act of 1910, the execution of its purposes could not have been intended to be delegated to any agency other than the Commission on City Plan, to which the duty was expressly authorized to be committed. In *Bond* v. *Baltimore,* 116 Md. 683, the provision thus mentioned was held to be valid as against the objection that with respect to land adjacent to the highway the Act attempted to provide for the taking of private property for other than public use. The opinion by JUDGE BRISCOE in that case, after quoting the language of the statute authorizing the City to acquire "for said purposes land or other property in the bed of the highway and adjacent thereto," said: "The use of the expression 'to acquire for the said purposes' in the act plainly limits and designates the purpose for which property may be taken by the City * * *. In other words, we think, it is clear that the only purposes for which property is authorized to be condemned are those set out in Section 1 of the Act, to wit, for the purpose of establishing a public highway over Jones' Falls * * *. And this being so, there can be no possible or serious dispute that the use for which property may

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be acquired and can be taken under Section 1 of the Act is for a public use." It is thus settled that the acquisition of *adjacent land* authorized by the statute in connection with the opening of the Fallsway was such as might be incident to the accomplishment of that object. If nothing had been said in the Act on the subject of the delegation of the power it granted to the City, it cannot be doubted that the Mayor and City Council could have directed the Commissioners for Opening Streets to carry out the purposes of the Act, for the City Charter, in Section 172, provides that "The said Commissioners shall be charged with the duty of opening, extending, widening, straightening or closing any street, lane, alley or part thereof, situated in Baltimore City, whenever the same shall have been directed by ordinance to be done, and shall perform such other duties as the Mayor and City Council of Baltimore may by ordinance prescribe." It is clear, in view of this provision of the Charter, that the Commissioners for Opening Streets could have had validly conferred upon them, and were legally qualified to perform, the duties specified in Ordinances 70 and 114 in connection with the opening of the Fallsway, unless the right of the City to require, and their capacity to accept, this service had ceased to exist as the result of an enactment authorizing the Mayor and City Council to impose the same duties upon the Commission on City Plan. The functions of that Commission are defined by Chap. 114 of the Acts of 1910, p. 649, by which it was created. It is provided that the Commission "shall investigate all plans proposed for the construction or extension of public highways in the City of Baltimore and the establishment of a civic center or other public improvements in connection therewith, and shall report the results of such investigations from time to time to the Mayor and City Council, and shall perform such other duties and exercise such other powers as may be delegated to it or as may be prescribed by ordinance not inconsistent with this article." This provision was enacted as part of the City Charter. The City

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was not *required* by the Act of 1910 to delegate the execution of the contemplated work to the Commission on City Plan. There are no considerations based upon public interests or private rights which make it proper to hold that the permissive terms of the statute in this connection should be construed as obligatory. *Sifford* v. *Morrison,* 63 Md. 14; *State* v. *Knowles,* 90 Md. 655. The right to open the Fallsway and acquire property for that purpose was given to the municipality itself, and there was obviously nothing mandatory in the mere authorization to commit the project to the agency mentioned. It is clear that the omission of the City to make the particular delegation thus permitted did not deprive it of the power, expressly granted by the Act, to proceed with the improvement. The Act of 1910 must be interpreted with reference to the existing and general provisions of the Charter to the effect that the duties of opening highways in the City shall be performed by the Commissioners for Opening Streets. The later enactment merely created an alternative agency to be employed at the option of the Mayor and City Council for this particular project. The Charter provided for the delegation of such a duty to the *Commissioners for Opening Streets,* while the Act of 1910 authorized it to be committed to the *Commission on City Plan,* and, as both provisions are in force, the question as to which of these duly qualified agencies should be charged with the performance of this service was plainly intended to be left to the discretion of the municipality in which the main power is vested.

In our opinion the Court below correctly determined the questions of law presented by the record.

Order affirmed, with costs and cause remanded.

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TRUSTEES OF THE SAMUEL READY SCHOOL FOR FEMALE ORPHANS

vs.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, TRUSTEE.

Sales in equity: mere irregularities; when immaterial where Court has jurisdiction; sales long after decree. Sale or partition in equity: trustee proper party. Sale or partition under sec. 228 *of Art.* 16 *of Code; sufficiency of averments.*

Where a court of equity has jurisdiction of the subject-matter and the parties, a mere irregularity in the proceedings under which a sale is made by a trustee appointed by the Court, will not be inquired into or deemed sufficient to sustain the exceptions to the sale by a purchaser, if such irregularities do not in any way affect the purchaser's title. p. 518

A will provided for three trustees; on their resignation a court of equity of competent jurisdiction appointed one trustee to make sale of the property; *held,* that the objections of a purchaser at a sale of the property under such decree to the ratification of sale could not be inquired into, when the Court had full jurisdiction over the subject-matter and the parties. p. 518

A trustee holding the legal title is a proper party to file a bill for a partition or sale for the purpose of division, and the mere lapse of time between the date of the decree and the sale will not, in general, be sufficient grounds for setting the sale aside. p. 521

On petition for a partition, or sale and division, of trust property, a decree directed the sale of all certain lots, including

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ground rents, when it should be deemed most advantageous, with leave to report to the Court from time to time for approval any sales of all or any of the property; the trustee was appointed to receive from the owner of the leasehold interest the redemption money for the reversionary interest in any lots where the rents were or might be redeemable, and to execute deeds to extinguish the rents; *held*, that the Court having jurisdiction of the parties and the subject-matter, and the trustee being required to bring the money into Court for distribution, the decree was binding on all parties interested, whether *in esse* or not, and that the sale of a ground rent so made was not subject to exception by the purchaser, even though the sale was made long after the sale of the other property. p. 521

What averments are sufficient to give a court of equity jurisdiction, upon a bill for a sale or partition under section 228 of Article 16 of the Code of 1912. p. 519

Decided June 26th, 1913.

Appeal from the Circuit Court of Baltimore City (ELLIOTT, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wilton Snowden, Jr., for the appellant.

John Hinkley, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The appeal in this case is from an order of the Circuit Court for Baltimore City overruling exceptions to a sale of a ground rent of $2,000 per annum, issuing out of a lot, situate on Boston street, in the City of Baltimore, and ratifying and confirming the sale.

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The sale was made by the appellee, as trustee, to the appellant, on the 21st of February, 1913, for the sum of thirty-nine thousand dollars, under a decree of Court passed on the 10th day of May, 1898, in the case entitled, the *Safe Deposit and Trust Company of Baltimore, Trustee,* v. *Kensett et als.*

In the report of sale made by the trustee, it is stated, that the trustee has sold all of the property mentioned in these proceedings, and has continuously endeavored to sell the rent but has been unable to sell the same at an adequate price; that subject to the ratification by the Court, a private sale has been made to the appellant of the ground rent for the sum of $39,000 to be paid in cash upon the ratification of the sale; that the price is a fair and adequate one, and is more than could be obtained at public sale, and that it is to the benefit, interest and advantage of all persons interested that the sale be ratified and confirmed. There was filed with the report a certificate of two real estate brokers, as to the adequacy of price at which the ground rent was sold.

The objections to the ratification of the sale are based upon the following grounds:

(1) Because the trustee cannot give a good and merchantable title to the property;

(2) That the appointment of the Safe Deposit and Trust Company as sole and substituted trustee was in violation of the provision of the testator's will, which provided that the number of trustees should always be three, and, even if the substitution be valid the appellee was not a proper party to institute the partition proceedings.

(3) Because the jurisdictional averments contained in the bill are not sufficient to bind unborn persons and the case is not therefore brought under the Acts of 1862 (Chap. 156) and 1868 (Chap. 273), section 198, Article 16 of the Code of 1888, as stated by the Auditor and Master in Chancery.

(4) Because the decree under which the property was sold is too old, having been passed nearly fifteen years ago, and was not a decree for sale and immediate re-investment of

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the property, but was intended to operate in the future and is not now a valid and subsisting decree.

It will be seen that the objections relate to, and are based upon, the form and validity of the proceedings adopted by the trustee prior to the decree and not in any way to the title of the testator, Mr. Kensett, the owner of the property or those from whom he acquired the property.

Some of the objections, in our opinion, are not open for review and cannot be regarded as sufficiently jurisdictional to defeat the sale under the decree, or to require the appellee to procure a new decree in order to accomplish the same result, as has been obtained here. *Hamilton* v. *Traber*, 78 Md. 28; *Wicks* v. *Wicks,* 98 Md. 308; *Slingluff* v. *Stanley,* 66 Md. 220.

The property here in question, and the decree for its sale, were before this Court in *Kensett* v. *Safe Deposit and Trust Company,* 116 Md. 526, and while the objections here raised were not directly presented, the decree was treated in that case as a valid and subsisting decree, and it was held that the parties in that case would be bound by the decree.

Whether the appointment by the Court in 1889 of the Safe Deposit and Trust Company as trustee upon the resignation of the three trustees named in the will was a proper compliance with the sixteenth clause of the will, is not a matter which can affect the appellant on this appeal.

The sale was made by the appellee, as a specially appointed trustee under the decree of 1898, and not under its substitutional appointment in 1889. The Court had the undoubted power to appoint less than three trustees to make the sale.

The substituted trustee appears to have been properly appointed under section 94 of Article 16 of the Code, and if the Court had jurisdiction of the subject-matter and the parties a mere irregularity in the proceedings, will not be enquired into or deemed sufficient to sustain exceptions on the purchaser's appeal, because they do not in any manner affect the title of the purchaser. *Taylor* v. *Monmonier,* 120

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Md. 101; *Jencks* v. *Safe Deposit Co.,* 120 Md. 626; *Offutt* v. *Jones,* 110 Md. 233; *Kennard* v. *Bernard,* 98 Md. 513; *Sloan* v. *Safe Deposit Company,* 73 Md. 239; *Newbold* v. *Schlens,* 66 Md. 587; *Benson* v. *Yellott,* 76 Md. 159.

The bill appears to have been filed under Article 16, section 198 of the Code of 1888, now section 228 of Article 16 of Bagby's Code, and we think its averments were sufficient to give the Court jurisdiction to pass the decree.

The prayer of the bill was in the alternative for partition or sale of the real estate, if the same shall be found beneficial. It is as follows: That a sale or sales may be made of the lots of ground and improvements in Baltimore City, and the proceeds divided under the direction of the Court or that partition of some or all of them, may be made if the same shall be found beneficial. There was also a prayer for general relief.

The object of the bill was, to have the property partitioned, and if not susceptible of partition without loss or injury, then to have it sold.

In *Ballantine* v. *Rusk,* 84 Md. 650, a bill containing somewhat similar averments was held to contain the necessary jurisdictional facts required by the statute. *Scarlett* v. *Robinson,* 112 Md. 206; *Campbell* v. *Lowe,* 9 Md. 500; *Murphy* v. *Coale,* 107 Md. 199.

The proof was to the effect, that the real estate was not susceptible of advantageous division without loss and injury, and it would be to the benefit and advantage of all parties, that the same should not be divided, but should be sold.

The decree itself provides:

"1. That this Court will now take jurisdiction in this case of the administration of the trust created by the 12th clause of the will of Thomas Kensett.

2. It appearing to the Court that the real estate which consists of the lots of ground and improvements in Baltimore City, including the lot in the annex and including the several reversionary interests, are not susceptible of partition with-

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out loss and injury, and that a sale of the said property and a division of the proceeds, under the direction of this Court, will be for the benefit, interest and advantage of all the parties interested therein. That all and each of said lots and reversionary interests be sold, and that the Safe Deposit and Trust Company of Baltimore be and it is hereby appointed trustee to make said sale, and as to any sale so made, the course and manner of its proceedings shall be as follows:"

In *Ball* v. *Safe Deposit and Trust Co.,* 92 Md. 503, and *Levering* v. *Gosnell,* 115 Md. 582, relied upon by the appellant, the decrees were different from the one here and they were decided upon a different state of facts. In *Ball's Case, supra,* we held that the decree was not in compliance with the statute because it provided for the future sale of a ground rent, not mentioned in the proceedings, and it was not shown that the sale was advantageous to the parties in interest at the time it was made.

In the *Levering Case, supra,* it was held the Court had no jurisdiction to decree the sale of the ground rent because the bill contained no prayer for a sale nor any of the jurisdictional allegations required by the statute.

By the decree in the case at bar, all and each of the lots, including the ground rent in question are directed to be sold. It provides, that the trustee shall sell any or all of said lots and reversionary interests at public or private sale, at such times as it may deem most advantageous to the trust estate and persons interested therein, and with leave to the trustee to report to the Court for its approval and ratification any sale or sales of any portion or all of said property upon such other terms as may be found to be proper, and with leave to the said trustee, "to hereafter apply for a partition of any part or all of the said real estate, if the same shall hereafter be found beneficial, and said trustee hereby appointed is also empowered to receive from the owners of the leasehold interest the redemption money for the reversionary interest in any of said lots

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where the rents are now, or may be redeemable, and to execute to them a good and sufficient deed or deeds to extinguish the said rent or rents, and thereupon to bring the said funds into this Court for distribution after deducting its commissions and all costs incurred."

The trustee states in the report that it has sold all of the property mentioned in the proceedings and has continuously endeavored to sell this rent, but has been unable to sell the same at an adequate price until the present time. The trustee is required by the decree to bring the money arising from the sale into Court to be distributed under its direction and as the Court had jurisdiction of the parties and the subject matter, it seems clear that the decree is binding upon all parties interested, those not *in esse,* as well as those now in being. This being so, it is not open to the objections urged on this appeal. *Downes* v. *Friel,* 57 Md. 531; *Vickers* v. *Tracey,* 22 Md. 199; *Porter* v. *Askew,* 11 G. & J. 347; *Hamilton* v. *Traber,* 78 Md. 26.

The trustee holding the legal title is a proper party to file a bill for a partition or sale for the purposes of division and the mere lapse of time between the date of the decree and the sale, on the facts of the case, is not sufficient to set aside the sale. *Davis* v. *Helbig,* 27 Md. 452; *Benson* v. *Yellott,* 76 Md. 159; *Perrin* v. *Keithley,* 9 Gill, 412; *Bolgiano* v. *Cooke,* 19 Md. 375; *Harrison* v. *Harrison,* 1 Md. Ch. 331; *Krone* v. *Linville,* 31 Md. 138.

In the present case, we find nothing on the record, or in the exceptions filed herein, to show that there is any defect in the title decreed to be sold, and as we are of the opinion that the purchaser will take a good and merchantable title, the order of the Court below overruling the exceptions and ratifying and confirming the sale will be affirmed.

Order affirmed, the costs to be paid out of the fund.

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SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, A BODY CORPORATE, TRUSTEE.

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Baltimore City: the Fallsway; delegation of authority to the Commission on City Plan, or Commissioners for Opening Streets; Chapter 110 of Acts of 1910; power of condemnation; assessments for benefits; notice; appeals from errors of Commissioners; when equity has no jurisdiction.

Chapter 110 of the Acts of 1910, empowering the Mayor and City Council of Baltimore to construct the Fallsway, authorizes the delegation of the power to the "Commission on City Plan," and authorizes the conferring on said commission, by ordinance, the power to condemn and acquire by purchase, etc., the lands necessary for the work, and such other powers possessed by the Mayor and City Council relating to opening streets, etc.; such provisions contemplated that if the City should determine to commit such construction to the Commission on City Plan there should be an *express* delegation of authority for that purpose. p. 527

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Syllabus.

An ordinance of estimates, in which there was merely awarded the Commission on City Plan a certain sum for constructing the public highway on or near Jones' Falls, was not such a delegation of authority as contemplated by the Act. p. 526

The fact that in such an ordinance of estimates the Commission on City Plan was so named did not prevent the City from afterwards, by ordinance, committing the construction of the Fallsway to the Commissioners for Opening Streets. p. 528

In such a case an assessment for benefits made by the Commissioners for Opening Streets was not rendered void merely because in the first instance the Commission on City Plan had been so named by the Board of Estimates in connection with an appropriation for the Fallsway and had expended a small part of the fund. p. 528

If the Fallsway had been constructed under section 6 of the Baltimore City Charter, notice required by section 828 of the Charter would have been prerequisite to the valid assessment of any benefits for the opening of the highway. p. 528

But as the Fallsway was constructed under the special authority of Chapter 110 of the Acts of 1910, and was independent of the requirements of section 6 of the Charter, there was no legal necessity of giving the notice provided for in section 6, as the Act of 1910 contained no such requirement. pp. 530, 531

The power to assess for benefits was not granted by the statute relating to the Fallsway, but it was one of the "other powers possessed" by the City under the Charter, which it was permitted by that Act to confer by ordinance upon the Commissioners. p. 527

Where the Commissioners for Opening Streets are fully and validly empowered to conduct proceedings for the assessments of benefits, if they estimate benefits under a misconceived theory of valuation, the error is to be corrected through the appeal specially provided for such purpose; but the whole proceeding is not to be declared void because of such error; and, in general, where such assessments are made in the exercise of a jurisdiction lawfully required and where a specific remedy has been afforded for errors by an appeal to another tribunal, a court of equity has no authority to interfere. p. 532

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Under section 31 of Article 5 of the Code of 1912, an appeal to the Court of Appeals may lie from an order refusing a preliminary injunction on an *ex parte* application. p. 533

Decided June 26th, 1913.

Appeal from the Circuit Court of Baltimore City (DUFFY, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Joseph L. Goldsmith and *German H. H. Emory* (with whom was *Morris A. Soper,* on the brief), for the appellant.

S. S. Field, The City Solicitor, for the appellee.

URNER, J., delivered the opinion of the Court.

In the case of the *Philadelphia, Baltimore and Washington Railroad Company* v. *The Mayor and City Council of Baltimore, ante,* page 504, the validity of benefit assessments made by the Commissioners for Opening Streets in connection with the opening of a highway over Jones' Falls in Baltimore City was sustained as against the objections there under consideration. The present appeal is from an order refusing a preliminary injunction upon a bill of complaint which disputes upon other grounds the right of the Commissioners to make such assessments. It was held in the former case that while Ch. 110 of the Acts of 1910, p. 639, providing for the improvement, authorized the City to delegate the duty of opening the

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new thoroughfare, known as the "Fallsway," to the Commission on City Plan, the Mayor and City Council had full power, under the co-existing provisions of the City Charter, to pass the ordinance then and now under inquiry, directing that this service be performed by the *Commissioners for Opening Streets.* It was also decided that property beneficially affected by the improvement was not relieved of liability to be assessed for benefits because of the creation of a fund by the Act of 1910 for the payment of the costs and expenses of the project. The bill in the present case charges in effect that the City actually availed itself of the right given by the Act to delegate the power and duty of opening the highway to the Commission on City Plan, which proceeded to exercise the authority thus conferred, and that having made such an election, and the Commission having acted upon it, the City was precluded from committing the work to a different agency. The ordinance is alleged to be invalid for the further reason that it was not preceded by the notice prescribed by section 828 of the City Charter (Acts of 1898, Chap. 123, p. 241, Art. 4, Public Local Laws). The objection is raised also that the proceedings of the Commissioners for Opening Streets are void because their assessments were made with a view to meeting the cost of construction work not proper to be considered in that connection, and were in excess of the amount for which they were authorized to assess benefits.

In reference to the first of the points thus submitted, the averment of the bill is that after the approval of the project by the voters of the City, as provided by Chapter 110 of the Acts of 1910, an ordinance was passed by the Mayor and City Council, known as the "Ordinance of Estimates for the year 1911," in which appeared the following allowance among the estimates for new improvements: "Commission on City Plan, to be taken from the Jones' Falls 1961 Loan; to opening, constructing and establishing a public highway over, along and near Jones' Falls, five hundred thousand

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dollars ($500,000.00)," and that the Commission thus specified proceeded to exercise the powers vested in it by the Act of 1910 and the ordinance just mentioned, and expended the sum of $6,108.25 out of the funds thus appropriated. Upon this allegation of facts, the bill advanced the theory of a conclusive and irrevocable election by the City to delegate the duty and power of opening the Fallsway to the Commission on City Plan.

The Ordinance of Estimates to which the bill refers was passed in pursuance of section 36 of the City Charter, which provides that the Board of Estimates shall annually make out three lists of moneys to be approved by the City Council for the ensuing fiscal year, and that these lists, which include one relating to new improvements, shall be embodied in an ordinance, prepared by the Board, making the necessary appropriations, which, after the publication of a prescribed notice, shall be submitted to the City Council for passage. It is evident that an ordinance of this character, whose only function is to set apart the funds estimated for the specified municipal purposes, is not such a measure as the Act of 1910 designed to be the medium for the delegation of the powers it conferred. The Act provides, by section 2, that "before proceeding to open and construct said highway, including the acquiring of property adjacent thereto, the Mayor and City Council of Baltimore shall by ordinance provide therefor, and there shall be designated upon a proper plat the property, landed or other, that is to be acquired in, along or adjacent to said highway," and by section 3, that "The Mayor and City Council of Baltimore is hereby authorized and empowered to delegate to the Commission known as the 'Commission on City Plan' the duty and power of opening, constructing and establishing said highway, and to confer by ordinance on said Commission the power to condemn and acquire by purchase or condemnation the lands and property mentioned in the last preceding section of this Act, and *such other powers* possessed by said Mayor and City Council of

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Baltimore, relating to the laying out, opening and construction of highways and acquiring property, landed or other, adjacent thereto, as it may deem proper." These provisions undoubtedly contemplated that if the City should determine to commit the opening of the Fallsway to the Commission on City Plan, there should be an *express* delegation of authority for that purpose.

The power to *assess for benefits* was not granted by the statute relating to the Fallsway, but was one of the "other powers possessed" by the City under its charter which it was permitted to "confer by ordinance" upon the Commission. The Ordinance of Estimates does not refer to the Act of 1910 or purport to delegate or define any duties to be performed or powers to be exercised in connection with the improvement. It appears from the allegations of the bill that the ordinance required by section 2 of the Act of 1910 to be passed preliminary to any proceedings for the opening and construction of the highway was approved February 9, 1912, more than a year subsequent to the Ordiance of Estimates for 1911. In the meantime, as the bill shows, an Ordinance of Estimates for 1912 had been enacted in which an allowance of $500,000.00 was made to the *Commissioners for Opening Streets* to be used "For opening, constructing and establishing a public highway over, along and near Jones' Falls." The first of these ordinances of estimates doubtless referred to the Commission on City Plan in the expectation that the authority to open the Fallsway would be given to that body. But it manifestly did not undertake by its own terms to invest the Commission with the necessary powers. To accomplish such a result further and specific action by the City was required. No such action was taken in relation to the Commission on City Plan, but by the ordinance of February 9, 1912 provision was made for the highway, as intended by the Act of 1910, and express direction was given that it be opened by the Commission for Opening Streets in accordance with the Act and the City Charter. If, therefore, it be assumed that

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an authorization to perform this service would be final and irrevocable if once made to the agency named in the statute, we are of the opinion that such a delegation was not effected by the Ordinance of Estimates in which that agency was mentioned. There is no principle of election, applicable to the case made by the bill, which would bind the municipality to confer upon the Commission on City Plan the power to open the Fallsway merely because the selection of that body for the work had been anticipated in an ordinance whose sole object was to make appropriations, and because part of the fund thus made available had been expended by the Commission. No prejudice to the complainant or the public has been alleged as a consequence of the course pursued by the City in the exercise of the powers granted by the Act of 1910 and by the general provisions of its charter with respect to this improvement. The objection to the assessments on the ground we have thus considered is clearly not sustainable.

The question next to be decided is whether the notice prescribed by section 828 of the City Charter was an essential preliminary to the ordinance under which the Commissioners for Opening Streets made the controverted assessments. That section provided that before the Mayor and City Council "shall pass any ordinance under section 6 of this Article, paragraph, 'Streets, Bridges and Highways,' relating to the laying out, opening, extending, widening, straightening or closing up, in whole or in part, of any street, square, lane or alley within Baltimore City, notice shall be given by advertisement published once a week for six successive weeks in two of the daily newspapers in the said City, that application shall be made for the passage of such ordinance * * *" If the ordinance providing for the Fallsway is to be regarded as having been passed under section 6 of the Charter, the notice prescribed by section 828 was unquestionably a prerequisite. By the paragraph of section 6 to which section 828 refers power is given to the Mayor and City Council "to provide for laying out, opening, extending, widening,

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straightening or closing up, in whole or in part, any street, square, lane or alley within the bounds of said City, which in its opinion the public welfare or convenience may require. To provide for ascertaining whether any, and what amount in value, of damage will be caused thereby, and what amount of benefit will thereby accrue to the owner or possessor of any ground or improvements, within or adjacent to said City, for which said owner or possessor ought to be compensated or ought to pay a compensation, and to provide for assessing or levying, either generally on the whole assessable property of said City, or specially on the property of persons benefited, the whole or any part of the damages and expenses which it shall ascertain will be incurred in locating, opening, extending, widening, straightening or closing up the whole or any part of any street, square, lane or alley in said City." There are other provisions in this subdivision of the Charter, but they need not be quoted.

The ordinance of February 9, 1912, under which the Fallsway was opened, is entitled "An Ordinance to condemn and open in pursuance of Chapter 110 of the Acts of 1910 of the General Assembly of Maryland a highway over and along Jones' Falls," etc. It authorized and directed the Commissioners for Opening Streets to condemn and open the thoroughfare in pursuance of that Act, and provided that their proceedings should be in accordance with the Act of 1910 and all such provisions of the City Charter as were applicable. By section 172 of the Charter the Commissioners for Opening Streets were "charged with the duty of opening, extending, widening, straightening or closing any street, lane, alley or part thereof, situated in Baltimore City, whenever the same shall have been directed by ordinance to be done, and shall perform such other duties as the Mayor and City Council of Baltimore may by ordinance prescribe." Section 175 provided that "Whenever the Mayor and City Council of Baltimore shall hereafter by ordinance direct the Commissioners for Opening Streets to lay out, open, extend,

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widen, straighten or close up, in whole or in part, any street, square, lane or alley, within the bounds of this City, the said Commissioners, having given the notice required by law of their first meeting to execute the same, shall meet at the time and place mentioned in said notice, and from time to time thereafter, as may be necessary, to exercise the powers and perform the duties required of them by said ordinance, and shall ascertain whether any and what amount of value in damages will thereby be caused to the owner of any right or interest in any ground or improvements within or adjacent to the City of Baltimore, for which, taking into consideration all advantages and disadvantages, such owner ought to be compensated; and the said Commissioners having ascertained the whole amount of damages for which compensation ought to be awarded, as aforesaid, and having added thereto an estimate of the probable amount of expenses which will be incurred by them in the performance of the duties required by them, as aforesaid, and also of the expenses incurred by the City Register by reason of said proceedings, shall proceed to assess all the ground and improvements within and adjacent to the City, the owners of which, as such, the said Commissioners shall decide and deem to be directly benefited by accomplishing the object authorized in the ordinance aforesaid."

It thus appears that the assessments of which the bill complains were not imposed in pursuance of an ordinance passed under section 6 of the Charter. The authority of the City to open the Fallsway and the powers of the Commissioners for Opening Streets to assess the benefits in question existed independently of that section under separate and specific provisions. The ordinance providing for this improvement not only omitted any allusion to section 6, but referred expressly to the Act of 1910 as the source of the power which the City was proposing to exercise through one of its established agencies. There was no attempt in the ordinance to provide, within the purview of section 6, for the ascertainment of

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either damages or benefits, but the Commissioners for Opening Streets were simply directed to perform the duties enjoined upon them by existing provisions of the City Charter. The conditions, therefore, under which the notice mentioned in section 828 is requisite, are not present in this proceeding. There was no legal necessity apart from that section for any notice preliminary to the passage of the ordinance, and the Act of 1910, in pursuance of which the City acted, contained no such requirement.

The remaining objection stated in the bill is that the proceedings of the Commissioners for Opening Streets are null and void because their assessments for benefits included elements and estimates not recognized by law. This amounts to a contention that the assessments are irregular and excessive. For such an erroneous exercise of authority the party aggrieved has an adequate remedy by direct appeal from the action of the Commissioners. By section 179 of the City Charter it is provided that any party dissatisfied with the assessment of damages or benefits may within thirty days appeal to the Baltimore City Court, which is given full power to hear and determine the question thus presented. The appellant is given the right to have a jury summoned and empanneled "to ascertain and decide on the amount of damages or benefits, under the direction of the Court." It is further provided that the Court "shall not reject or set aside the record of the proceedings of the said Commissioners for any defect or omission in either form or substance, but shall amend or supply all such defects and omissions, and increase or reduce the amount of damages and benefits assessed, and alter, modify and correct the said return of proceedings, in all or any of its parts, as the said Court shall deem just and proper."

In *Wannenwetsch* v. *Baltimore City,* 111 Md. 39, it is said, in the opinion by JUDGE BURKE, that: "Where a special and limited tribunal acts within its jurisdiction, and an appeal is provided by the statute to another tribunal, in

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which their action may be reviewed, mere errors, mistakes of judgment or irregularities in their proceedings do not form a foundation for a bill in equity. *Methodist Church* v. *Baltimore City,* 6 Gill, 391; *Hazelhurst* v. *Baltimore,* 37 Md. 220; *Page* v. *Baltimore,* 34 Md. 558." The objection in the *Wannenwetsch case* was that the Commissioners published in only one English newspaper certain notices necessary to be given in the course of their proceedings instead of making the publication in two such newspapers as required by law. It was held that the notices were consequently insufficient, but that as the *ordinance* was valid, and the Commissioners acquired jurisdiction in the premises and acted within its limits, any errors, defects or irregularities in the exercise of that authority could have been corrected by an appeal to the Baltimore City Court, as provided by the ordinance, and that a Court of Equity had no power to intervene. The decision thus rendered and those to which it referred are conclusive of the question we have now to determine. The Commissioners in this case were fully and validly empowered to conduct the proceedings in the course of which they made the assessments here sought to be annulled, and if they estimated the benefits upon a misconceived theory of valuation, the error thus committed is subject to correction through the appeal specially provided for that purpose. There is certainly no reason to declare the whole proceeding void because the Commissioners may have reached and reported a mistaken conclusion. It being clear upon the averments of the bill that the assessments complained of were made in the exercise of a jurisdiction lawfully acquired, and a specific remedy having been afforded for the alleged grievance by an appeal to another tribunal, a Court of Equity has no authority to decide the issue.

The case of *Friedenwald* v. *Shipley,* 74 Md. 225, was cited in support of the appellant's contention. In referring to that case JUDGE BURKE said in *Wannenwetsch* v. *Baltimore, supra,* "there is nothing in the decision in the *Friedenwald*

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case in conflict with the principles we have stated. The broad language used in some portions of the opinion in that case must be read in connection with the precise questions which the Court had under consideration. What was actually decided in that case is this: first, that the examiner had *exceeded* his authority in a most material respect, viz, in estimating for the cost of building two bridges across the tracks of the Philadelphia, Wilmington and Baltimore Railroad Company; and, secondly, that the statement of damages, benefits and expenses filed by him was so framed as to mislead persons interested. The Court found as a fact that 'information was withheld from them which would probably have induced them to appeal; at all events which was essential to an intelligent determination of the question whether an appeal was necessary for their protection.'" In the present case there is no such combination of prejudicial conditions, and we find no occasion to exempt it from the operation of the general principle so clearly stated in the *Wannenwetsch and other cases* cited.

There was a motion to dismiss the appeal on the ground that the order from which it is taken was in reality a *pro forma* ruling. The appeal is from an order refusing a preliminary injunction on an *ex parte* application. An appeal to this Court from such an order is permitted by section 31 of Article 5 of the Code; *C. & P. Telephone Company* v. *Baltimore City,* 89 Md. 707; and the record discloses no circumstances which can be held to affect the right thus afforded.

Order affirmed, with costs.

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STATE OF MARYLAND

vs.

JOHN H. GURRY.

Penal statutes: construction; police power; control of private property; Baltimore City; 14*th Amendment to U. S. Constitution; "Segregation Ordinance"; Ordinance* 692 *of Mayor and City Council of Baltimore, of May* 15*th,* 1911; *regulating the residential districts of races in Baltimore City; vested rights.*

While penal statutes are to be strictly construed, their construction must not be unreasonable or forced. p. 538

In sections 1 and 2 of the Ordinance No. 692 of the Mayor and City Council of Baltimore, of May 15th, 1911, providing for the segregation of white and colored people in different residential districts, the words "in whole or in part" modify the words "residences or places of abode," and the section means that where the buildings in a block, "so far as the same are occupied," are used in whole or in part as residences or places of abode by members of one race, then no member of the other race shall occupy any building in that block as a residence. The words "in whole or in part" apply to blocks where all of the houses are wholly occupied, as well as to blocks where, although some are vacant, the other buildings are occupied by members of one race only. p. 539

Where some of the houses are partly used as residences and partly as shops and stores, or for purposes other than for residences, only portions of the houses used as residences are to be considered in determining the question as to whether or not the block shall come under the operation of the ordinance. p. 539

This ordinance is not a violation of section 221 of the City Charter. p. 540

It is for the preservation of peace, the prevention of conflict and ill-feeling, between the white and colored persons in Balti-

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more City, and for promoting the general welfare of the City; provisions applicable to the white race are made precisely applicable to the colored race, and the ordinance does not present any case of discrimination prohibited by the 14th Amendment to the Constitution of the United States, or by Article 23 of the Bill of Rights of Maryland. p. 540

Ordinance No. 692 is unconstitutional, however, because its provisions are made applicable to property owned before its passage; under the guise of the police power, it is a taking away of vested rights. pp. 550, 551

It is not to be presumed that the Legislature meant to confer upon the City the power to prohibit by ordinance one who was the owner of a dwelling when the ordinance was passed, from moving into it, simply because he is of a different color from other persons using the block, in which his house is situated as a dwelling or place of abode. p. 551

The object of section 221 of the City Charter, providing that every ordinance enacted shall contain but one subject which shall be described in its title, as in the case of section 29 of Article 3 of the Constitution, is to prevent the incorporation in one Ordinance of distinct and separate matters of legislation having no connection with each other, and not referred to in the title. p. 540

Under its Charter, the City of Baltimore, in the exercise of the police power, has the same power to pass ordinances for the maintenance of the peace, good government, health and welfare of the City as the Legislature has to enact statutes for that purpose. p. 540

The Mayor and City Council of Baltimore has the power to pass ordinances for the segregation of races in Baltimore City. p. 548

In determining the constitutionality of an ordinance passed under the exercise of the police power, courts must take into consideration the reasonableness of their provisions, and determine whether or not they are so reasonable or oppressive as to cause the assumption that the Legislature did not intend to empower the municipality to enact them. p. 541

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The 14th Amendment to the Constitution of the United States does not take from the states the police power that they possessed before the Constitution was adopted; and the states still possess those powers subject to the observance of the fundamental principles of civil rights. p. 544

The absolute control of property by an owner may be subject to reasonable regulations under the police power of the State; and the owner may not use his property as he pleases, if such use injuriously affects others. p. 550

Salus populi, suprema lex. p. 542

Decided October 7th, 1913.

Appeal from the Criminal Court of Baltimore City (ELLIOTT, J.).

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Edgar Allan Poe, the Attorney General, Wm. L. Marbury (with whom was *W. L. Rawls,* on the brief), and *S. S. Field, the City Solicitor* (upon the invitation of the Attorney General and by special leave of the Court; Mr. Field filed also a supplemental brief), for the appellant.

W. A. Hawkins (with whom was *Geo. W. F. McMechen,* on the brief), and C. Ames Brooks (with a supplemental brief), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

There is involved in this appeal the validity of the ordinance of the Mayor and City Council of Baltimore City, known as the Segregation Ordinance (City Ordinance No. 692, May 15th, 1911).

The appellee, a colored man, was indicted for violation of section 2 of said ordinance and upon the lower Court sustaining a demurrer to the indictment, this appeal was taken from the judgment thereupon entered.

The ordinance, which is composed of ten sections, is entitled "An ordinance for preserving peace, preventing con-

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flict and ill feeling between the white and colored races in Baltimore City, and promoting the general welfare of the city by providing so far as practicable, for the use of separate blocks by white and colored people for residences, churches and schools."

Section 1 provides: "That from and after the passage of this ordinance it shall be unlawful for any white person to move into or use as a residence or place of abode any house, building or structure, or any part of any house, building or structure situated or located on any block, as the same is hereinafter defined in section 4, the houses, buildings and structures on which block, so far as the same are occupied or used as residence or places of abode, in whole or in part shall be occupied or used as residences or places of abode by colored persons, otherwise than as provided in section 3 hereof. Such a block shall be deemed a colored block for the purposes of this ordinance."

Section 2 is in the identical language of section 1, except that it prohibits any colored person from doing what section 1 prohibits any white person from doing.

Section 3 excepts domestic servants from the operation of sections 1 and 2 when they reside with their employers.

Section 4 is, "That the word 'blocks' as the same is used in this ordinance shall be construed to mean that portion of any street or alley upon both sides of the same between the two adjacent intersecting or crossing streets." And further provides the method, in cases where either of the adjacent streets intersects but does not cross the street upon which the block in question may be located, by which that portion of the block on the side of the street facing the intersecting street is to be classified.

Section 5 fixes the penalty for violation of the prohibitions of sections 1 or 2 of the ordinance.

Section 6 provides the manner of determining whether blocks upon which there were no buildings used as residences at the time of the passage of the ordinance, but upon which it is desired by the owners thereof to erect buildings for the

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purposes of residences, shall become either colored or white blocks.

Section 7 provides the means whereby blocks which were either white or colored under sections 1 and 2 can be opened to the occupancy of both white and colored persons.

Sections 8 and 9 provide that no buildings, not so used prior to the passage of the ordinance, shall be used as churches or schools without a permit from the Board of Police Commissioners and no permit shall be issued to allow the use of such buildings by colored persons in a white block or white persons in a colored block.

Section 10 provides that nothing in the last four sections shall be taken to affect the validity of the first five sections.

The learned judge below, in sustaining the demurrer, filed an opinion, from which it appears that the reason for the Court's action was based upon the unenforceability of the ordinance because of the uncertainty of the language of sections 1 and 2.

There can be no question, that this being a penal ordinance, it must be strictly construed; but this rule is open to the limitation that the construction must not be an unreasonable or forced one. As was declared in *Keller* v. *State,* 11 Md. 525: "Even penal statutes which it is said should be strictly construed, ought not to be so strictly construed as to defeat the obvious intention of the Legislature. And though they are not to be extended by construction, they should receive a rational interpretation."

In *Wharton's Criminal Law* (10th Ed.), sec. 28, the rule is stated thus: "Penal statutes are to be strictly construed. In construing such statutes, however, we are to look for their reasonable sense, and if this is clearly ascertained it must be applied though a narrower sense is possible."

In the opinion of the Court we find this language: "In an effort to interpret these sections (1 and 2) we are forced to the conclusion that the thing prohibited is the residence of a white person in a block occupied, in whole or in part, by colored persons, or the residence of a colored person in a

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block occupied, in whole or in part, by white persons." From which, and also other portions of the opinion, it is apparent that the words "in whole or in part" were taken to modify the word block. But this is a construction to which we cannot accede. Although at a casual reading of these two sections the language does apparently admit of this construction, nevertheless, upon close scrutiny it is clear that the words "in whole or in part" were used to modify the words "residences or places of abode." Therefore the meaning of the language of the sections is plain that the thing prohibited is, that when the buildings on a block, "so far as the same are occupied or used as residences or places of abode, in whole or in part, shall be occupied or used as residences or places of abode" by the members of one race, that then no member of the other race shall occupy any building on that block as a residence. The effect of the words "in whole or in part" being to cover blocks where all of the houses were wholly occupied as well as where there were some vacant, but all that were occupied, being occupied by the members of the same race. Or where some of the houses were partly used as residences and partly as shops, stores or other purposes other than residences, that in that event the only portion of the house to be considered in determining as to whether or not the block should come under the operation of the ordinance was to be the portion used as residences. The blocks, which at the time of the passage of the ordinance were occupied by both white and colored, are left entirely free for the same character of occupancy. Although language could have been used to make the meaning clearer, we are of the opinion that these sections are free from uncertainty, and therefore it was error to have declared the ordinance void for that reason.

The appellee contends that the ordinance is in conflict with sec. 221 of the City Charter, p. 360, wherein it is provided: "Every ordinance enacted by the City shall embrace but one subject, which shall be described in its title, etc." This has been declared to be an adaptation of Article 3, section 29 of the State Constitution. There have been so many adjudica-

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tions upon that section that there can no longer be any doubt as to its correct interpretation. And what was said in the case of *Gans* v. *Carter,* 77 Md. 1, seems to be applicable here: "We have but a word to say and that is to repeat what we have so often said, that the object of this clause was to prevent the embodying into the same act distinct and separate matters of legislation, having no connection whatever with each other and matters not referred to in the title." Measured by this standard there can be no force in the contention.

The main question in this case arises, however, over whether the provisions of this ordinance are in conflict with Article 23 of the Bill of Rights of the Constitution of Maryland, and the first section of the Fourteenth Amendment of the Constitution of the United States.

The title to the ordinance recites its purposes to be "for preserving peace, preventing conflict and ill feeling between the white and colored races in Baltimore City, and promoting the general welfare of the City," etc. What is applicable to the white race is made precisely applicable to the colored race. No advantage that is enjoyed by one race is denied the other. Every restriction placed upon the one is in exact terms imposed upon the other.

Upon whether or not this ordinance is a valid exercise of the police power must depend its enforceability.

That the City has the power under its Charter to pass ordinances in the exercise of the police power, equal to legislative enactments, must be regarded as settled in this State since the case of *Rossberg* v. *State,* 111 Md. 394, wherein this Court said: "Broader or more comprehensive police powers could not be conferred under any general grant of police power, for the purposes mentioned in section 18, than those granted in that section, and when we consider the 'Welfare Clause' of the Charter, section 31, greater emphasis could not be laid upon the implied powers of the City for the maintenance of the peace, good government, health and welfare of the City than is there laid * * * In the present case, the legislative grant is not merely one of power to pass ordinances relating

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to specified police powers, regarded as a part only of the general police power, but the grant is of all the power commonly known as the police power, to the same extent as the State has or could exercise said power within said limits. The implication therefore is a necessary one, that notwithstanding the preceding clause of that section of the Charter enumerated certain purposes for which ordinances might be passed, the Legislature intended the City to have, in addition, the power to pass ordinances for any and all purposes relative to the exercise of the police power."

If then the Legislature could pass a statute under the police power of the State, providing for the segregation of the races, as we think it could, there would seem to be no doubt that the Mayor and City Council of Baltimore can pass a valid ordinance having the same end in view. It is true, however, that, notwithstanding the broad powers vested in the Mayor and City Council by the charter, some distinction is made between statutes passed by the Legislature and ordinances passed by a municipality under the police power—one illustration of which is what was said by CHIEF JUDGE MCSHERRY in *State* v. *Hyman,* on page 618 of 98 Md. The Court must undoubtedly take into consideration the reasonableness of the provisions of this ordinance and determine whether any of those involved in this case are so unreasonable or oppressive as to cause it to assume that the Legislature did not intend to empower the municipality to enact them as they stand—whatever may be said as to the Court's powers in construing statutes which have a real and substantial relation to any object properly within the police powers of the State.

Both State and Federal Courts have been most industrious in dealing with the many cases growing out of the laws claimed to have been passed in the exercise of this power, known as the police power, and it might be well to consider what is meant, in a constitutional sense, by that term. As was said by that learned jurist, CHIEF JUSTICE SHAW, in *Commonwealth* v. *Alger,* 7 Cush. 53: "It is much easier to per-

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ceive and realize the existences and sources of this power than to mark its boundaries, or prescribe limits to its exercise." And the definition there given has been, probably. more often quoted with approval than any other. "The power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with or without penalties, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." In *Champer* v. *Greencastle,* 138 Ind. 339, it is thus defined: "The police power of the State, so far has not received a full and complete definition. It may be said, however, to be the right of the State to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community, which do not encroach on a like power vested in Congress by the Federal Constitution or which do not violate any of the provisions of the organic law." In *State* v. *Wagener,* 77 Minn. 483: "The power to impose such restrictions upon private rights as are practically necessary for the general welfare."

In *Deems* v. *Baltimore City,* 80 Md. 173, this Court said: "Every well organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public * * * It may be said to rest upon the maxim *'salus populi, suprema lex'* and the constitutional guarantees for the security of private rights * * * have never been understood as interfering with the power of the State to pass such laws as may be necessary to protect the health and provide for the safety and good order of society. 'Property of every kind' says MR. JUSTICE STORY 'is held subject to those general regulations which are necessary for the common good and general welfare.' And the Legislature has the power to define the mode and manner in which every one may use his property." In *State* v. *Hyman,* 98 Md. 596, "The exercise of the police power being for the promotion of the public good is superior

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to all considerations of private rights or interest, and by virtue of it the State may lawfully impose upon the exercise of private rights such burdens and restraints as may be necessary and proper to secure the general health and safety." In *Police Commr.* v. *Wagner,* 93 Md. 191, the Court said: "The State has power to pass such laws as are necessary to protect the health, morals or peace of society." In *Cochran* v. *Preston,* 108 Md. 220, "The power to prescribe regulations demanded by the general welfare for the common protection of all is known as the police power of the State and is inherent in every sovereignty."

The Supreme Court has, times almost without number, been called to pass upon laws enacted by the States upon matters relating to their internal government, and has given expression to the meaning to be ascribed to the police power. In the *Slaughter House Cases,* 16 Wall. 62, which were the first cases involving a construction of the Fourteenth Amendment, the Court said: "This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property." "It extends" says another eminent judge "to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State," "and persons and property were subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or upon acknowledged principles, ever can be made so far as natural persons are concerned."

In the case of *Beer Co.* v. *Mass.,* 97 U. S. 25, it was said: "Whatever difference of opinion may exist as to the extent and boundaries of the police power * * * there seems to be no doubt that it does extend to the protection of the lives, health and prosperity of the citizens, and to the preservation

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of good order and public morals." Again in *District of Columbia* v. *Brooke,* 214 U. S. 138: "It is the most essential of powers, at times the most insistent and always one of the least limitable of the powers of government." It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by prevailing morality or strong and preponderating opinion, to be greatly and immediately necessary to the public welfare." *Noble Bank* v. *Haskell,* 219 U. S. 104. In *Barbier* v. *Connolly,* 113 U. S. 27, the Court said: "But neither the Amendment (14th)—broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes called the police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people." In *Chicago, B. & Q. R. Co.* v. *Drainage Com.,* 200 U. S. 592: "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." In *Crowley* v. *Christensen,* 137 U. S. 86, the Court said in dealing with the extent of the police power: "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law."

It is not, nor can it be, contended that the Fourteenth Amendment took from the States the police power they possessed at the time of the adoption of the Constitution. They now possess the power to the same extent subject, of course, to the fundamental principles of civil rights. *Slaughter House Cases, supra; Barbier* v. *Connolly, supra: Mugler* v. *Kansas,* 123 U. S. 623; *Jacobson* v. *Mass.,* 197 U. S. 25.

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"It does not deprive the States of the right to preserve order within their limits, to pass laws against crimes and punish offenders, to regulate relations between individuals, to control for the public good the use of private property, to protect the health, life and safety of the people, and to that end, not only to enact suitable legislation, but to destroy property that is dangerous to the well being of the State." *Cooley's Const. Law* 251.

That this power is far reaching and most important to the preservation of the States cannot be denied. It has been impossible to confine its operation to a set rule, but every community has been left to meet the circumstances of each case as the conditions changed and to determine upon the necessity for action. *Allgeyer* v. *Louisiana,* 165 U. S. 590.

There is, however, the constant warning present, practically, in all the cases, in the examples and rule, that the exercise of the power must not be unreasonable, but must be enacted in good faith for the promotion of the public good, and not for the oppression or annoyance of a particular class. *Plessy* v. *Ferguson,* 163 U. S. 555.

If legislative bodies, under the guise of protecting the public welfare, arbitrarily pass laws which have no relation to that object, the Courts will determine whether there was a proper exercise of the power. *Mugler* v. *Kansas, supra; Lawton* v. *Steele,* 152 U. S. 133. Naturally, at times, the exercise of this power limits to some extent the enjoyment of the fundamental rights, but if the restraints are deemed by the law-making body necessary for the general welfare and are not "so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred," the Courts will not interfere, for the local authorities are primarily the judges of the necessity of such legislation. And although Courts may disagree as to the propriety of the legislation, unless it plainly, and beyond all question, exceeds the power, there should be no judicial interference. *Schmidinger* v. *Chicago,* 226 U. S. 578; *Minn.* v. *Barber,* 136 U. S.

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313; *Atkin* v. *Kansas,* 191 U. S. 207; *McLean* v. *Arkansas,* 211 U. S. 547; *Eubank* v. *Richmond.* 226 U. S. 137.

If then this power is inherent in every State for the preservation of its general welfare, is the ordinance in question an unreasonable exercise of it and are its provisions so arbitrary and oppressive that they amount to the invasion of a person's constitutional rights?

As we have seen the avowed object of the ordinance is to preserve peace, prevent conflict and ill feeling between the two races and thereby promote the welfare of Baltimore. The means employed are that blocks which were occupied by colored people exclusively should continue to be occupied by them exclusively, and that blocks occupied exclusively by white people should so continue to be occupied by them.

The ordinance does not legislate on what were "mixed blocks"—those occupied by members of the two races—at the time it was passed, and whatever other objections may be urged against it, it cannot be truly said that there is any discrimination in the ordinance against the colored race. Indeed in its practical operation it would be more burdensome on white people than on colored people, for it is well known that white people own the great bulk of property in Baltimore City, and hence where the property of one colored person would be affected by such an ordinance those of many more white people would be. What is denied one class is denied the other, what is allowed one class is allowed the other. There is therefore no such discrimination as is prohibited by the Constitution or statutes securing civil rights, and it is not necessary to discuss that question further.

No intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races which are likely to, and occasionally do, result in outbreaks of violence and disorder. It is not for us to say what this is attributable to, but the fact remains—however much it is to be regretted—and if a segregation of the races to such extent as may be permissible under the Constitution and laws

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of the land will have a tendency not only to avoid disorder and violence, but to make a better feeling between the races, everyone having the interests of the colored people as well as of the white people at heart ought to encourage rather than oppose it. Mr. JUSTICE BROWN said in *Plessy* v. *Ferguson,* 163 U. S. 537: "The object of the amendment (14th) was undoubtedly to enforce the absolute equally of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."

If the welfare of the city, in the minds of the Council, demanded that the two races should be thus, to this extent, separated and thereby a cause of conflict removed, the Court cannot declare their action unreasonable. It was acknowledged by the counsel for the appellee, both in the brief and in verbal argument, that for years there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people. With this acknowledgment how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?

As was said in *Plessy* v. *Ferguson, supra,* which was a case involving separate railroad coaches for white and colored persons within the limits of a State: "So far than as conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the Legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order." And further said they could not say

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that such a separation was unreasonable or obnoxious to the Fourteenth Amendment.

A large number of the States have laws regulating, like in the foregoing case, the separation of the races in railroad cars, including our own State. *Hart* v. *State,* 100 Md. 595.

The Courts have uniformly held that this was a reasonable exercise of the police power, and was not a discrimination when the same accommodations were provided for each race.

Penalties in criminal laws are not only imposed to punish violators but to deter the commission of crime. If, as is practically conceded in this case, the living in such close proximity produces friction that is liable to result in open clashes and disorder, why should not the governing body take cognizance of it and legislate to avoid it and thereby promote the general peace? It seems that it would be the better exercise of their discretion, for the public welfare, to discourage by removing the cause than to trust to deterring by the fear of punishment.

In this State, as well as in a number of others, there has been a statute in force for many years prohibiting marriages between white and colored persons, and imposing a heavy penalty for its violation, and in *Plessy* v. *Ferguson, supra,* the Supreme Court said: "Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State." That case as well as many others has also recognized the right of States to establish separate schools for white and colored children and, as we have seen, to require the separation of the white and colored races in public conveyances. Without giving other illustrations of the exercise of the police power, we are of the opinion that the object sought to be accomplished by this ordinance is one which properly admits of the exercise of the police power. It only remains for us to determine whether the ordinance as drawn should be sustained.

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It will be observed that the first five sections of the ordinance do not depend, for their validity, upon the remaining sections which legislate on subjects germane to but not essential to, sections 1 and 2. As the indictment is for the alleged violation of section 2, which is in the precise language of section 1 (excepting the latter is applicable to white persons and the former to colored persons) those two are the most important sections for our consideration. The serious objection to them is that they wholly ignore all vested rights which existed at the time of the passage of the ordinance. Prior to that time any white person undoubtedly had the right not only to own, but to move into and use as a residence or place of abode any house, etc., situated in what is by section 1 made a colored block, and a colored person had the same rights as to what is by section 2 made a white block. If the traverser, for example, on May 15th, 1911, when the ordinance was passed, owned a dwelling in what was made a white block, he could not under the ordinance move into it, although it was perfectly lawful for him to own it when he became owner, and to use it as a dwelling. He might be unable to rent it to a white person, and as a colored person was prohibited from moving into it, he could not rent it to a colored person, and he could not under the ordinance move into it himself. The result would be that his house would remain idle, unless he could sell it, which would under the circumstances likely be at a great sacrifice, although when he acquired it he had the right under the Constitution and laws of Maryland to occupy it as his dwelling, or to rent it to any person, white or colored, to be used for legitimate purposes. Or it might be that a white person had a valuable and attractive house in a "block" which was otherwise occupied by colored people, yet if at the passage of the ordinance it happened to be unoccupied as a dwelling, he could not under the ordinance move into it or rent it to a white person. To deny him such rights would be a practical confiscation of his property, for his house might be of a character he would not rent to a colored person, and if he could

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not use it himself he would be deprived of not only the income from it, but of such use of it as is guaranteed to every owner of property by the Constitution and laws of the land. Of course the same conditions might exist when the owner of the one house was colored and the other residents of the block were white, although probably not so likely to happen.

We do not loose sight of the fact that the absolute control of property by an owner may be subject to reasonable regulations under the police powers of the State. An owner of property cannot establish a bawdy house or other nuisance in it because he is the owner of it. He cannot necessarily use it just as he pleases, if such use thereby injuriously affects others. He may be prohibited from using it while it is in such condition that the use of it will be dangerous, or, in some cases, will be injurious to others. He may be prohibited from manufacturing or selling intoxicating liquors in it. Other instances might be given of the exercise of the police power, but we have not hitherto known of a case which approached the exercise of such power as is contended for under this ordinance—to prohibit one who was the owner of a dwelling when the ordinance was passed from moving into it, simply because he is of a different color from other persons using that block as residences or places of abode, although he might keep his premises in better sanitary condition and in every way more attractive than the others. He may be quite as well behaved and as law abiding as the other residents of the block, he may have paid more for his house than the others for their respective houses, or may have inherited the family residence. It is not because there is any reason why it could not or should not be used as a dwelling, but simply because he is white and the others colored. Such an ordinance may work some hardships even as to after-acquired property, but if property is acquired when valid laws or ordinances affecting it are in force, it is taken subject to them. Under sections 1 and 2 of the ordinance the most serious consequences might follow their adoption and rights which had always existed be taken away by the action

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of the municipality. Without deeming it necessary to consider whether it would be possible for the Legislature itself to thus take away such vested rights under the exercise of the police powers, we deem the provisions as they were passed too unreasonable to permit us to assume that the Legislature intended to confer on the municipality the power to thus affect vested rights. Indeed when we see such provisions as those in section 7, which provide for a majority of the owners of either real or leasehold property in a block subject to the operations of sections 1 or 2 having the Inspector of Buildings declare that said block is no longer subject to the operation of such sections, it would be difficult to conclude from the ordinance itself that the Mayor and Council were so convinced of the necessity for such an exercise of the police powers as would justify such interference with vested rights.

A practical difficulty in the enforcement of sections 1 and 2 which occurs to us is the lack of any provision in the ordinance for some sufficient public notice of what blocks are affected, which are to be white and which colored. Unless there be some public record giving the necessary information there would probably be great confusion in the examination of title and passing on the rights of purchasers, even if no difficulties arise in the enforcement of such sections.

We do not understand why in section 3 the exception was limited to domestic servants or just how comprehensive that term was intended to be. It would be difficult to include caretaker, chauffeur or janitor in the term "domestic servants," but as the validity of the ordinance is not thereby affected we will not discuss that further.

As the case before us does not involve the provisions of sections 6, 7, 8 and 9 we will not discuss them separately, or pass upon the validity *vel non* of such provisions as the delegation of powers attempted by sections 6 and 7 to property owners, etc., but for the reasons stated we will affirm the judgment.

Judgment affirmed.

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THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE.

Obiter dicta. Corporations: amendment of charter; title of statute; when not sufficient; Constitution, Article 3, section 29. Street paving: railways; between tracks.

Where the Court of Appeals in deciding a cause declares that, although, according to its view of the case the decision of a certain question is not before it and is not essential, but, in order to prevent further litigation on that score, it proceeds to dispose of the question, and after a motion for a re-argument, although it rescinds the decree, yet reaffirms its opinion on the same question, its ruling upon such question can not be treated as mere *obiter dicta*. p. 558

The titles of Chapter 401 of the Acts of 1906, and of Chapter 202 of the Acts of 1908, describe the statutes as empowering Baltimore City to create a paving commission, to provide for submitting to popular vote the question of issuing bonds for paying the cost of the work of said commission, etc., and as authorizing the assessment of the whole or part of the cost of the streets, upon the abutting property owner; besides these objects, the body of the Act provides that the Railways Company, on the improved streets, shall repave between their tracks, etc., with the same character of improved pavement used on such

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streets; *held,* that the title of the statutes did not contain such reference to or notice of this provision as to comply with section 29 of Article 3 of the Constitution, and the provision was invalid as to those railway companies, whose charter required them only to repave the pavement between the tracks and for two feet on eiter side. pp. 560, 561

If the Legislature has the authority to amend the charters of the Railway Companies so as to require them to repave between their tracks, it must be by an Act whose title gives some reference to such an amendment. p. 561

Decided October 7th, 1913.

Appeal from the Baltimore City Court (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Edgar H. Gans and *Joseph C. France,* for the appellant.

S. S. Field (*the City Solicitor*), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

The appeal in this case is from a judgment in favor of the City of Baltimore for the cost of repaving the track area—between the tracks and two feet on each side—of appellant's street railway, on Linden avenue between Dolphin street and North avenue.

The case is in the nature of a test one, and, under agreement of counsel filed in the case, it is admitted that the ultimate liability of the appellant, if the contention of the city should be deemed correct, will exceed the sum of one million

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and a half dollars exclusive of the expense of adapting their track conditions to the new plan of paving, and which was admitted in proof would amount to an approximately equal sum. It is therefore seen that the case, in a monetary sense, is an important one to both parties.

By ordinance of the Mayor and City Council, No. 153, approved August 16, 1912, passed in pursuance of the Act of 1906, Chapter 401, section 8, it was provided by section 1 thereof as follows: "Be it ordained by the Mayor and City Council of Baltimore that there is hereby imposed upon all street railway companies occupying with their tracks parts of the beds of streets, avenues or other highways in the City of Baltimore upon which work shall have been done or shall hereafter be done under the Act of 1906, Chapter 401 of the General Assembly of Maryland, and any amendment or amendments thereof, the obligation to pay for said work so far as the same shall have been done or shall be done between the rails of their said tracks, and for a space of two feet on either side thereof."

The Act of 1906, Chapter 401, mentioned in the above ordinance, was the Act providing for the appointment of a Paving Commission for Baltimore, and authorizing the borrowing of five million dollars for the purposes of the work contemplated by the city in the matter of improved paving. Section 8, which is the only section involved in this appeal, is as follows:

> "SEC. 8. *And be it further enacted,* That the Mayor and City Council of Baltimore be and it is hereby likewise authorized to impose upon all street railway companies occupying with their tracks parts of the beds of the streets, avenues or other highways in the City of Baltimore upon which work should be done under this Act, of the obligation to pay for said work so far as the same shall be done between the rails of their said tracks, and for a space of two feet on either side thereof, and the Mayor and City Council of Baltimore is further authorized to enforce said obligation

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by all such appropriate agencies, means, processes, proceedings and remedies as it may ordain for the purpose; but nothing in this Act shall be taken as in any wise relieving any such company or any other corporation or person from any obligation in its or his relations to the public highways of the City of Baltimore now cast upon it or him by law."

The original tracks on Linden avenue between Dolphin and McMechen streets were laid by the Baltimore, Peabody Heights and Waverly Passenger Railway Co., a corporation incorporated by Act of 1872, Chapter 369. The tracks were laid under authority of Ordinance No. 36, approved April 28th, 1879. The name of this company by Act of 1880, Chapter 488, was changed to North Baltimore Passenger Railway Company. The tracks from McMechen street to North avenue were laid by the said North Baltimore Passenger Railway Company under authority of Ordinance No. 54, approved April 21, 1881. The original charter provided that it should have the power to lay its tracks on such streets and under such terms as might be designated by ordinance, and further as to all matters not therein provided for, its rights should be the same as provided in the charter of the Baltimore City Passenger Railway Company. One of the sections of that charter not expressly provided for in the Peabody Heights charter is, "that the General Assembly hereby expressly reserves the power at all times to repeal, alter or amend this charter."

The appellant company succeeded to, and now has, all the rights and obligations of the company which laid the tracks. including the duty provided by ordinance by virtue of charter provisions, to "keep the streets covered by said tracks, and extending two feet from the outer limits on either side of said track, in thorough repair at their own expense."

Prior to 1897, the obligation to both repair and repave was assumed by a few of the companies, but on the 9th day

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of December of that year, an ordinance was approved, whereby it was provided that all street railways to which thereafter the right of using the streets should be granted, should not only maintain the track area, but should pay the cost of new and improved pavements, whenever an ordinance should be passed providing for the paving or repaving of streets used by them. In all instances coming under these provisions, the appellant makes no contention, but confines its opposition to the operation of the Acts and ordinance to those companies occupying streets before 1897 and whose obligation was confined to repair only.

The city's contention is that by reasonable construction the obligation in the original ordinances to keep the track area in repair, means that the railway company shall keep the area in repair and proper condition to correspond with the rest of the street. In other words, that the true meaning is, that it is not only to actually keep it in repair, as that term is usually used, but that the term also embraces the duty to repave with any material the city sees proper to place on the rest of the street. If the city wishes to take up a cobblestone street and lay in its place an improved character of street, such as asphalt or Belgian blocks, that under the contract to keep in repair the railway must take up the cobbles in the track area and put down the asphalt or Belgian blocks. And the city further contends that even though the obligation to repair imposed by the original ordinances does not compel the railway company to pay for the cost of repaving, that still the Legislature had the power to impose upon the appellant occupying the streets, the obligation to repave, in addition to the original obligation to repair only. The contention is made that section 8 of the Act of 1906, Chapter 401, and the ordinance passed in pursuance thereof, should be sustained, either as a valid exercise of the police power, or of the reserved power of the Legislature to alter, repeal or amend the charter of the railway companies which originally

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laid the tracks on Linden avenue, and to whose rights and obligations the appellant succeeded.

The case was tried before the Court, without a jury, and the exceptions reserved were upon the action of the Court in striking out certain testimony, and the refusal to rule as a matter of law, in separate prayers, that there was no evidence legally sufficient to entitle the plaintiff to recover; that section 8 of Chapter 401 of the Acts of 1906 and Ordinance No. 153 of the Mayor and City Council are invalid as being in conflict with the Federal Constitution: (1), in denying the equal protection of the law; (2), prohibiting the taking of property without due process of law; and (3), prohibiting the impairment of contracts.

Of course, the appellant contends that the obligation to keep in repair does not include repaving, but the only other contentions now made are that the Legislature never intended the construction that is now contended for by the city; that if it did, it had not the power, because such construction is an impairment of its contract and that the Act is invalid because it is not in conformity with section 29 of Article 3 of the State Constitution.

With regard to the claim of the city, that the obligation, imposed upon the railway by the original ordinances, to keep the track area in repair, includes the duty to repave with new material, whenever the city, in its progress, paves the balance of the street with improved paving, we would say that we deem it unnecessary to enter into any extended discussion of this question. Although the authorities cited and the reasoning in behalf of this contention are both of much force, there are authorities of equal weight to the contrary. In fact, in this State that question has been passed upon by this Court in *Baltimore* v. *Scharf,* 54 Md. 499, and decided contrary to the city's contention.

In that case a property owner was asking to have the authorities of Baltimore restrained from collecting certain taxes, assessed against him for repaving the entire width of

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a street, by virtue of an ordinance. The claim, among others, was made that the ordinance was void because it did not make a railway company, occupying the street in controversy with tracks, pay any portion of the costs, whereas its charter and an ordinance bound it "to keep the streets occupied by its tracks, and two feet on each side of its track, in thorough repair." The Court said: "The objection that the obligation to repair is on the railway by the express terms of its charter, interposes no sufficient reason to avoid the ordinance. Their obligation is to keep in repair, not to repave with a new and different material and perhaps more costly. The obligation to repair the *new pavement* whenever necessary would attach under the charter obligations, unless sufficient reasons could be found to relieve them."

The city contends that this was *obiter,* but with this we cannot agree. It is true that the decision of this point was rendered unnecessary because the case was decided upon another point—the lack of notice. Yet the Court before passing upon the question said that although the decision was rendered unnecessary, "but as it may prevent further litigation on that score we may properly dispose of the questions," and proceeded to do so. The decree in this case upon reargument was afterwards rescinded, *Baltimore* v. *Scharf,* 56 Md. 50, but the opinion on this point was reaffirmed. This then clearly takes it out of the domain of *obiter* and will be regarded by us as a question to which the judicial mind was directed. And although we are impressed with the reasoning we nevertheless see no reason to depart from the ruling of our predecessors. We are, therefore, of the opinion that upon a proper construction of the obligation to repair imposed by the original ordinances the appellant is not liable for the cost of repaving.

Can then under the Act of 1906, Chapter 401, and the amendment thereto and the ordinance passed in pursuance thereof, the appellant be made to bear the cost of the repaving in addition to the repairing obligation?

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From the conclusion we have reached, we have not found it necessary to consider any of the questions raised other than whether the Acts of 1906, Chapter 401, and 1908, Chapter 202, and the titles thereto are comprehensive enough to carry with them a modification of the charter provisions of the appellant. And therefore, we are not expressing any opinion as to whether or not it was in the power of the Legislature to impose the duty upon the appellant of repaving the track area in addition to that of repairing previously imposed.

At the passage of the Acts, the rights and duties of the appellant were well defined. If the city's contention is correct that by section 8 of Chapter 401 of the Acts of 1906, the Legislature intended to empower the Mayor and City Council to impose upon all railway companies using the streets of the city, the costs of repaving the track area, irrespective of whether or not their charters required them to repair and repave, or only to repair; and, in addition, if it is correct that the Acts and ordinance are a valid exercise, either of the police power, or of the reserved power of the Legislature to alter, repeal or amend the charter of the appellant, then, there was the attempt to make a vital change in the charter of the appellant. But that such was not the intention of the Legislature we think is proved by the Acts themselves.

The title to Chapter 401, Acts of 1906, is as follows: "An Act to create a Paving Commission for the City of Baltimore, and to define its duties and powers; to authorize the Mayor and City Council of Baltimore to issue stock to an amount not exceeding five million ($5,000,000) dollars for the purpose of defraying the cost of the work of said Commission; to provide for the submission of an ordinance to that end to the legal voters of the City of Baltimore; and to empower the Mayor and City Council of Baltimore to assess the cost of any work of said Commission, in part, upon the property bordering upon any public lane, alley, avenue, street or high-

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way in the City of Baltimore, upon which such work shall be done by said Commission, and to collect and make use of such assessments for the purposes of this Act."

The title to Chapter 202 of the Acts of 1908, which was an amendment of Chapter 401, Acts of 1906, is as follows: "An Act to repeal section 7, and to repeal and re-enact with amendments, sections 2, 3 and 6 of Chapter 401 of the Acts of the General Assembly of Maryland for the year 1906, relating to the creation of a Paving Commission for the City of Baltimore, and defining its duties and powers; and authorizing the Mayor and City Council of Baltimore to issue stock to an amount not exceeding five million dollars ($5,000,000) for the purpose of defraying the cost of said work of said Commission."

The prior Act, section 7, imposed one-third of the cost upon the city and two-thirds upon the abutting property owners. The amendment provided, section 2, that the Commission could assess the entire cost upon the abutting property. Section 3 authorizes and provides the method by which the Mayor and Council may acquire private property rights, etc., that may exist in the highways. Section 6 deals with the five million dollar stock issue.

The construction claimed for by the city, if allowed, would permit of the amendment of the appellant's charter, which it had enjoyed for more than thirty years, by an Act whose title gave not the slightest intimation of such intention. Two years later, and before any action whatever had been taken upon the prior Act, an amending Act was passed by the Legislature, in the title to which there is not only no reference to anything which might affect the appellant, but in the body of which there is the plainest inference to be drawn that the abutting property owners were to be assessed for the entire cost. If the true construction of section 8 of Chapter 401, Acts of 1906, should be that its provisions apply to companies in the category of the appellant, as well as those granted the right to the use of the streets subsequently to December 9th,

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1897, and those companies under the obligation to repave as well as repair, then the title to the Act should have contained some reference so as to have given some notice to those in like position to the appellant that their charters were about to be amended. If the constitutional provision contained in section 29 of Article 3 is to be of any weight at all, and this Court has many times declared it to be of the most importance, it is difficult to see how any corporation could claim the benefit of this constitutional requirement, if we should permit this appellant's charter to be amended by these Acts whose titles contain not the slightest reference either directly, or indirectly, to it or those in a like class to it. If the intention was to amend the charter, the appellant had the right to constructive notice at least, so as to have had an opportunity to be heard if it wished, or to have taken any other action it should have seen fit.

Our conclusion is that this section 8 is not invalid but that it does not apply to those companies upon which the obligation to repair only existed.

We are of the opinion that the prayer of the appellant, asking the Court to rule as a matter of law that there was no legally sufficient evidence to entitle the appellee to recover, and that the verdict for the appellant should have been granted.

Judgment reversed without a new trial, costs to be paid by the appellee.

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EMMA H. JESSUP ET AL.

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Statutes: duly authenticated; parol testimony may not contradict.

When the formalities required by law and established practice for preserving the identity of an Act of the General Assembly appear of record to have been duly observed, the proof thus afforded gives to the enactment such a degree of authenticity as to place it beyond the reach of contradictions which rest merely on parol and are subject to the infirmities and diversities of memory. p. 564

Even the legislative journals do not have a probative quality, sufficient of themselves to contradict a statute duly authenticated, and are entitled to be considered, for such a purpose, only in connection with other competent proof. p. 566

When an Act of Assembly has been duly authenticated with all the formalities provided by law, it can not be contradicted by the parol testimony of an engrossing clerk, to the effect that after the bill was engrossed he erased certain provisions merely by drawing lines through them, although it also appears that the journals of the two houses did not show any authority for any such alteration of the bill. p. 566

Decided October 29th, 1913.

Appeal from the Circuit Court for Baltimore County (DUNCAN, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, URNER, STOCKBRIDGE and CONSTABLE, JJ.

T. Scott Offutt (with whom was *John I. Yellott* on the brief), for the appellants.

S. S. Field, City Solicitor, for the appellees.

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Urner, J., delivered the opinion of the Court.

Upon this appeal there is presented for the second time the contention that the measure which received executive approval as Chapter 117 of the Acts of 1912, known as the "New Condemnation Law," was not in fact passed by the General Assembly. In *Ridgely* v. *Baltimore City,* 119 Md. 567, the objection just stated was overruled and the statute as signed by the Governor and published was held to be valid and operative. The theory advanced is that the Act as enrolled and presented for the Governor's signature omitted a provision for an appeal from the final judgment of condemnation which was contained in the Act as passed by the Senate and House of Delegates. The only respect in which the present question differs from the former is in the fact that additional evidence has been offered for the purpose of proving such an omission. In the *Ridgely case* the evidence before the Court consisted of the original and the printed copy of the bill as introduced in the Senate, the bill as engrossed for its third reading in that body, with papers attached setting forth two amendments later proposed in the House and adopted by both branches, the journal entries showing the legislative history of the measure, and the enrolled copy of the Act as approved by the Governor. It appeared that the bill as engrossed for its third reading in the Senate included the provision referred to, but that this clause was subsequently stricken out by means of lines drawn through it in red ink. This action was not required by any of the amendments attached to the bill or mentioned in the journals. It was accordingly argued that the provision in question must have formed a part of the bill as passed. In disposing of the contention this Court, adopting the opinion prepared by Judge Burke, in the Court below, said: "The presumption is that this provision was properly stricken out, and that it (the Act) passed the Legislature in the form shown by the enrolled and engrossed bills. This is a strong presumption, and can only be rebutted by clear and satisfactory evidence competent in law for that purpose." It was held that the

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silence of the journals as to the elimination of the disputed clause was not sufficient to impeach the bill as formerly authenticated. The proposal in the present case is to prove by parol testimony that the provision was stricken from the bill by one of the engrossing clerks after its final passage.

The opinion in the *Ridgely case* stated that upon the question as to how, when and by whom the language relating to an appeal from the final judgment was eliminated from the bill no definite or satisfactory evidence had been adduced. It is the theory of the present offer that the proposed testimony would supply the deficiency of proof thus indicated. But the rule is well settled in this State that "no statute having the proper forms of authentication can be impeached or questioned upon mere parol evidence." *Berry* v. *Drum Point Railroad Co.,* 41 Md. 463; *Annapolis* v. *Harwood,* 32 Md. 479; *Ridgely* v. *Baltimore City, supra.* In referring to the absence of evidence as to the actual striking out of the provision under consideration the former opinion made no intimation whatever that such an omission could legally be supplied by parol testimony. On the contrary it distinctly declared, as already quoted, that the presumption as to the passage of the bill in the form in which it was enrolled could be rebutted only by "evidence competent in law for that purpose," and the decision gave practical application to the rule we have stated by excluding parol testimony proffered to show that the Legislature had eliminated by amendment another provision of the bill which nevertheless remained in the Act as enrolled.

When the formalities which are required by law and established practice for the very purpose of preserving the identity of an Act of the General Assembly appear of record, as in this case, to have been duly observed, the proof of verity thus afforded gives to the enactment such a high degree of authenticity as to properly place it beyond the reach of contradiction which rests merely in parol and is subject to the infirmities and diversities of human memory.

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The precise question now before us was discussed and decided in *Annapolis* v. *Harwood, supra.* It was said in that case: "The appellants insist that the Act, as recorded and printed, did not contain all the provisions which it contained when it was, in fact, passed by the two Houses, and they produce a copy certified by the chief clerks of the Senate and House of Delegates respectively, to be a true copy of the Act as passed, with contents different from those above quoted, and they offer to prove that the difference was occasioned by mistake of the clerk in engrossing the same, after its final passage, preliminary to its examination by the committee on engrossed bills, and to the affixing of the great seal, signature by the Governor and recording. The Act, as printed, the appellants admit, was duly examined by the committee, sealed, signed and recorded, and the question is whether it is competent, by extrinsic evidence, to prove the contents of an Act of Assembly to be different from those set out in the copy, which has been attested in all the forms prescribed by the Constitution." After quoting the constitutional provisions as to the authentication of a statute the opinion then proceeds: "The object of these careful provisions was to guard against controversy in respect to the *contents* of laws. To attest the verity of the contents of a law all these solemnities are invoked. Not only must it be sealed with the great seal, and signed by the Governor, but it must be so signed in the presence of those officers of the two Houses who are best qualified to know whether the contents of the paper being signed are the identical contents of the law which passed their respective Houses. Then it is to be recorded, and from the Record Office is to be again certified under the great seal, printed and published. We cannot perceive on what principle the Court could be justified in going behind evidence so fully presented by the Constitution, and inquiring, on extrinsic proof, into the verity of the contents of an Act of Assembly so attested."

In *Allegany County* v. *Warfield,* 100 Md. 516, the testimony of the Governor was admitted to show that his signature

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to the bill there under inquiry was attached under a misapprehension as to the identity of the Act, and was immediately erased. It was said by the Court that this proof was admissible "not only because it was the *best* evidence that could be offered of a want of approval, but also because it was not an offer of parol testimony to alter, change, vary or modify the language of a law." Upon the same principle the Governor has been permitted to testify as to the order in which bills approved the same day had been signed. *Strauss* v. *Heiss,* 48 Md. 292.

While the decisions of this Court recognize its right and duty, in passing upon a question like the present, "to receive evidence such as that furnished by the engrossed bills, with the endorsements thereon, and the journal of proceedings of the two Houses of the Legislature" (*Berry* and *Ridgely cases, supra*), the inadmissibility of parol testimony to impeach a duly authenticated statute has been clearly determined. Even the legislative journals do not of themselves have such a probative quality and are entitled to be considered only in connection with other competent proof. *Fouke* v. *Fleming,* 13 Md. 392; *Berry* v. *Drum Point R. Co., supra; Ridgely* v. *Baltimore City, supra; Baltimore Fidelity Warehouse Co.* v. *Canton Lumber Co.,* 118 Md. 139. We accordingly hold that the testimony proferred in this case was inadmissible and was properly excluded.

The record also contains exceptions relating to the selection of the jury impanelled to try the issues of fact, and to the legal sufficiency of the evidence to show that the condemning agency was unable to agree with the defendants upon a price for the land sought to be acquired, or to prove that the property was needed for the object contemplated. These objections were not pressed in the argument; and in our opinion they are not sustainable.

Judgment affirmed, with costs and cause remanded.

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EDWARD C. CARRINGTON, JR.,

vs.

JOHN W. GRAVES.

Brokers' commissions: sale prevented by the act of the principal. Written instruments: construction of—; for the Court. Prayers: erroneous theory of law according to conceded facts.

If a broker is to be paid by the purchaser, he can not recover unless the sale is consummated on the terms agreed upon, unless it was owing to the purchaser's improper conduct that the sale was not so consummated. p. 572

But if a broker procures an agreement to sell on terms satisfactory to the proposed purchaser, on the latter's promise to pay a commission, and the sale fails of consummation only because of the improper conduct of the purchaser, the payment of the commissions may not be lawfully refused. p. 572

A prospective purchaser agreed with a broker to pay him "upon the consummation of the purchase of said property; that is, the payment of the balance of the purchase money, after the delivery of the deed, the sum of $300, etc."; on the ground that he had been deceived by a misrepresentation as to the location of the property, the purchaser refused to consummate the purchase. In a suit by the broker for the commissions, it was *held*, that if the misrepresentation complained of was as to a material fact, and one which had induced the party to agree to take the property, it would form a valid defense to the declaration; but that if the misrepresentation was not as to a material fact, or if the purchaser's refusal to consummate the purchase was arbitrary and capricious, the purchaser was liable for the commissions. p. 576

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The construction of a written instrument is for the Court. p. 575

Prayers that do not correctly state the law according to the conceded facts are erroneous. p. 575

Decided November 12th, 1913.

Appeal from the Superior Court of Baltimore City (ELLIOTT, J.).

The facts are stated in the opinion of the Court.

The following are the prayers offered by the plaintiff and defendant respectively and the action of the Court thereon:

Plaintiff's First Prayer.—The plaintiff prays the Court to instruct the jury that if they find from the evidence that the defendant agreed with the witness, Spalding, to purchase the farm as set out in the contract offered in evidence in this case, and that the defendant had sixty days within which to consummate the purchase of said property, and that the defendant agreed to pay the plaintiff the sum of three hundred dollars ($300) for his work in purchasing the farm for six thousand dollars ($6,000), if the jury so find, then their verdict must be for the plaintiff. (*Granted.*)

Plaintiff's Second Prayer.—The plaintiff prays the Court to instruct the jury that if they find from the evidence that the plaintiff sold the farm mentioned in the evidence to the defendant for six thousand dollars ($6,000), which sale the owner and witness, Spalding, sanctioned or acquiesced in, and the defendant signed the contract offered in evidence in this case, and agreed to consummate the sale within sixty days, and agreed by letter bearing date the 28th day of October, 1907, and offered in evidence in this case, to pay the plaintiff three hundred dollars ($300) for procuring the sale of said farm to the defendant, then their verdict must be for the plaintiff, unless the jury find that the sale was not consummated because of default on the part of the plaintiff in this case. (*Granted.*)

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Defendant's First Prayer.—The defendant prays the Court to instruct the jury, that under the pleadings and evidence the plaintiff is not entitled to recover and their verdict must be for the defendant. (*Refused.*)

Defendant's Second Prayer.—The defendant prays the Court to instruct the jury that it appears from the evidence that the plaintiff did not get the said Henry F. Spalding to enter into a legally binding contract for the sale of his property to the plaintiff, and that their verdict must be for the defendant. (*Refused.*)

Defendant's Third Prayer.—The defendant prays the Court to instruct the jury that there is no legally sufficient evidence that the balance of purchase money for the property mentioned in the evidence was paid, and that there is no legally sufficient evidence that the deed for the property mentioned in the evidence was delivered, and their verdict must be for the defendant. (*Refused.*)

Defendant's Fourth Prayer.—The defendant prays the Court to instruct the jury, that if they believe from the evidence that a sale of the property was not carried out, because the plaintiff misrepresented to the defendant the location of said property, then the plaintiff is not entitled to recover and their verdict must be for the defendant. (*Granted.*)

Defendant's Fifth Prayer.—The defendant prays the Court to instruct the jury, that if they believe from the evidence that the land of Henry F. Spalding, attempted to be sold by the plaintiff to the defendant, did not bind upon the Patuxent River, and also believe from the evidence that the plaintiff represented to the defendant that said land did bind on such river, and shall also believe from the evidence that no sale of said land was ever carried out because said land did not bind on said river (if they so find) then their verdict must be for the defendant. (*Granted.*)

Defendant's Sixth Prayer.—The defendant prays the Court to instruct the jury, that if they believe from the evidence that the plaintiff attempted to sell to the defendant certain property in St. Mary's county as belonging to Henry

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F. Spalding, and the jury shall also find from the evidence that the said Henry F. Spalding did not own and could not sell to the defendant, the property offered to the defendant by the plaintiff, and shall also find from the evidence that the sale of said property was never carried out, because Henry F. Spalding did not own said property offered to be purchased (if they so find), then their verdict must be for the defendant. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

William Ewin Bonn, for the appellant.

J. Royal Tippett, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellee sued the appellant for "Commission on purchase of timber land in St. Mary's County," to quote from the account filed. An agreement signed by the appellee as agent of Henry F. Spalding, the owner of the property, and by the appellant was offered in evidence and contained the following provisions:

"Baltimore, Md., October 28, 1907.

"Sold to Edward C. Carrington, Jr., the Spalding tract of ground, containing four hundred and eighty-nine (489) acres, more or less, situated in the 6th Election District, St. Mary's County, Maryland, on the East side of Three Notch Road. * * * The title to said property is to be good and merchantable and is in fee simple. The purchaser to have sixty days within which to examine title * * * The purchase price of the above is six thousand dollars ($6,000); one hundred dollars having been paid on account thereof, and the balance is payable in cash within sixty days from date, upon the delivery to the purchaser of a good and sufficient deed for said property."

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Mr. Carrington gave Mr. Graves his check for $100.00 at the time of signing the contract, and the latter forwarded his own check to Mr. Spalding for that amount, advising him that he had sold the property and that the balance of the purchase money was to be paid within sixty days. Mr. Spalding returned the check saying he could not accept it until he knew more about the conditions. On the day the above agreement was signed Mr. Carrington gave Mr. Graves the following letter:

> "Dear Sir:—Having purchased of you the Spalding tract in the 6th Election District of St. Mary's County, Md., inasmuch as I am advised that your authority from Mr. Spalding was to sell the property for an amount sufficient to net him six thousand dollars ($6,000), in order that you be within the strict power of your authority, I hereby agree to pay you upon the consummation of the purchase of said property, that is, the payment of the balance of purchase money and the delivery of the deed, the sum of three hundred dollars as commission. Yours truly (Signed) Edward C. Carrington, Jr."

Mr. Spalding and Mr. Carrington were afterwards brought together by Mr. Graves and they agreed to accept all the conditions of the sale. Mr. Spalding never called for the hundred dollars and the appellee finally credited the appellant with it on his claim—thus reducing it to $200.00 with interest. The sale was not consummated but this suit was brought to recover the balance of the three hundred dollars, alleged by the appellee to be due him. The trial resulted in a verdict in favor of the plaintiff, and from the judgment entered thereon this appeal was taken.

The plaintiff offered two prayers, which were granted, and the defendant offered six—the first, second and third of which were rejected and the fourth, fifth and sixth were granted. In this State there are a number of decisions to the effect that in order to entitle a broker to commissions from a vendor

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he must have completed the sale—that is, he must have found a purchaser in a situation, and ready and willing, to complete the purchase according to the terms agreed upon. The proposed purchaser must actually purchase by complying with the terms agreed on, unless his failure to do so is occasioned by the fault of the vendor. *Riggs* v. *Turnbull,* 105 Md. 135, where JUDGE PEARCE cited a number of the previous cases. If the broker is to be paid by the purchaser, the general rule applicable thereto likewise is that he cannot recover commissions for the sale, if it was not consummated on the terms agreed upon, unless it was owing to the purchaser's improper conduct that it was not so consummated; but if the broker procures an agreement to sell on terms satisfactory to the proposed purchaser, on a promise by the purchaser to pay a commission, and through improper conduct of the purchaser, the sale is not consummated, he will not be permitted to escape payment of the commissions.

A statute has been passed which materially changes the rule in this State as to the right of brokers to commissions when the contract has not been carried into effect, Article 2, section 17 of Code of 1912, but as it was passed after this agreement was made, it need not be further mentioned. But the record shows that the only agreement under which the appellee can recover, if at all, is that contained in the letter of October 28th, 1907, above quoted. It is true that he first testified: "Mr. Carrington asked for the price and asked witness if he could secure the property for him. Witness told him he could, and Mr. Carrington told him that he would pay $300 if he would secure the property for him, or put him in a position where he might have it. * * * Mr. Carrington agreed to pay the $6,000.00. That the agreement of purchase was in writing," and he then identified it and it was offered in evidence. But, as we have seen, when he forwarded his check to Mr. Spalding, advising him that he had sold the property, Mr. Spalding returned it, saying he would not accept it until he knew more about the conditions, and

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appellee further testified: "After witness had made the sale, then he brought Mr. Spalding and Mr. Carrington together, and both parties in his presence, agreed to accept every term and condition as made in that sale. Mr. Carrington agreed to pay witness $300.00, *as per letter dated October 28th,* 1907, which was offered in evidence and is as follows." The letter is then set out in the record, and the witness continued: "Mr. Carrington and Mr. Spalding both agreed in his presence, *after this letter was written,* to accept all the conditions of the sale."

The terms of the payment of the $300.00 as commissions are therefore set out in the letter, and the appellee was as much bound by them as the appellant was. Those terms are: "I hereby agree to pay you upon the consummation of the purchase of said property, that is the payment of the balance of purchase money, and the delivery of the deed, the sum of three hundred dollars as commission," etc. There can therefore be no doubt that the appellee was not entitled, under those terms, to recover the commission before the consummation of the purchase as therein explained, unless the sale was not consummated by reason of the fraud or arbitrary and capricious conduct of the appellant. It is clear that if that be so, the two prayers of the plaintiff as offered (which we will ask the Reporter to publish) should not have been granted. Neither of them mentions the fact that the purchase was not consummated and both of them wholly ignore the terms of the letter, above quoted. There is no qualification in the first prayer to the right of the plaintiff to recover, and the only one in the second is the conclusion which states, "unless the jury find that the sale was not consummated because of default on the part of the plaintiff in this case."

The ground relied on by the appellant was that the plaintiff had represented to him that the land extended to the Patuxent River and by that representation he was induced to purchase. It was not contended that there was any default on the part of *the plaintiff* in the consummation of the sale. We might point out several material objections to both of

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these prayers but it is sufficient to say that under the concessum in the case the letter contained the terms under which the plaintiff would be entitled to the commission and neither of these prayers rely on those terms for the right to recover, but on the contrary base that right on facts wholly different from those stated in the letter.

The Court did, however, in the three granted prayers offered by the defendant instruct the jury as to the effect of the misrepresentation relied on by him. The fourth instructed the jury that if they believe "that a sale of the property was not carried out because the plaintiff misrepresented to the defendant the location of said property, then the plaintiff is not entitled to recover and their verdict must be for the defendant." The fifth is more specific—instructing the jury that if they found that the land did not bind on the Patuxent River, that the plaintiff reported to defendant that it did so bind, and that no sale was carried out because it did not, the plaintiff could not recover, and the sixth was on the theory that plaintiff undertook to sell to defendant property that Spalding did not own, and could not sell.

It is contended by the appellee that the granted prayers of the defendant sufficiently qualify those of the plaintiff to correct the alleged errors in them, if standing alone. It is true that it does not always follow that there must be a reversal of a judgment if a prayer granted at the instance of the plaintiff does not include all the facts necessary to entitle him to recover, for it may be that another granted prayer sufficiently corrects the omission, but it must very clearly appear that the jury could not be misled by such omission. When it is intended to qualify or limit one prayer by another, the correct practice is to refer to the other such terms as the jury will see that it is so intended, for otherwise they may be misled or may overlook the effect of the qualifying one. There are many decisions on the subject in this State, but in the recent one of *Robinson* v. *Silver,* 120 Md. 41, JUDGE STOCKBRIDGE referred to a large number of them and very clearly stated the rule, and we need not refer to others.

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The great difficulty is that the plaintiff's prayers do not correctly announce the law applicable to the facts, as proved by the plaintiff and not denied by the defendant, in reference to the contract for commissions. The theory of the prayers of the plaintiff is that the defendant agreed to pay him the $300.00, as stated in his first prayer "for his work in purchasing the farm for six thousand dollars," or as stated in the second, "for procuring the sale of said farm to the defendant," and he still so contends in this Court. But this is not a case in which there are two theories as to what the contract was, for although the plaintiff first said that, "Mr. Carrington told him that he would pay $300.00, if he would secure the property for him, or put him in a position where he might have it," he subsequently testified what is stated above and distinctly said that when the terms of sale were agreed upon by Mr. Spalding and Mr. Carrington, Mr. Carrington agreed to pay him as per letter dated October 28th 1907. We have seen what the agreement, thus reduced to writing and upon which the appellee acted, was. and it is not what either of the plaintiff's prayers said it was. Inasmuch as it was in writing it was for the Court to construe it, and the construction placed on it by the plaintiff's prayers was an erroneous one. So this case as presented is not, as it would have been if the agreement had properly been set out in the plaintiff's prayers, whether the granted prayers of the defendant can be treated as a limitation or qualification of those of the plaintiff and all considered together without danger of the jury being misled, but whether the prayers correctly state the law as applicable to the conceded facts. As we are of the opinion that they do not, for the reasons stated, we must reverse the judgment.

The defendant's first, second and third prayers were properly rejected. Under the terms of the latter the appellant was only liable upon the consummation of the purchase, which the letter says means payment of the balance of the purchase money and the delivery of the deed, and it being shown that the balance of the purchase money was not paid

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and the deed was not delivered, the commissions cannot be recovered, unless the plaintiff can show that the sale was not consummated owing to the bad faith or fraud, or to the arbitrary and capricious conduct of the appellant. If it be true that the appellee represented to the appellant that the property bounded on the Patuxent River, and that induced the appellant to enter into the agreement and was in his opinion a material fact, then he had the right to refuse to take the property, and the plaintiff was not entitled to recover the commission, but if there was no such representation, or if it was not a material question in inducing the appellant to agree to purchase, and the defendant simply arbitrarily and capriciously or fraudulently refused to consummate the sale, he is liable to the plaintiff, as the latter had the right to assume, when he undertook the work, that the appellant would act in good faith and would consummate the sale unless there be some valid reason for not doing so. We mention the one reason as that was the only substantial one relied on. It was true that something was said about the lines between the property of Mr. Spalding and that of his mother being in dispute, but we do not understand that there is anything in the record to sustain that, as the record apparently referred to a contention between his mother and Mr. Jones, and at any rate there is nothing to show that the appellant objected to taking the property on that ground or that it could not readily have been arranged if he had called it to the attention of the appellee.

Judgment reversed and new trial awarded; the appellee to pay the costs.

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FRANCES F. HALL
vs.
STATE OF MARYLAND.

"Second offense": indictments; what must contain; statutes; construction; valid in part. Liquor Laws: Chapter 179 of Acts of 1908; Goeller v. State, 119 Md. 61, explained.

If a party be indicted on the charge of the commission of a "second offense," and the sentence prescribed is different from or severer than that for a first offense, the indictment must set out the former conviction, and the jury, by their verdict, must find the traverser guilty of such second offense before the penalty therefor can be imposed. p. 580

An indictment must contain an averment of every fact essential to justify the punishment inflicted. p. 580

In general, an averment of a prior conviction can only be sustained by the production of the record, or its duly authenticated copy, and by proof as to the identity of the person on trial with the one described in the former trial. p. 580

A mere averment of a former conviction does not charge an offense. p. 580

An indictment charging the accused with the sale of liquor in violation of section 14 of Chapter 179 of the Acts of 1908 contained, in relation to a former conviction, the allegation that on a day certain at the September Term of a certain Court, "one F. F. H., etc., having a license to sell * * * liquors, under the provisions of Chapter 179 of the Acts of 1908, was indicted * * * in said County for the unlawful sale of * * * on the 28th day of July, 1912, and on the 11th of November, 1912, at a session of said Court, under the said indictment, * * * the said F. F. H. was convicted and judgment entered that the said F. F. H. pay a fine of $200 and costs * * * as by the record * * * will more fully * * * appear"; *held,* that the

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allegations as to the prior offense and conviction were as full as need be. p. 581

A statute may be good in part, while other parts are invalid; and portions of one section may be valid, while others are invalid. p. 582

The scope and report of *Goeller* v. *State,* 119 Md. 61, is merely to declare unconstitutional that portion of section 14 of Chapter 179 of the Acts of 1908, which authorizes the Judge to ascertain from the documents of the Court, in connection with the evidence, whether the party accused of violating the provisions of that statute by the sale of liquor on Sunday, etc., had already been indicted and convicted for other such violations of the Act; and the decision does not affect the constitutionality of the Act as a whole. p. 582

Decided November 12th, 1913.

Appeal from the Circuit Court for Baltimore County (DUNCAN, J.).

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE. BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Edward L. Ward submitted a brief for the appellant.

Edgar Allan Poe, The Attorney-General, submitted a brief for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellant was indicted, tried and convicted in the Circuit Court for Baltimore County for the sale of beer on Sunday, and was sentenced to pay a fine of $200.00 and costs, and her license was suppressed. She demurred to the indictment, and also filed a motion in arrest of judgment. The demurrer and motion in arrest were overruled, and the record before us has been brought here by her appeal from the judgment.

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The Act of 1908, Ch. 179, p. 564, regulates the sale and granting of licenses for the sale of spirituous and fermented liquors in Baltimore County. It is provided by section 14 of that Act: "If any person having a license under the provisions of this Act, shall violate any of the provisions of this Act, upon conviction thereof, except in the cases enumerated in the next preceding and succeeding sections, he shall pay a fine of not less than $100.00, and no more than $200.00, and on conviction the second time, which fact the Court may ascertain from the dockets of the Court in connection with evidence, he shall pay a fine of $200.00, and his license shall be suppressed."

The appellant asks a reversel of the judgment for two reasons: First, because of the insufficiency of the indictment; and, secondly, because section 14 of the Act, under which the fine was imposed and the license suppressed, is unconstitutional and void. The indictment contains one count only, and the offense charged is alleged to be the second committed by the traverser under the statute. The statute imposes a severer punishment, viz., the suppression of the license for a second offense against its provisions, than that imposed for the first offense. The portion of the indictment which set out the former indictment and conviction is as follows:

> "The jurors of the State of Maryland, for the body of Baltimore County, on their oath present that heretofore, to wit, at the September Term of the Circuit Court for Baltimore County, in the year of our Lord one thousand nine hundred and twelve, one Frances F. Hall, late of said County, having then and there a license to sell spirituous and fermented liquors under the provisions of the Act of Assembly of Maryland of 1908, Chapter 179, was indicted by the Grand Inquest of the State of Maryland, in and for Baltimore County, for the unlawful sale of a certain quantity of fermented liquors, to wit, beer, to a certain Ferdinand Groshaus, on the Sabbath Day, commonly called Sunday, to wit, on the twenty-eighth day of July, in the year of our Lord one thousand nine hundred and

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twelve; and that on the eleventh day of November, in the year of our Lord one thousand nine hundred and twelve, at a session of the said Court, the Circuit Court for Baltimore County, upon the indictment aforesaid, the said Frances F. Hall, was convicted, and judgment was entered by the Court that the said Frances F. Hall pay a fine of two hundred dollars and costs; as by the record thereof will more fully and at large appear; which judgment still remains in full force and effect, and not in the least reversed or made void."

It is contended by the appellant that these allegations of the indictment are not sufficiently definite and clear to charge a second offense under the statute. It is well settled that in such cases as this the indictment must set out the former conviction, and the jury by their verdict must find the traverser guilty of such second offense before the penalty provided for the second offense can be imposed. *Maguire* v. *State,* 47 Md. 485; *Goeller* v. *State,* 119 Md. 61. In *Maguire's Case, supra,* it was said: "The law would seem to be well settled that if the party be proceeded against for a second or third offense under the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offense, the fact thus relied on must be averred in the indictment; for the settled rule is that the indictment must contain an averment of every fact essential to justify the punishment inflicted. *Rex* v. *Allen,* Russ & R., 513; *Regina* v. *Page,* 9 C. & P. 756; *Reg.* v. *Willis,* L. R. 1 C. C. 363; *Plumbly* v. *Conn.,* 2 Met. 413; 3 *Whart.. C. L.,* sec. 3417; 1 *Bish. C. L.*, secs. 961, 963. And this averment of a prior conviction can only be sustained by the production of the record; or a duly authenticated copy of it, sustained by proof of the identity of the person on trial with the one described in the former indictment. *Reg.* v. *Clark,* 20 *E. L. & Eq.* 582; 1 *Bish. C. L.,* sec. 963; 3 *Whart. C. L.*, sec. 3417. But such an averment of a prior convicition does not charge an offense. As said by Lord Campbell, in *Reg.* v. *Clark, supra:* "It is only the averment of a fact which may

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affect the punishment. The jury do not find the person guilty of a previous offense; they only find that he was previously convicted of it, as an historical fact."

Tested by this rule, the indictment alleged a prior offense and conviction as fully as need be, and informed the appellant of the accusation against her with sufficient particularity to enable her to prepare for her defense. The contention that section 14 of the Acts of 1908, quoted above, is unconstitutional, is evidently based upon a misapprehension of the scope and effect of the decision in *Goeller* v. *State, supra.* In that case, the traverser was convicted for selling liquor on Sunday in Baltimore County. The indictment did not charge a second offense. There was a general verdict of guilty, and the Court basing its action on that clause of section 14, which declared "and on conviction a second time, *which fact the Court may ascertain from the dockets of the Court, in connection with evidence," imposed a* fine provided for a conviction as for a second offense. Judgment was reversed upon the distinct ground that it was not within the power of the Legislature to authorize the Court to ascertain the fact of the former conviction in the manner prescribed by section 14. JUDGE PEARCE, who delivered the opinion, said: "It may safely be declared, therefore, that if our Declaration of Rights requires *all* former convictions to be alleged in the indictment, there is *no other proper manner,* in which any former conviction can be brought forward in aggravation of the punishment, and JUDGE ALVEY in fact has so declared in *Maguire's Case* in saying that the very course of procedure was not in accord with the established practice in such cases; and it could not be, if, as he had also said, the previous conviction must be alleged in the indictment."

In the case before us, we have the anomaly pointed out by JUDGE ALVEY in *Maguire's Case, supra,* viz., a divided verdict, part rendered by one tribunal and part by another. The jury demanded by the traverser and impanelled to try every issue involved, passed upon a single question only, the fact of the sale charged in the indictment, while the Court passed

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upon another issue, the fact of a conviction of a previous similar offense, an issue vitally involved under the Act in question; so that one fact in issue is found by the verdict of the jury, and another fact in issue is found by the Court in its sentence, not that it is true in the professed form of a verdict, but of the essence of the verdict."

There is, it is true, some broad language used in the concluding portions of the opinion which the appellant has relied on to strike down the whole of section 14, but when that language is read and applied to the precise question before the Court, it is obvious that it never was intended to have the effect contended for. This is manifest from the judgment which remanded the case for the imposition of the penalty provided by the Act for a first offense. "A statute may be good in part, while other parts are invalid. If a portion be unconstitutional, the Court is not authorized, for that reason, to declare the whole void." *State* v. *Davis,* 7 Md. 151. In *Commonwealth* v. *Hitchings,* 5 Gray, 482, where the same rule of construction was adopted, the Court said: "The constitutional and unconstitutional provisions may often be contained in the same sections, and yet be perfectly distinct and separable, so that the first may be sustained, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; *but whether they are essentially and inseparably connected in substance.*" *Hagerstown* v. *Dechert,* 32 Md. 369.

All that was decided in the *Goeller Case,* with respect to the validity of the Act of 1908, Chapter 179, was that the provisions of section 14 which empowered the Court, from an inspection of its dockets in connection with evidence, to declare the traverser guilty of a second offense, was unconstitutional. What has been said disposes of the only two questions presented by the appeal, and finding no error in the rulings of the lower Court, the judgment will be affirmed.

Judgment affirmed, with costs.

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MARY F. TIMANUS
vs.
JOHN C. LEONARD AND CHARLES T. DELANEY.

Trespass: entry of another's land; damages; when nominal only.

Any unauthorized entry upon the lands of another is a trespass, and whether the owner suffers substantial injury or not, he at least sustains a legal injury which entitles him to a verdict for damages, although they may be merely nominal. p. 588

In such a case, in order to entitle the plaintiff to a verdict, it is not necessary that he should give affirmative proof that he had sustained that particular amount of damages. p. 588

To entitle a plaintiff in such a case to more than nominal damages, it must be shown from the evidence that he has sustained special damages in consequence of the wrong complained of, or that the unauthorized entry or trespass was willful, wanton or malicious, or that the trespass was committed with such reckless disregard of the rights of the plaintiff as to entitle him to punitive or exemplary damages. p. 588

Where a contractor employed in changing the grade and in paving a street, by mistake, took some loads of gravel from a vacant lot, in a way which caused it no injury, it was *held,* that owner of the lot was not entitled to any more than nominal damages. p. 590

Decided November 12th, 1913.

Appeal from the Baltimore City Court (HARLAN, C. J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE JJ.

John Watson, Jr., for the appellant.

William P. Lyons, for the appellee.

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PATTISON, J., delivered the opinion of the Court.

In this case the appellant, plaintiff below, brought an action of trespass *quare clausum fregit* against the appellees, defendants below, alleging in her declaration that the defendants broke into and entered upon the lands of the plaintiff situated on the east side of Irving avenue, Baltimore City, and "dug up from said lands and carried away a large amount of earth." To this declaration each of the defendants pleaded that he did not commit the wrong alleged.

At the conclusion of the evidence offered by both the plaintiff and defendants, the jury was instructed by the Court below, at the request of defendants, that there was no evidence in the case which entitled the plaintiff to exemplary damages against either of the defendants, and the Court of its own volition further instructed the jury that "the evidence in this case is not legally sufficient to warrant a verdict against either of the defendants for more than nominal damages."

It is from the ruling of the Court in granting the prayers named, and in refusing the plaintiff's prayer, which we will hereafter refer to more particularly, and in admitting certain testimony excepted to by the plaintiff, that this appeal is taken.

It is disclosed by the record that John C. Leonard, in the year 1909, under a contract with the Mayor and City Council of Baltimore, graded and paved Irving avenue between Frederick road and Massachusetts avenue, and in the grading and paving of said avenue the other defendant, Charles T. Delaney, acted as his foreman.

In grading said avenue there was found in its bed, where a stream had once crossed it, muck and mud which had to be removed and the excavation filled with proper earth before paving the street at that point. The defendant had previously obtained from at least two persons, Helfrich and Hammer, permission to get dirt for such purposes, should it be required in connection with the work upon said street, from lots owned by them in that vicinity, without charge therefor. But it

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appears from the record that a part of the earth required to fill the excavation made by the removal of the muck and mud above mentioned from the bed of the street, was taken, without permission of the plaintiff, from the lot of land on Irving avenue, mentioned in the declaration, * * * owned by her and of which she was in possession, adjoining the lot of Hammer. Her lot was several feet above the grade of the street, and the excavation made in the removal of the earth therefrom extended only to the depth of the grade of the street and started at a point twenty feet or more from the street, the excavation being about where the cellars would be when houses were erected upon said lot.

The evidence of the plaintiff discloses that in the removal of said earth no damage or injury was done to the land, the plaintiff stating in her testimony "that beside the dirt that had been taken there, no other damage had been done on the lot at all." The value of the dirt, if any, was not shown. The only evidence in connection therewith was that of the defendants, which was that the dirt so removed had no value; that others owning lots in that vicinity, similarly located disposed of the earth above the grade level without charge therefor.

The defendant Leonard in the spring of 1909, prior to or about the time of the commencement of the work, underwent a surgical operation which resulted in the impairment not only of his physical, but also his mental powers, and he was thereby largely prevented from giving active supervision to this work and depended largely upon his subordinates. Delaney, as he testifies, was required to look after other work as well as the work upon Irving avenue, and therefore one Fallon was placed in charge of the work upon Irving avenue in the absence of Delaney. At the time the excavation was being made and filled, Leonard was spending much of his time at Atlantic City, only occasionally coming to Baltimore and then remaining only for a short while, and thus he gave but little, if any, attention to the work of grading and paving Irving avenue. Later, in the summer or fall of 1909, he went to a sanatorium.

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Delaney, in his testimony, stated that when he discovered that dirt was being taken from the lot which he afterwards learned was the plaintiff's lot, he asked Fallon, the party in charge of the work in his absence, why he was taking the dirt from that lot, to which Fallon replied that he was told by Leonard to get it from that location, and Delaney assuming that to be true and supposing that Leonard had permission from the owner of the lot to remove such dirt, allowed them to continue removing said dirt from the plaintiff's lot, until about two hundred and eighty cubic yards of dirt had been removed therefrom. After the dirt had been removed he was notified by one Gordon, agent of the plaintiff, that the defendant had taken dirt from the lot of the plaintiff without her permission. This, as he states, was the first information that he had that the lot from which the dirt was taken was the lot of the plaintiff. Upon inquiry he found it to be true and admitted to Gordon that a part of the dirt used in filling the excavation had, in fact, been taken from the plaintiff's lot, but that the most of it had been taken from other sources. He, however, suggested that he would "shape the lot up" if he, Gordon, would like for him to do so, telling him that he would put the dirt back and put the lot in the condition it was before the dirt was taken. Gordon said "he did not think that would do" and suggested that he see the plaintiff. This he did and repeated the offer to her, but she, in turn, sent him back to Gordon. The record does not disclose that anything more was done towards attempting to adjust the alleged claim of the plaintiff.

It also appears from the record that a bill for extra labor and work of men and teams in connection with the aforesaid excavation and the filling of the same, was made out and presented for payment by Delaney, for and on behalf of Lenoard, to the Commissioners for Opening Streets, amounting in all to $536.44. We mention this fact, not that we regard it important in stating the facts from which the rulings of the Court are to be reviewed, but because of the stress laid upon it by the counsel for the plaintiff both in his printed brief

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and in his oral argument in support of the contention made by him. Delaney, as he testifies, understood from his conversation with Mr. Christhilf, chief engineer for the Commissioners for Opening Streets and the person supervising the work for and on behalf of the city, that he was to keep an account of the actual cost of doing this unexpected work, for the payment of which the contract with the city did not, in his opinion, provide. In this account no charge is made for the dirt taken from the lots of the plaintiff and others used in filling such excavation, but only the actual cost of the labor of self, men and teams and the use of certain implements were charged in said bill. The bill, however, as made out was not approved and he was only allowed for the number of cubic yards of earth excavated at the rate allowed him by the provisions of the contract, which was far less than the amount of his bill.

With these facts in evidence, the plaintiff asked that the jury be instructed that should they find that the lot of land mentioned in the declaration was owned by, and was in the possession of the plaintiff, and that Delaney was the foreman of Leonard in charge of the work of grading the avenue therein mentioned, under the aforesaid contract with the city, and as such foreman had control of the operations under said contract, and that he or the men under him, acting under his direction or with his knowledge and consent, and without the permission of the plaintiff, "entered upon the lot of ground aforesaid and dug up and carried away earth from said lot, then said John C. Leonard and said Delaney are liable to the plaintiff for such damages as the jury may believe from the evidence the plaintiff has sustained by reason of the excavation and carrying away of said earth, and such further damages as will, in the judgment of the jury, punish the defendants for their said acts and will tend to deter others from committing similar trespasses."

The Court refused to grant this prayer, and as we have said, granted the prayers of the defendants instructing the jury that there was no evidence which entitled the plaintiff

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to exemplary damages against either of them, and of its own volition instructed the jury that there was no evidence legally sufficient to warrant a verdict against either of the defendants for more than nominal damages.

By the undisputed evidence in this case, the entry of the defendants upon the lands of the plaintiff was unauthorized, and therefore was a trespass, and for such invasion of her rights the plaintiff is entitled to recover some damages of the defendants. It was not necessary, in order to entitle the plaintiff to a verdict, that she should have given affirmative proof that she had sustained any particular amount of damages; for every unauthorized entry upon the lands of another is a trespass, and whether the owner suffers substantial injury or not, he at least sustains a legal injury, which entitles him to a verdict for damages. Such damages may be merely nominal. *Balto. & Ohio R. R. Co.* v. *Boyd,* 67 Md. 40; *Ashby* v. *White,* 2 Lord Raym. 955; *Mellor* v. *Spateman,* 1 Saunders (note 2), p. 346a; *Taylor* v. *Henniker,* 12 Ad. & El. 488; *Dixon* v. *Clow,* 24 Wendell, 188.

To entitle the plaintiff in this case to more than nominal damages, it must be shown from the evidence that she has sustained special damages in consequence of the wrong complained of, or that the unauthorized entry or trespass was wilful, wanton or malicious, or that the trespass was committed with such reckless disregard of the rights of the plaintiff as to entitle her to punitive or exemplary damages.

There is no evidence as we have said, of special damages sustained by the plaintiff as a result of the wrongful entry or trespass of the defendants. In her testimony she stated that she had suffered no injury to the land in consequence of the removal of the earth therefrom, and in our opinion it is not shown by the evidence that the dirt so taken from her lot had any value whatever. But should we be wrong in this conclusion, there is certainly no evidence establishing its value upon which a verdict for special damages could have been rendered; and there is, we think, so far as the record discloses, an absence of any such elements of wanton or

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malicious motives, or such reckless disregard of the rights of the plaintiff in the commission of the trespass as would entitle the plaintiff to claim punitive or exemplary damages, and therefore the Court, in our opinion, committed no error in its instruction to the jury or in its rulings upon the prayers.

Why the defendant directed Fallon to go upon the lands of the plaintiff and remove dirt therefrom, if he did so direct him, is not clearly or satisfactorily shown by the record. Fallon was not upon the witness stand, and although Leonard was present and testified at the trial of the case below, nothing was asked him concerning the alleged direction given to Fallon. He may, or may not, have given direction to Fallon as to the place from which the dirt was to be procured, but if he did, it is at least possible, if not probable, that Fallon misunderstood his direction as to the location of the lot, inasmuch as the Hammer lot, from which he was permitted by its owner to take dirt if needed by him, adjoined the lot of the plaintiff, and that it was from the Hammer lot and not from the lot of the plaintiff that the dirt was to be taken. But whether this be the correct explanation or not, there was no legally sufficient evidence before the jury tending to show that the entry upon the lands of the plaintiff by Leonard was made with the motives or in the manner above stated, entitling the plaintiff to exemplary damages against him. And this is also true of the defendant Delaney. His explanation as to why the dirt was permitted to be removed from the lot of the plaintiff, to say nothing of his conduct thereafter, affirmatively shows that his participation in the wrong complained of was not wilful or malicious, or that the trespass was committed by him with a reckless disregard on his part of the rights of the plaintiff. He, an agent of Leonard, was told by Fallon, likewise an agent of Leonard, that he was directed by Leonard to get the dirt from the lot of land that he subsequently learned was owned by the plaintiff.

The appellant, in her first and second exceptions, has excepted to the admission in evidence of the conversation be-

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tween Fallon and Delaney, in which the former told the latter that he was directed by Leonard to take the dirt from the lot which was subsequently ascertained to be the lot of the plaintiff. The ground of the objection is, that it is hearsay. We have no difficulty in reaching the conclusion that this testimony was entirely proper, if for no other purpose, to show the entire absence of the essential elements in the commission of the trespass by him upon which the plaintiff could claim exemplary damages.

This disposes of all the exceptions, the third exception having been waived by the appellant.

It is urged by the appellant that she is entitled to special damages in this case, even though no evidence of such special damages was offered or submitted to the jury, and in support of this contention cites and relies upon the case of the *Baltimore & Ohio R. R. Co.* v. *Boyd, supra,* in which it says: "It is true, there is no evidence whatever of any special damages sustained, or that the plaintiffs were hindered or obstructed in any proposed use of their lot, by reason of the presence and use of the railroad tracks; but, nevertheless, we are of opinion that the plaintiffs are entitled to a reasonable compensation for the use of their land, and we think this is measured by what would be a fair rental value for the ground, occupied as it has been, for the time covered by the actions, and nothing more."

That case, however, does not sustain the contention of the appellant. There the land was used and occupied for years by the railroad, and the Court decided that the plaintiffs could recover reasonable compensation for the use of their land, but not that the plaintiffs could recover for special damages not proven. In this case there is no claim made, nor can any be made, for compensation for the use and occupation of the land, for it was not used and occupied by the defendants.

We will thus affirm the judgment of the Court below.

Judgment affirmed, with costs to the appellees.

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MARY V. GAULT ET AL.

vs.

HOSPITAL FOR CONSUMPTIVES OF MARYLAND, A BODY CORPORATE.

In general,, the *cestui que trust* has the right in equity to follow and recover, or impress the trust upon the trust fund or property which has been wrongfully diverted, in whatsoever form or hands it may come, so long as it may be distinctly traced and identified, and until it comes into the hands of a *bona fide* purchaser for value without notice, or until the rights of innocent third parties have intervened. p. 594

When trust money becomes so blended with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. p. 594

When trust property can not be traced, the equitable right of the *cestui que trust* to follow it fails. p. 596

Decided November 12th, 1913.

Appeal from Circuit Court No. 2 of Baltimore City (STUMP, J.).

The facts are stated in the opinion of the Court.

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The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Edward M. Hammond and *Edward L. Ward*, for the appellant.

Andrew C. Trippe (with whom was *James McC. Trippe* on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

By the residuary clause of the will of Joseph Ruddach made in 1831, he divided the balance of his estate, not previously disposed of, into four parts, one of which he gave to his son Washington, one to his son Joseph Henry, one to his son Edmond,

> "And the remaining one equal and undivided fourth part thereof unto my wife, Rebecca Ruddach, her heirs, executors, administrators and assigns forever, in trust nevertheless, to pay the net Rents, Interest and Income thereof unto my daughter, Mary Elizabeth Ruddach, for her sole and separate use * * * and from and immediately after the decease of my said daughter, then in trust to and for the only proper use and behalf of such person or persons as would be entitled to the same if the said Mary Elizabeth had survived her husband and died intestate, seized and possessed of the said premises in fee simple, by devise, and in such manner and for such quantity of Estate as such person or persons would in such case be entitled to by law."

The present case involves only the fourth of his estate bequeathed, in trust as above quoted.

It appears from the administration accounts passed in Joseph Ruddach's estate, and from an auditor's account in the Circuit Court distributing the proceeds of sale of cer-

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tain real estate, that the aggregate amount of property passing to Rebecca Ruddach, as trustee, was $5,014.34.

Mary Elizabeth Ruddach, the *cestui que trust* for life named in the will, married William F. Burns, who was for a long time President of the Eutaw Savings Bank, and having survived her husband died December 8th, 1910, leaving a will in which the appellee was named as residuary legatee. The estate of Mary E. Burns having been distributed by her executor to the legatees named in her will, the bill in this case was filed by certain of those who would have been entitled in remainder under the will of Joseph Ruddach, against the residuary legatee to recover the amount of the corpus of the trust estate created as already shown. The proceeding is upon the theory that at some time the trust fund in the hands of Rebecca Ruddach, as trustee, was by her turned over to Mrs. Burns, who thereafter continued the discharge of the duties of the trust, but who did not in her lifetime, or by her will, make any provision for turning over the corpus of the trust estate to the remaindermen.

There is evidence in the record that for a number of years prior to her decease, Mrs. Burns had contributed generously to the support of the plaintiffs, a nephew and certain nieces, the amount reaching at least $2,800.00 per annum, and these allowances were contributed and in some instances increased by her committee after she became of unsound mind. When these gifts were first made by Mrs. Burns is not entirely clear, some certainly as much as thirty years before her death.

By the death of her husband Mrs. Burns became a wealthy woman, possessed of about $400,000 in her own right and with a life interest in some $300,000 more from the estate of her husband and a similar interest in $150,000 from the estate of an only daughter.

While a number of questions were argued in connection with the case, it will be sufficient to consider the one vital question, the tracing of the trust fund. The present suit is not against the trustee under Mr. Ruddach's will, but against

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the residuary legatee of one to whom that trustee is claimed to have turned over the trust estate. In such cases the controlling principle is clear. "It is a well settled rule that a *cestui que trust* has the right in equity to follow and recover, or impress the trust upon the trust fund or property which has been wrongfully diverted, into whatsoever form or hands it may come so long as it may be distinctly traced and identified, until it comes into the hands of a *bona fide* purchaser for value without notice or the rights of innocent third parties have intervened or until the means of ascertaining the property fails but the right to follow trust funds or property ceases when the means of ascertaining and identifying the same fails." 39 *Cyc.* 528, 531; *Englar* v. *Offutt,* 70 Md. 78; *Drovers' Bank* v. *Roller,* 85 Md. 495; *Holmes* v. *Gilman,* 138 N. Y. 369; 20 L. R. A. 566; *Wetherell* v. *O'Brien,* 140 Ill. 146; *Bank* v. *Goetz,* 138 Ill. 127; 32 Am. St. Rep. 119, and elaborate note beginning on page 125.

In the present case can the $5,014.34 constituting the corpus of the trust estate in the hands of Mrs. Ruddach be distinctly traced to the hands of Mrs. Burns? The evidence to show this is first the testimony of Mrs. Finley Burns, a sister-in-law of Mrs. Mary E. Burns. This lady was, at the time she testified, approximately seventy years of age, had lived with Mrs. Mary E. Burns and knew Mrs. Ruddach well. She says: "I only know what they both told me that Mrs. Ruddach had given Mrs. Burns' part to her, and Mrs. Burns was to use it for a certain purpose," that what was so given was the "income." This witness further testified that she heard this talked over often, "a thousand" times, and that the first time was "surely thirty years ago." A little later the same witness testified in substance that Mrs. Mary E. Burns had told her she was holding about $5,000.00 and that it had been given her because she had undertaken the care and support of the plaintiffs. On cross-examination the same witness testified that she did not know who had the money and that the attendant circumstances of these con-

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versations did not make any great impression on her. Another witness, Mrs. Mary F. Lewis, testified that Mrs. Mary E. Burns had told her that she, Mrs. Bruce, had the money, that the amount was about $5,000.00, and that the witness had heard it a great many times, and certainly before 1880. The testimony of these two witnesses is the sole evidence upon which to predicate a transfer of the corpus of the trust fund from the trustee, Mrs. Ruddach, to Mrs. Burns. The defendant produced Mr. Hayden, now the president of the Eutaw Savings Bank who testified that an account was opened in that bank in the name of Mary E. Burns in 1850, that at no time during the running of that account was there any deposit of $5,000.00 or a sum approximating that amount, that from 1860 to 1869 there were no deposits, and the deposit on the last date was of $100.00 and that Mrs. Burns during his acquaintance with her never spoke or indicated that she held any moneys coming from Mrs. Ruddach as trustee.

It further appears in evidence that at the time the application was made to the Circuit Court No. 2 after the adjudication of lunacy of Mrs. Burns for the payment to these plaintiffs of moneys for their support, the estate of Mrs. Burns was alleged to have been derived from the estate of her husband William F. Burns, and nothing was said of any trust fund in which these plaintiffs were interested as remaindermen. The record is barren of any evidence to show in what form Mrs. Ruddach held the trust fund, whether stocks, bonds, mortgages or in cash, and there is no identification whatever of any such property to pass to Mrs. Burns unless in cash. But if it had been held by Mrs. Ruddach as cash, there is no evidence whatever that it passed to Mrs. Burns, beyond a general recollection of two ladies as to conversations which took place many years ago. This falls far short of what has been held a distinct tracing and identification of the fund, or even showing a commingling of trust moneys with the individual moneys of the trustee. In such cases the great weight of authority both in England and this country

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is in favor of the rule as given in *Little* v. *Chadwick,* 151 Mass. 109; 7 L. R. A. 570, that "when trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The Court will go as far as it can in thus tracing and following trust money; but when as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails." This doctrine was reaffirmed in *Lowe* v. *Jones,* 192 Mass. 94; 116 Am. State Rep. 225, in which all the antecedent authorities were carefully reviewed.

It seems to have been the idea of the plaintiffs that the payments made by Mrs. Burns to them were to be regarded in the light of income, and thus bring the case within the rule laid down in *In re Holmes,* 55 N. Y. Supp. 708, that the payment of interest by a trustee shows the fund in his possession, although it or some portion of it was mingled with his individual property. And to support this view Mrs. Finley Burns is careful in testifying, to say that the payments made by Mrs. Mary E. Burns were of income, never of principal. The difficulty with this theory lies in the fact that an income of $2,800.00 or over per annum cannot be produced by an estate of only $5,000.00, and Mrs. Finley Burns only ventures to claim $300.00 per annum as the income, but no attempt is made to distinguish as between income paid to the *cestui que trustent in remainder,* and gifts to them by Mrs. Mary E. Burns. The decree appealed from will accordingly be affirmed.

Decree affirmed, with costs.

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EDITH JOHNS COTTEN, EXECUTRIX OF THE WILL OF JESSE TYSON.

vs.

JULIA McH. TYSON, ET ALS.

Corporations and stockholders: title to property; assets of corporations. Trustees: construction of instrument. Fees: chargeable to the firm.

Where a trustee's administration of the estate, in view of a conflict of interests, can not be safely completed without judicial construction, the costs of the necessary proceedings are properly chargeable to the fund. p. 607

A stockholder, as such, is not the owner of any portion of the property of the corporation, and, apart from his stock, has no interest in the assets capable of being assigned. p. 604

Where a person is the owner of all the capital stock of a corporation, his acts in reference to the property bind the corporation. p. 604

But, in general, a stockholder, while retaining his ownership, can not assign the interest represented by his stock in any particular claims of the corporation's assets. p. 605

Certain *cestui que trusts* charged their trustee with having diverted the funds of a solvent corporation, of which he was the president and in which their estate, as well as said trustee individually, were the principal stockholders, into certain insolvent corporations, in the stock of which latter both were also interested, thereby incurring a large loss to the stockholders of said solvent corporation. In an agreement between the said *cestui*

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que trusts on behalf of their estate and their trustee, the latter agreed to pay the former a large sum of money to compensate them for the losses so incurred by them, and the former agreed to assign to him in consideration thereof "all the interest, estate, title, claim and demand of every description" of their estate "in the capital stock and shares of stock, property and assets of every description" of said insolvent companies; said estate, however, in which said *cestui que trusts* were interested, to retain its stock in the solvent corporation. Shortly afterwards the entire stock of the solvent corporation was sold, but the original holders thereof individually reserved and retained all of their claims (based on the advances so made by the said trustee as its president) against the insolvent corporations. *Held,* that the agreement did not operate as an equitable assignment, on the part of the estate in which said *cestui que trusts* were beneficially interested, to assign said estate's interest in claims originally due by said insolvent companies to said solvent company. pp. 605, 606

Decided November 12th, 1913.

Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

Richard H. Pleasants and *Alfred S. Niles,* for the appellant.

J. Wallace Bryan and *J. Southgate Lemmon* (with whom were *Lemmon* and *Clotworthy* on the brief), for the appellees

URNER, J., delivered the opinion of the Court.

By the will of Isaac Tyson, Jr., who died in 1861, a trust as to one-eighth of his residuary estate was created for the

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benefit of his son, Richard W. Tyson, for life with power of disposition as to the estate in remainder. The execution of the trust was committed by the will to Jesse Tyson and James W. Tyson, two other sons of the testator. In 1873 Richard W. Tyson died leaving a will by which he devised and bequeathed his estate, in connection with that over which he was given the right of appointment by his father's will, to his two brothers just named in trust for the benefit of his wife, Julia McH. Tyson, for life and after her death for his children and descendants. The estate of Isaac Tyson, Jr., included certain mines and mining privileges from which were obtained the ores used in a manufacturing business conducted by the testator and his son Jesse as equal partners under the firm name of Jesse Tyson and Company. There were other assets, real and personal, of large value. The trust estate eventually set apart for Richard W. Tyson under the terms of the will amounted to approximately $109,000. It was not segregated from the general estate of the testator until some years after his death. In the meantime the estate had been kept intact and the mining and manufacturing enterprises to which we have referred were continued, as authorized by the will, for the benefit of the various trusts and intrests created by its terms. The division for which the will provided was made in 1868 after the trustees had organized two corporations, under the respective name of the Baltimore Chrome Works and the Tyson Mining Company, to which the interests of the estate in the industries mentioned were conveyed in exchange for due proportions of their capital stock. The assets allotted at that time to the Richard W. Tyson trust consisted of two warehouses, appraised at $29,000.00; a mortgage of $5,000.00; 375 shares of the Baltimore Chrome Works, transferred at their par value of $37,500.00; and 625 shares of the Tyson Mining Company, having an estimated value of $37,500.00. This distribution did not cover the entire interest of the trust in the residuary estate of the testator, as there were undivided assets to the

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amount of about $126,000.00 which remained in the custody of Jesse and James W. Tyson as general trustees under the will. The estate thus left undisturbed included an investment in the Mineral Hill Mining Company, and it later acquired an interest in the Elizabeth Mining Company. Both of these corporations were financed mainly by the Tyson Mining Company with funds advanced by the Baltimore Chrome Works; and all four companies were under the control and management of the trustees in their individual capacity.

After the death of Richard W. Tyson in 1873 the separated trust estate we have described passed under his will to the same trustees for the objects already indicated. In 1900, Mrs. Julia McH. Tyson, as the life beneficiary, caused an examination to be made of the accounts relating to the administration of the trust and of the undivided estate of Isaac Tyson, Jr., and to the affairs of the corporations in which the estates held investments. The investigation was subsequently, with the concurrence of the trustees, placed in the hands of expert accountants. During the progress of their work James W. Tyson died, and the Safe Deposit and Trust Company succeeded him, as co-trustees of Jesse Tyson under both wills, by appointment of the Court below, whose jurisdiction had been invoked for the trusts in the early period of their existence. As a result of the investigation a claim on behalf of the Richard W. Tyson trust was preferred against Jesse Tyson and the estate of his deceased co-trustee for a proportionate part of the estate of Isaac Tyson, Jr., with which they appeared to be still chargeable, and for losses alleged to have occurred through mismanagement of the trust properties and interests. After some negotiations between Jesse Tyson and those entitled under the will of Richard W. Tyson they entered into an agreement in writing dated June 2nd, 1902, described in its caption as a "Memorandum of terms of settlement of all claims of the widow and children and grandchildren of Richard W. Tyson, and of the trustees under his will, against Jesse and James W. Tyson, as executors and

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trustees under the will of Isaac Tyson, Jr., and under the will of Richard W. Tyson, and individually, and in every other capacity, and of all claims of Jesse Tyson and the executors of James W. Tyson against them, and against the estate of Richard W. Tyson."

The agreement provided for a settlement to be made by Jesse Tyson to the amount of $90,625.00, upon which interest should begin to run as of June 1st, 1902, and as to $18,000.00 of which it was contemplated that he should receive contribution from the estate of James W. Tyson, deceased. It was agreed also that "The estate of Richard W. Tyson shall transfer, assign and convey to Jesse Tyson, to be received by him as his own property, all the interest, estate, title, claim and demand of every description of said estate of Richard W. Tyson in the capital stock and shares of stock, property and assets of every description of the Tyson Mining Company, the Mineral Hill Mining Company and of the Elizabeth Mining Company, and in the Elizabeth Mines, appurtenances and ores, and in all mines and mining rights belonging to the estate of Isaac Tyson, Jr., or to his executor or trustee, and in all the undistributed estate of Isaac Tyson, Jr., (excepting Rosemont Farm), and in all undivided cash claimed to belong to the trust estate of Richard W. Tyson or to the estate of Richard W. Tyson." It was stated in the agreement that upon its performance the trust estate of Richard W. Tyson would consist of the obligations of Jesse Tyson given under the terms of the settlement, certain real estate investments, and "the 375 shares of stock of the Baltimore Chrome Works, now held by the trustees of said trust estate."

Subsequently to the date of the agreement, but before the settlement for which it provided was consummated, the trustee under the will of Richard W. Tyson, after obtaining authority from the Court for the purpose, joined with the other stockholders of the Baltimore Chrome Works in the sale of the entire capital stock of the corporation. There were expressly reserved from the sale certain assets of the Chrome

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Works, including its accounts and claims against the Tyson Mining Company and the Elizabeth Mining Company. These assets were to be transferred to a trustee selected by the vendor stockholders. The transaction was duly reported to the Court and was later ratified by the same order which approved of the agreement of June 2nd, 1902, for the settlement of the claims of the Richard W. Tyson estate against the original trustees. The assets reserved from the sale of the stock of the Baltimore Chrome Works were assigned by that corporation and its stockholders to the Safe Deposit and Trust Company for conversion into cash and distribution to the vendors of the stock according to their respective interests. The stock held by the Richard W. Tyson trust amounted to one-eighth of the whole issue which passed under the sale. In the assignment of the reserved assets it was accordingly provided that one-eighth of their proceeds should be paid to Jesse Tyson and the Safe Deposit and Trust Company, trustees under the will of Richard W. Tyson. This stipulation was followed by the statement that the distribution should be "subject to the legal operation and effect of an agreement dated June 2nd, 1902, between Jesse Tyson and the beneficiaries under the will of Richard W. Tyson and others, the said Safe Deposit and Trust Company and the devisees of Richard W. Tyson insisting, however, that such agreement does not in any aspect or to any extent whatever affect their right to one entire eighth part of the property hereby covered without deduction or abatement."

In 1909 the Safe Deposit and Trust Company, by virtue of the assignment just mentioned, received dividends aggregating $105,329.94 on the claims of the Baltimore Chrome Works against the Tyson Mining Company and the Elizabeth Mining Company. The share of this fund to which the Richard W. Tyson trust was entitled, after the payment of commissions and other expenses, was $12,956.43, which has been increased by the addition of interest to $13,758.68. During the year in which these dividends were received, the

trust under the will of Richard W. Tyson was terminated by the death of Mrs. Julia McH. Tyson, the beneficiary for life, and shortly afterwards the Safe Deposit and Trust Co., as the sole remaining trustee, filed a petition in the Court below seeking direction as to the final distribution of the estate. The petition referred specifically to the amount realized for the estate from the reserved assets of the Baltimore Chrome Works, which were stated to be subject to the right, if any, which the executrix of the will of Jesse Tyson, then deceased, might have to the proceeds under the terms of the settlement of June 2nd, 1902. The executrix was made a party defendant and answered the petition, contending that the interest reserved to the Richard W. Tyson estate, as a stockholder of the Chrome Works, in the assets excepted at the time of the sale of the stock, was transferred to Jesse Tyson by the assignment for which the agreement provided, covering "all the interest, estate, right, title, claim and demand of every description" held by the assignor estate "in the capital stock and shares of stock, property and assets of every description" of the Tyson Mining Company and the Elizabeth Mining Company. This contention was answered and opposed by the Safe Deposit and Trust Company as trustee under the will of Richard W. Tyson. The auditor to whom the case was referred, upon a careful consideration of the oral and documentary evidence offered, reported adversely to the claim of the executrix, and awarded to the trustee the balance of the fund remaining for distribution after allowance had been made for the costs of the proceeding. Exceptions to the report were filed by the executrix, but as they applied only to the disposition of the residue of the fund, the audit was in other respects formally ratified. Upon final hearing the Court below overruled the exceptions, confirmed the distribution as reported and charged upon the executrix the costs of the litigation. From this order the exceptant has appealed.

It is apparent from the record that the title to the fund in controversy must depend upon the construction of the agree-

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ment of June 2nd, 1902, in the light of the conditions then existing. The settlement as eventually and actually made was by express reference based upon the terms of the original agreement. When it was executed and delivered the sale of the stock of the Baltimore Chrome Works was not contemplated, and there was accordingly no provision for the reservation of the assets from which the money now in question has been derived. In order, therefore, to sustain the contention of the appellant, we should have to hold that the assignment of all the right, title and interest held by the Richard W. Tyson trust in the capital stock and assets of the Tyson Mining Company and the Elizabeth Mining Company effected the transfer of the interest of the estate as a stockholder of the Baltimore Chrome Works in the claims of that corporation against the mining companies. This view would necessarily disregard the accepted theory of a stockholder's status with respect to the corporate property, and it is opposed to the evident intent of the parties as expressed in the agreement.

The principle is elementary that a stockholder as such is not an owner of any portion of the property of the corporation, and apart from his stock has no interest in its assets which is capable of being assigned. *De la Vergne Refrigerating Machine Co.* v. *German Savings Inst.,* 175 U. S. 40; *Humphreys* v. *McKissock,* 140 U. S. 304; *Wheelock* v. *Moulton,* 15 Vt. 519; *Spurlock* v. *Missouri Pac. Ry. Co.,* 90 Mo. 199; *Williamson* v. *Smoot,* 7 Martin (La.), 31; *Mickles* v. *Rochester City Bank,* 11 Paige, 118; *Burrall* v. *Bushwick R. Co.,* 75 N. Y. 211; *Sellers* v. *Greer,* 172 Ill. 549; *Home Fire Ins. Co.* v. *Barber,* 67 Neb. 644; 10 *Cyc.* 373-4; *Thompson on Corporations,* 2nd Ed., Vol. 4, sec. 3465.

Where one person is the owner of all the capital stock of a corporation, it has been held bound by his acts in reference to its property. *Pott* v. *Schmucker,* 84 Md. 552; *Swift* v. *Smith,* 65 Md. 428; *Hoffman Steam Coal Co.* v. *Cumberland Coal and Iron Co.,* 16 Md. 456. But it is entirely clear upon

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reason and authority that a stockholder of a corporation, while retaining his stock ownership, cannot assign the interest represented by his stock in any particular class of the corporate assets. Such an attempted alienation would not only be incompatible with the retention of title to the stock in the assignor, but its enforcement would be altogether impracticable. The stockholder himself could not require the corporation to segregate and distribute a specific portion of its property, and certainly he could not create and confer such a right by assignment.

The agreement to be construed in this case, however, does not even purport to provide for the transfer of an interest in the corporate assets of the Baltimore Chrome Works from which the funds in controversy have been realized. It refers only to the assignment of the interest of the estate in the stock, property and assets of *other companies,* in which the former corporation was concerned simply as an unsecured creditor. The description of the subject-matter of the transfer, therefore, could not be held to embrace such a right as the one here asserted. Even if a stockholder could effectively assign an interest in the *choses in action* of his corporation, such a result could obviously not be accomplished by a mere assignment of his interest in the assets of its debtors.

There is a stipulation in the memorandum of settlement to the effect that Jesse Tyson, the retiring trustee, to whom the assignment was to be made, should not sell his individual stock in the Baltimore Chrome Works without giving an opportunity to the life beneficiary of the Richard W. Tyson trust to sell its stock in that corporation at the same rate. It thus appears affirmatively that according to the understanding of the parties, the interest of the trust as a stockholder of the Balto. Chrome Works should not be affected in any way by the settlement. If the assignment had been intended to have the effect of separating and transferring from the stock of the trust the interest it represented in the large proportion of the assets of the Chrome Works included in its claims

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against the mining companies, it would have been absolutely inconsistent and futile to provide for a future sale of this stock upon an equal basis of value with other holdings to which the agreement did not apply.

It is to be further observed that the conditions which brought about the segregation of the assets from which the funds for distribution have been derived did not come into existence until after the agreement of settlement had been executed and delivered. At the time of the agreement the sale of the capital stock of the Chrome Works, with a reservation of the assets in question, had not been proposed or anticipated. If this sale had not been made, or if it had not excepted the designated assets, the issue now before us could not have been presented. It is evident, therefore, that the appellant's claim was made possible only by a contingency which has occurred subsequently to the agreement now invoked and for which it made no provision.

The considerations to which we have thus referred are in our judgment conclusive of the question to be decided, and we can have no hesitation in concurring with the Court below in the view that the assignment made in pursuance of the agreement of settlement did not vest in the assignee any right or interest upon which the claim of the appellant can be sustained.

The appeal also presents for review the direction contained in the order below as to the payment of the costs. It is urged on behalf of the appellant that she ought not to be subjected to this burden, for the reason that the issue involved in the case was raised by petition of the Safe Deposit and Trust Company as trustee, filed for the purpose of having the agreement in question construed and the rights of the respective claimants of the fund determined, and also because the auditor's report, in so far as it charged the costs of the proceeding to the trust estate, was finally ratified without objection by any of the parties interested. It appears from the record that the order ratifying the audit, except as to the

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award of the balance for distribution, was passed in June, 1912, and that it authorized the trustee to make the payments of costs as allowed out of the fund reported. The order overruling the exceptions and requiring the appellant to pay the costs was passed in the following January, long after the first order disposing of the costs had become enrolled. It has been noted that when the reserved assets of the Baltimore Chrome Works, after the sale of its capital stock, were transferred to the Safe Deposit and Trust Company, the assignment recognized the existence of a difference of opinion between Jesse Tyson and the beneficiaries of the trust from which he was retiring as to whether he was entitled to the interest of the trust in the proceeds of the assets by virtue of the agreement of settlement. The issue we have had to determine in this case was thus presented upon the face of the instrument under which the Safe Deposit and Trust Company received the reserved assets and reduced them to cash for distribution, and the proceeding to have the question adjudicated was not instituted by the appellant, but by the Trust Company, whose administration of the estate, in view of this conflict of interests, could not be safely completed without a judicial construction of the agreement to which the controversy refers. In view of all these circumstances, we think the costs are properly chargeable against the fund as provided in the audit.

The order under review will accordingly be affirmed as to its ruling upon the exceptions, but it will be reversed as to its disposition of the costs.

Order affirmed in part and reversed in part and cause remanded, the costs above and below to be paid out of the fund.

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WILLIAM J. CHAPMAN AND G. WALTER CHAPMAN

vs.

CHARLES CARROLL NASH, INFANT, BY HIS FATHER AND NEXT FRIEND, CHARLES M. NASH.

Prayers: "no evidence"; duty of the Court; malicious prosecution; want of probable cause. Malice.

Where, at the end of all the evidence, both of the plaintiff and the defendant, the defendant prays for an instruction directing a verdict in his favor, on the ground that the plaintiff has offered no evidence legally sufficient to establish his case, on appeal, the Court must consider the whole evidence and not that of the plaintiff alone. p. 610

Such a prayer amounts to a demurrer to the whole evidence, and the Court, in dealing with it, must assume the truth of the facts adduced in support of the plaintiff's case. p. 610

In such a case, the Court may consider other facts appearing in the record that have been proved, and not denied by the plaintiff. p. 610

In order to enable a plaintiff to recover in a suit for malicious prosecution, in addition to the fact that he was prosecuted and acquitted, he must show that he was prosecuted at the instance of the defendant, and that such prosecution was both malicious and without probable cause on his part. p. 611

The want of probable cause in such a case is a mixed question of law and fact. p. 611

In such a case probable cause is such a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the party accused to be guilty. It is wholly immaterial whether the party was guilty or not, if the facts known to the defendant, and only

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known to him, were such as would warrant a cautious man in believing the party to be guilty. p. 612

While malice may be inferred from the want of probable cause, a want of probable cause may not be inferred from even the most express malice. p. 616

In an action for malicious prosecution, where the defendant in such action had caused the plaintiff to be arrested on the charge of conspiracy to defraud (by means of false certificates of weight as to several loads of hay), it was *held*, that the plaintiff had failed to establish want of probable cause and that he was not entitled to recover. p. 617

Decided November 12th, 1913.

Appeal from the Baltimore City Court (HARLAN, C. J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

Wm. H. DeCourcy Wright, for the appellant.

John S. Young and *Eldridge Hood Young* (with whom was *Louis Hollander* on the brief), for the appellee.

BURKE, J., delivered the opinion of the Court.

This is the defendants' appeal from a judgment recovered by the appellee against them in a suit for malicious prosecution. The suit was brought against the W. J. Chapman Coal Company, a corporation, Horace Isaac, and the appellants. At the conclusion of the appellee's testimony the Court in-

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structed the jury to find their verdict in favor of Isaac and the Coal Company, and thereupon the plaintiff submitted to a *non-pros* as to those defendants and the case proceeded against the appellants.

William J. Chapman is the president of the coal company, and G. Walter Jackson is the secretary. At the conclusion of the whole case the appellants asked the Court to direct a verdict in their favor upon the ground that the plaintiff had offered no legally sufficient evidence of a want of probable cause for the prosecution. The Court rejected this prayer. The first and most important question in the case is the propriety of the ruling upon that prayer. When such a prayer is offered at the end of all the evidence, both for the plaintiff and the defendants, "the Court must consider the whole evidence and not that of the plaintiff alone, for that offered by the defendant may supply any defect in the proof of the plaintiff. *The Consolidated Railway Co.* v. *Pierce,* 89 Md. 495. The prayer is a demurrer to the whole evidence. The Court in dealing with it will assume the truth of the facts adduced in support of the plaintiff's case, and it will consider such other facts appearing in the record which have been proved and not contradicted or denied by the plaintiff. The Court upon such a prayer must not assume to decide controverted questions of fact, but will leave all such facts to the determination of the jury. The rule by which the Court will be guided in considering such a prayer, offered after all the evidence is in, is thus stated by JUDGE ALVEY in the case of *Bacon* v. *Baltimore & Potomac R. R. Co.,* 58 Md. 482:

"For while it is perfectly true that where the plaintiff adduces evidence which, if uncontradicted, will justify and sustain a verdict, no amount of contradictory evidence, however strong, will justify the Court in withdrawing the case from the jury; yet, if it be proved as part of the plaintiff's case, or if it be otherwise proved, or not controverted or denied by the plaintiff, that the party injured or killed was clearly guilty of negligence in the occurrence of the accident,

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and that such accident would not have occurred but for the negligence of the party injured, directly contributing thereto—in such case, the defendant is entitled to have the jury instructed that their verdict must be for the defendant. The facts are taken as established, and the question then becomes one of law for the Court, to be passed upon and decided as upon a demurrer to the evidence. There is no office to be performed by the jury unless there is a contest in regard to the material facts involved in the issue or question to be decided, and if the facts, sufficient in themselves to establish clearly the contributory negligence on the part of the party injured, be either admitted or shown in proof by the plaintiff while attempting to prove negligence on the part of the defendant, the Court is well justified in acting upon such proof as true and in directing the jury accordingly." This rule was applied in *Thelin* v. *Dorsey,* 59 Md. 539, and *Hooper* v. *Vernon,* 74 Md. 136, both cases of malicious prosecution. In *Thelin's case,* the Court said: "The law controlling a case of this kind is so fully and clearly expounded by this Court in *Boyd* v. *Cross,* 35 Md. 197; *Cooper* v. *Utterbach,* 37 Md. 318; *Stansbury* v. *Fogle,* 37 Md. 381; *Cecil* v. *Clarke,* 17 Md. 508; and *Medcalfe* v. *Ins. Co.,* 45 Md. 205, that we have only need in this case to reaffirm the principles therein announced. In substance those cases determine, that in order to enable the plaintiff to recover in a suit for malicious prosecution, he will be required, in addition to the fact that he was prosecuted and acquitted, to show that he was prosecuted at the instance of the defendants," and that such prosecution was both malicious and without probable cause on the part of the defendants." In is also fully settled in those cases, that "the want of probable cause is a mixed question of law and fact." "As to the existence of the facts relied on to constitute the want of probable cause—that is a question for the jury; but *what will amount to the want of probable cause in any case is a question of law for the Court.*" "If the evidence adduced be legally insufficient to be submitted to the jury to prove each of the elements of the plaintiff's case," his action will

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"be pronounced groundless and the defendant not be called on for his defense." *Boyd* v. *Cross*, 35 Md. 196. All the cases referred to adopt the definition of JUDGE WASHINGTON in *Munns* v. *Dupont*, 3 Wash. C. C. 31, of probable cause. It is:

"Such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing the party accused to be guilty. It is wholly immaterial whether the party was guilty or not, if the facts known to the defendant, and only known to him, were such as would warrant 'a cautious man' in believing the party was guilty."

In the light of these principles, we will examine the material and uncontradicted facts appearing in the record, and in dealing with them we must, as stated in the case of *Hooper* v. *Vernon, supra*, consider them in the light in which they appeared to the defendants when they instituted the prosecution.

There was no evidence offered by the defendants which would aid the plaintiff upon the question of the want of probable cause, and that question must be determined upon the undisputed facts in evidence.

The plaintiff is a son of Charles M. Nash, who lived in Baltimore County, about twenty-five miles from the city, and who was engaged in the business of buying hay in the county and hauling it to Baltimore City and selling it to various purchasers. Among his purchasers was the Chapman Coal Company, to which he had sold hay for about two years prior to August 10, 1911, on which date the occurrences took place which led to the prosecution of the plaintiff and his father upon the criminal charge hereinafter mentioned. The plaintiff was then about nineteen years old and had been driving the hay wagon for about two years, and during those years no one else to his knowledge had hauled hay to the Coal Company for his father. The father owned two wagons which he used in hauling hay to the city; one of

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these wagons was heavier than the other. The hay carriages of the two wagons were different in color—that of the heavy wagon was blue and that of the lighter one was red. Both wagons had been weighed at the Fremont Street hay scales, and their weight had been registered there. When the plaintiff brought in a load of hay to be delivered to the defendants the method of ascertaining the amount of hay to be paid for and the manner of collecting was this: The wagon and hay were weighed together, and the plaintiff would tell the weighmaster which wagon he was using. He would say the lighter or the heavier one as the case might be. The weighmaster would accept his statement and deduct the registered weight of the wagon which the plaintiff informed him he was using from the gross weight, and the difference would be the net weight to be paid for by the purchaser. The weighmaster would give the plaintiff a ticket which showed the net weight made up in this way. The ticket and hay were then taken to the South Baltimore yard of the Coal Company, where the hay was unloaded and the ticket O. K'd. by the superintendent of the Coal Company and taken by the plaintiff for payment of the office of the company at Sharp and Lombard Streets. The money was collected not by the plaintiff, but by Charles M. Nash, his father, whose custom was to go to the office after the ticket had been left there and collect the money. The lighter wagon as shown by the weight at the hay scales weighed 3,000 pounds and the heavy one 3,800 pounds. Within one year prior to August 10, 1911, the plaintiff had delivered thirteen loads of hay to the Coal Company and had presented tickets therefor which showed the wagon to weigh 3,000 pounds. These tickets were accepted as correct by the Coal Company, and the amounts shown to be due were paid without question to Charles M. Nash. On August 5, 1911, the Coal Company wrote to Charles M. Nash saying that he might send in a load of prime timothy hay the following week, and advised him that the hay must be weighed and the certificate presented

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from the State scales in the city. The prior thirteen deliveries had been certified to by others than the State inspectors. The plaintiff left home with a load of hay on the ninth of August and drove as far as Pikesville, where he spent the night, and on the morning of the tenth he proceeded to the Northwestern Hay Scales where the hay was weighed. He told the weighmaster that he was driving the lighter wagon, and was given a ticket which showed that 3,000 pounds were deducted from the gross weight. He then took the hay to the yard of the Coal Company, delivered the ticket, and unloaded the wagon. Mr. W. J. Chapman, one of the defendants, was present while the plaintiff was in the act of unloading. After Mr. Chapman had observed the wagon, he concluded that its weight was in excess of that stated in the certificate, and he asked the plaintiff to re-weigh the wagon, which the plaintiff promised to do. The plaintiff at that time knew that he had made a misstatement to the weighmaster as to the wagon, and that the weight shown upon the ticket was not correct, and that there was a shortage of 950 Mr. Chapman had at that time: "Q. You knew right then and there that it was the wrong weights, didn't you? A. Yes. Q. Did you tell him so? A. No, sir. Q. Then you knew when you left him that you had the wagon with the wrong weight? A. Yes. Q. And you never told him? A. No, sir. Q. Although he asked you what weight it was? A. The ticket showed that. Q. The ticket showed that, and he had brought it to your particular notice by asking you to go to the scales and have the wagon weighed? A. Yes. Q. You went right on up home? A. Yes; to tell my father and let him come down and attend to it." William J. Chapman testified that he asked the plaintiff if the weight shown on the ticket was correct, and that he said it was, and this testimony is not denied. Charles M. Nash testified that he knew the wagon used to haul this particular hay weighed 3,950 pounds, and that he told his son on August 9th to use the heavy wagon. Mr. Isaac, one of the members of the Coal Company, went to the

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Northwestern Hay Scales to see the wagon weighed, but the plaintiff did not go to the scales, but continued on his way home without re-weighing the wagon. He was overtaken near Arlington by two members of the Coal Company and the wagon was weighed at that place, and it was found to weigh 3,800 pounds. It was then taken to the Northwestern Hay Scales where it was found to weigh 3,950 pounds, and where the ticket was corrected by the State inspector. Although the plaintiff, according to his own testimony, well knew at the time he delivered the hay that the weight of the wagon had been misstated, he made no mention of that fact then or when he was overtaken on the road. On the morning of August 11th, Charles M. Nash called at the office of the Coal Company and inquired what the trouble about the load of hay was, although it must be inferred that he well knew and was informed that it was short in weight, and asked for settlement on the corrected bill. William J. Chapman declined to settle, but told him to call in a few days, which he did. He testified that Mr. Chapman told him at that interview that he would not settle, but said, "If you will drop this load of hay, we will drop our side." He asked Mr. Isaac, the treasurer of the Coal Company, to pay for the amount of hay shown by the corrected bill, and said his son did not know the weight of the wagon, and that he should have told him. Charles M. Nash placed his account in the hands of an attorney for collection, and after some communication with William J. Chapman a suit was brought before a justice of the peace. Prior to the institution of the suit the Coal Company made a demand upon Charles M. Nash for alleged shortages amounting to $239.16 in hay delivered from August, 1909, to August 10, 1911, inclusive. On the day of the trial before the justice, December 13, 1911, G. Walter Chapman appeared before James W. Lewis, a police justice of Baltimore City, and swore out a warrant against the plaintiff and his father, charging them with a conspiracy to defraud the Chapman Coal Company of Baltimore, a corpo-

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ration, for $11.87, current money, by means of false certificate of weight of the load of hay delivered to it on August 10, 1911. They were arrested and indicted by the Grand Jury in the Criminal Court of Baltimore upon this charge, and after a trial in that Court were acquited. The explanation offered by the plaintiff at the trial of his statement to the weighmaster that he was using the lighter wagon was that he had made a mistake. There was testimony offered tending to show that the defendants were actuated by malice in the institution of the prosecution, but such evidence can not be considered in determining the question of probable cause.

While malice may be inferred from the want of probable cause, a want of probable cause can not be adduced from the most express malice. "In the trial of actions of this nature," said JUDGE WASHINGTON, in *Munns* v. *Dupont, supra*, "it is of infinite consequence to mark with precision the line which the law will justify the defendant in going and will punish him if he goes beyond it. On the one hand, public justice and public security require that offenders against the law should be brought to trial and to punishment if their guilt be established. Courts and juries, and the law officers whose duty it is to conduct the prosecution of public offenders, must, in most instances, if not in all, proceed upon the information of individuals, and if these actions are too much encouraged, if the informer acts upon his own responsibility and is bound to make good his charge at all events, under the penalty of responding in damages to the accused, few will be found able and willing at so great a risk to endeavor to promote the public good. The informer can seldom have a full view of the whole ground and must expect to be frequently disappointed by evidence which the accused only can furnish. Even if he be possessed of the whole evidence he may err in judgment and in many instances the jury may acquit where to his mind the proofs of guilt were complete."

The question we are to determine is this: Were the facts we have stated such as justified the defendants as reasonable.

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cautious men in believing the plaintiff and his father had entered into a conspiracy to defraud them? That such a fraud by the methods adopted in weighing the wagon might have been perpetrated with the greatest facility is evident. The wagon which weighed 3,950 pounds was represented as weighing 3,000 pounds, and the tickets for the thirteen prior loads delivered gave the weight of the wagon as 3,000 pounds. The son delivered the tickets and the father collected the money. The plaintiff testified that he gave the weight as 3,000 pounds by mistake. It is possible that this statement is true, but it is almost inconceivable that he did not know it was the heavier wagon, and his misstatements to Mr. Chapman, and his suppression of the truth at the time when it was his duty to have spoken truthfully, were most unfortunate for him. The facts and circumstances which are undisputed, and which were within the knowledge of the defendants at the time the warrant was sworn out, were well calculated to create in their minds the strongest suspicion, and in our opinion would have warranted a prudent and cautious man in believing, that a skilfully devised plan had been adopted by the defendants to defraud and cheat. We do not mean to say that any such plan or scheme did in fact exist. The plaintiff has been acquitted of the charge preferred against him. It is to be hoped that he was entirely free from any intent to do wrong, but the uncontradicted facts and circumstances which we have carefully weighed and considered have led us to the conclusion that under the legal principles governing this class of actions the plaintiff failed to show by any evidence legally sufficient for that purpose that the prosecution was instituted without probable cause. It follows that the defendants' prayer which asked for the withdrawal of the case from the jury should have been granted. This conclusion dispenses with the consideration of the other questions raised by the record.

Judgment reversed, without a new trial, with costs to the appellants.

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WILLIAM H. DOLBY
vs.
CHARLES LARAMORE AND SUSIE M. LARAMORE.

Contracts: canners and growers; breach; refusal of defendant to accept goods; duty of plaintiff to minimize damages. Experts: capacity. Witnesses: estimates of—. Prayers: segregating facts; withdrawing facts from jury. Evidence: improperly excluded, when no ground for reversal. Suits on contracts: specially declared on; and bill of particulars.

Where a person wrongfully discharged brings suit against the employer for his loss of wages, etc., he is required to show that he used all reasonable exertion to minimize the loss resulting from the breach of the contract. p. 624

A tomato grower had a contract with a canner for taking his crop at a certain price; at a time when the canner was receiving more tomatoes than he could handle he refused to receive those of the grower; in an action by the grower against the canner, it was *held*, that the plaintiff and the jury would have been amply justified in inferring that such refusal was temporary only, one which might be terminated at any time, and there was no obligation upon the plaintiff to show that he had sought any other purchaser for the tomatoes so rejected. p. 624

In an action by a tomato grower against a canner with whom he had a contract for the purchase of his crop, the defendant, by a certain prayer, sought relief from liability as to all the tomatoes not accepted and receipted for, on the ground of the alleged unmerchantable character of some of the tomatoes tendered or delivered, constituting, as he claimed, a violation of the contract on the part of the plaintiff; at the time of such rejection the defendant did not annul the contract on this ground, but, on the contrary, according to his own evidence,

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invited the plaintiff to send other tomatoes of a different quality, etc.; it was *held,* that such a prayer was improper. p. 625

The fact that there was a contract between the plaintiff and defendant for the sale and purchase of the plaintiff's crop, does not negative or modify the cause of action set out in a suit for goods bargained and sold; it only affects the price, terms and conditions of the sale. p. 624

In a suit upon a contract, specially declared on, as such, and where such contract forms the basis of the claim, the price named in the contract, and not the actual value of the articles sold, must be the measure of recovery, limited to the extent, that if, in such a case, the plaintiff files a bill of particulars, he cannot recover in excess of what he sets out in the bill. p. 623

In an action for damages for the breach of a contract between a tomato grower and a canner, one shown to have been both a tomato grower and a canner is properly qualified to express an opinion as to the merchantable character of the tomatoes in question, which he had seen. p. 622

A competent witness may give in evidence his estimate of the number of animals, articles or persons, etc., observed by him, provided the inference be founded on adequate data. p. 622

Answers of witnesses that are irresponsive to the questions asked may be properly stricken out, whether the answers were intended to be evasive or not. p. 622

A prayer instructing the jury that the plaintiff is entitled to recover, provided they find certain facts, withdraws from their consideration all facts other than those mentioned; and if from any facts so excluded the jury would have been justified in drawing a conclusion different from that which the prayer requires them to find, the prayer is erroneous. p. 624

The wrongful action of the Court below in overruling an objection to the evidence of a witness, is not ground for a reversal when evidence of the same character had already been admitted without objection. pp. 621-622

Decided November 12th, 1913.

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Appeal from the Circuit Court for Wicomico County (STANFORD, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

James E. Ellegood (with whom were *Henry B. Freeny* and *F. Leonard Wailes* on the brief), for the appellant.

George H. Myers (with whom was *Miles and Myers* on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

Charles Laramore entered into a verbal contract with the appellant in the spring of 1912 to sell to him all the tomatoes which Charles could or would grow on his farm in Somerset County. The crop contracted for was to be used at the appellant's canning factory in Wicomico County. The fruit was to be delivered at the ferry landing on the Somerset side of the Wicomico River, and the price was to be fifteen cents a basket, or such higher price as the market rate might be that season. The season of 1912 was apparently a favorable one for tomatoes in Somerset and Wicomico Counties. The price rose in the packing season from fifteen to sixteen and two-thirds cents a basket. Laramore began his deliveries and obtained from Dolby, the appellant, receipts for 2915 baskets, some of which were delivered at the ferry landing by the driver for the appellee, and some at the canning factory on the other side of the river, apparently because the driver saw other teams, making similar deliveries, carry their loads across to the factory. Then came a disagreement, the appellant claiming that the fruit offered was not in merchantable condition, the appellee that his baskets were not promptly returned, so that he was delayed in picking the crop. Then there took place an interview between the plaintiff (appellee)

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and the defendant (appellant) in which the plaintiff told the defendant that he had hauled 410 baskets to the ferry landing, the place of delivery stipulated in the contract, and asked that the defendant send a scow across to get them, whereupon the defendant said he was not going to receive any more on that, the Somerset side of the river, that the other growers had as lief deliver them on the other side, to which the plaintiff claims to have replied "I'm not," while the defendant insists that no answer at all was made. There is also testimony on the part of the plaintiff that at an interview had about the same time, in response to his request for baskets, that the defendant had said, "yes I know it is bad but you can see how it is around here, you can see for yourself we are rushed here, I will send the scow over in a short while, I will pay you for all that rot in the field; just do the best you can with them." No further tomatoes were in fact delivered to the defendant, and when the season closed the plaintiff presented his demand to the defendant, for 3325 baskets of tomatoes at 16⅔ cents per basket, $554.16, and 1000 baskets rotted in the field at 13⅔ cents, $136.66, or a total of $690.82.

The defendant, admitted his indebtedness for the 2915 baskets, less a set-off of $210.10, and denied any liability for the 410 baskets taken to the ferry landing, which after remaining there for a day or two were "dumped", or for the fruit alleged to have rotted in the field, and in accordance with his admission made a tender of $283.00. The case was tried in Wicomico County and a verdict rendered in favor of the plaintiff for $474.33 and this appeal is from the judgment entered thereon. The record contains four bills of exception, of which three relate to questions of evidence, and the fourth to the instructions given to the jury. These will be considered seriatim. The first was to the action of the Court in permitting Clinton Laramore, a brother of the plaintiff, who had helped pick the tomatoes, give an estimate of the number which had rotted in the field. Even if this ruling of the Court had been erroneous, like estimates were

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given by other witnesses without objection so that no injury was done the defendant, but the ruling was correct. It is said in 17 *Cyc.* 104, that "a witness may estimate the number of animals, articles or persons observed by him, provided his inference is founded on adequate data." Examples of the application of this rule are abundant. In ***Read*** v. *Barker,* 32 N. J. L. 477, evidence was admitted by a miller as to the quantity of grain a mill could grind; in *Thornton* v. *Savage,* 120 Ala. 449, and *Clink* v. *Gunn,* 90 Mich. 135, witnesses were permitted to state their estimates as to the number of logs involved; in *Pope* v. *Ramsey,* 78 Mo. App. 157, the rule was applied with regard to railroad ties, and in *Dennis* v. *Dennis,* 15 Md. 73, a farmer was permitted to give an estimate of the probable annual product of certain land and the expense of cultivation. Such evidence is in the nature of opinion, but in *Eastman* v. *Amoskeag Co.,* 44 N. H. 143 (82 Am. Dec. 201), it was said, "in questions relating to heights and distances and as to the number, quantity and dimension of things a witness may not be able to testify without an implied expression of opinion, but that is no objection to the testimony upon such points and subject."

The second exception was to the witness, Ross, being permitted to testify as to the quality of the rejected tomatoes. The fruit shown to the witness was identified by the plaintiff as a part of that returned by the defendant, and as Ross had been shown to have been both a grower and canner of tomatoes he had been properly qualified to express an opinion as to the merchantable character of the fruit.

The third exception was taken when the defendant was on the stand as a witness. He was asked, "what do you mean by merchantable?" to which he replied, "The Pure Food Law says we shan't put anything but red, ripe tomatoes in cans." Whether the answer was intended to be evasive or not, it was clearly irresponsive to the question asked, and was therefore properly striken out. *Brashears* v. *Orme,* 93 Md. 442; *Skelley* v. *Vail,* 27 Ind. App. 87.

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The remaining exception was reserved to the ruling of the Court on the prayers. The first of those on behalf of the plaintiff dealt with the right of the plaintiff to recover for the tomatoes delivered to and receipted for by the defendant, and the 410 baskets delivered at ferry landing, and subsequently dumped, while the second was limited to the right of the plaintiff to recover for those which had rotted in the field. The first is entirely free from objection and fairly presents the law under the plaintiff's theory of the case. The second prayer is, however, technically defective. It fixes the amount of recovery in the event of the jury finding certain facts, at the "worth" of the tomatoes, that is to say, *a quantum meruit*. The suit was upon a contract, specially declared on as such, and where a contract for the sale of articles forms the basis of a claim, the price named in the contract and not the actual value of the articles sold, must be the measure of recovery, limited only to this extent, that where a plaintiff in such a case has filed a bill of particulars, he cannot recover in excess of what he sets out in his bill. *Dick* v. *Biddle Bros.*, 105 Md. 308. But has the defendant been injured by this error? If not, such error alone will not justify a reversal of the judgment and the remanding of the case. The contract price was 16⅔ cents per basket, but in the bill of particulars filed with the *narr.* instead of charging the defendant with the full contract price as might have been done, the plaintiff has charged for 1000 baskets of tomatoes, rotted in the field, 13⅔ cents. The bill of particulars so made out claimed $690.82. If from this be deducted the full amount of the set off claimed of $210.10 there remains the amount of $480.72, while the verdict of the jury was for $474.33 or less than the amount claimed in the bill of particulars, and no injury to the defendant can be deduced from this state of facts.

The first prayer of the defendant seeks to limit the recovery of the plaintiff to the tomatoes delivered to and receipted for by him, and to relieve him from any liability for the balance because of their unmerchantable character and be-

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cause the plaintiff made no effort to sell and dispose of the tomatoes. This prayer was properly rejected. The rule by which a person, wrongfully discharged, is required to use all reasonable exertion to minimize the loss resulting from the breach of the contract is without application in a case like the present. In those cases the contract is definitely and absolutely terminated, in this the reverse is true, the defendant was rushed with more fruit than he could handle at the time, but the plaintiff and the jury would have been amply justified in inferring this to be a temporary condition merely, one which might be terminated at any time and the plaintiff called upon to resume and continue his deliveries. The defendant's second and third prayers were granted after an amendment by the Court. The effect of the amendment made was to convert into good instructions what would have otherwise been erroneous, upon the principle laid down in *Singer Co.* v. *Lee,* 105 Md. 663, and *Corbett* v. *Wolford,* 84 Md. 426, in which latter case it was said "a prayer instructing the jury that the plaintiff is entitled to recover provided they find certain facts, withdraws from the jury the consideration of all facts other than those mentioned and if from such excluded facts the jury would be justified in drawing a conclusion different from that which the prayer requires them to find, it is error to grant such a prayer."

Nor can any error be found in the rejection of the defendant's fifth and tenth prayers, for the reasons already given when considering the plaintiff's second prayer. The ninth prayer of the defendant was properly modified by the Court. It would have been clearly error to remove from the consideration of the jury the first count of the declaration. The fact that the parties had made a contract for the sale and purchase of the plaintiff's crop of tomatoes, did not negative or modify the cause of action set forth in the first count, for goods bargained and sold, it only affected the price, terms and conditions of the sale. The plaintiff in his evidence failed, so far as the record discloses, to present any evidence

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bearing on the allegation contained in the 7th count that "he was unable to find any other market for his crop," and therefore that count was properly withdrawn from the consideration of the jury.

The 4th, 6th and 7th prayers of the defendant may be considered together. They assumed the truth of the evidence offered on the part of the appellant and excluded from consideration the evidence produced by the plaintiff, and so were obnoxious to the rule as laid down in *Orem Fruit Co.* v. *N. C. Ry.*, 106 Md. 1, while the 6th and 7th prayers were open to the further objection that they asked that the defendant be relieved of a portion of his liability upon the theory of waiver, whereas the contract testified to was entire and not severable.

The 8th prayer of the defendant seeks relief from liability as to all fruit not accepted and receipted for, upon the ground of the alleged unmerchantable character of some of the tomatoes delivered or tendered, and that this constituted a violation of contract on the part of the plaintiff. If the defendant had at the time of such rejection seen fit to annul the contract on this ground, there would have been much force in this contention. But he did not do it or attempt to, on the contrary according to his own version he invited the plaintiff to send other tomatoes of a different quality, and if the plaintiff's account be correct the defendant induced him to hold on by promising to pay for all tomatoes which rotted in the field.

The testimony presented great divergence at many points, but which evidence was to be given credence, was a matter for the jury, and the instructions as granted by the Court appear to have placed the case fully and fairly before them. The judgment appealed from will accordingly be affirmed.

Judgment affirmed, with costs.

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CLEASON R. HESSON

vs.

JAMES L. HESSON.

Written instruments: presumptions. Deeds: mistake; fraud of one party; reformation; delay.

A court of equity has ample power to correct and reform an instrument, and make it conform to the intention of the parties if, by mistake, it fails to express their real intention, or contains terms or stipulations contrary to their common intention, provided the evidence be of a character to justify such action by the Court. p. 629

It is incumbent, however, upon the party seeking to reform a written instrument to show by conclusive proof that it does not embody the final intention of the parties. p. 629

In the absence of fraud, courts will not rectify instruments unless executed under a common mistake, where both parties have done that which neither of them intended. pp. 630-631

A mistake on one side may be ground for rescinding the instrument, but, in the absence of fraud, it is not ground for reforming a written instrument. p. 629

The fact, however, that there was a mistake as to what the contract was intended to be, must be established by clear and satisfactory proof. p. 629

Where the evidence of the complainant as to the terms of the agreement is contradicted by the defendant, courts will

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not rectify the contract unless there be sufficient evidence to corroborate that of the plaintiff, or unless the circumstances be such as to warrant a modification of the rule. pp. 632, 633

Where, without the knowledge of the grantor, the defendant put on record a deed for a certain piece of property which contained a reservation clause not contained in, and different from, the agreement between the parties in reference to it, it was *held,* to constitute a case where reformation of the deed could not be refused solely because the defendant was not mistaken as to what was in it. pp. 632-638

The presumption is, that a written instrument embodies the correct terms of the agreement between the parties, and in order to justify a party to ask its reformation in equity, this presumption must be overcome or rebutted by the complainant. p. 633

Where a son who had purchased land from his father, filed a bill to have the deed reformed, one year after he discovered that the deed put on record by the parties did not correctly express the intention of the parties, it was *held,* that, in view of all the facts in the case, the delay was no ground for refusing relief. p. 638

Decided November 12th, 1913.

Appeal from the Circuit Court of Baltimore City (BOND, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER and STOCKBRIDGE, JJ.

Chester F. Morrow and *Alfred S. Niles* (with whom was *Oscar Wolff* on the brief), for the appellant.

W. Purnell Hall, for the appellee.

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BOYD, C. J., delivered the opinion of the Court.

The appellant filed a bill of complaint against the appellee by which he sought to have a deed made by the appellee to him reformed, by striking out a reservation in favor of the appellee and his wife which appellant contends was improperly inserted in the deed. The appellee conveyed to the appellant the leasehold interest in the property known as 1724 W. Lafayette Ave., in the City of Baltimore, by deed dated May 20th, 1909. The consideration named in the copy of the deed filed with the bill is $2,500.00, but it is admitted that the actual consideration was $5,500.00—$3,500.00 having been paid in cash, and a promissory note given for $2,000.00, which was subsequently paid. The description of the property was followed by this reservation: "reserving, however, unto the said James L. Hesson and Leah A. Hesson, his wife, for and during the term of their natural lives and no longer the right to use the stable erected on the rear portion of said lot hereinbefore described," and the *habendum* clause is made "subject to the aforesaid reservation".

The appellant is the son of the appellee, and had been employed by him in his grocery store. In December, 1906, the appellee purchased this property, paying for it $2,300.00, according to the appellant, and $2,500.00, as testified by the appellee. The appellee rented the property to the appellant, who opened a grocery store for himself in the first story in the early part of 1907, and, having been married in June, 1909, which was the month after he purchased the property from the appellee, he repaired it and occupied the upper stories as a residence. While the father owned the property he erected in the rear of the lot the stable in question at a cost of $1,000 or less—the father and son differing as to the precise amount.

After the appellant paid the $3,500.00 in cash, the appellee had the deed drawn by an attorney. He and his wife executed it, and the same day he left it at the clerk's office for record without showing it to his son, but gave the "ticket" (the receipt of the clerk) to him that evening. The deed was left in the clerk's office until June, 1911. The son

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claims that he asked his father several times to get it, but he always replied that it was safer in the office, and the son said that as his father attended to outside business for him he relied on him getting it. The father did finally get it and delivered it to the son, who testified that upon reading it over he was surprised to find the reservation in it—that being the first time he had seen the deed or knew of the reservation. The next day he read it over more carefully and the following evening he spoke to his father about it, as he did several times afterwards.

The general principles applicable to proceedings for the rescission or reformation of contracts have been frequently announced by this Court. It cannot be doubted that a Court of Equity has ample powers to correct and reform an instrument and make it conform to the intention of the parties, if by mutual mistake it fails to express "their real intentions or contains terms or stipulations contrary to their common intention," provided the evidence be of a character to justify such action of the Court. It was said in *Dulany* v. *Rogers,* 50 Md. 533, that "It is incumbent however, upon the party seeking to reform a written instrument to show by conclusive proof that it does not embody the final intention of the parties; Courts will not rectify it unless it was executed under a common mistake,—both parties having done that which neither of them intended. A mistake on one side may be ground for rescinding, but not for reforming a written agreement." A number of other decisions of this Court, including the late one of *Gaver* v. *Gaver,* 119 Md. 634, have announced the same principle, although using somewhat different expressions as to the character of proof required. It is well settled, however, that the fact that there was a mistake, and what the contract was intended to be, must be established by clear and satisfactory proof; and it was said in *Second National Bank* v. *Wrightson,* 63 Md. 81, that the Court must be satisfied beyond a reasonable doubt. In *Coggins* v. *Carey,* 106 Md. 217, we quoted from *Coale* v. *Merryman,* 35 Md. 382, that "The only difficulty is, in questions of this char-

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acter, the certainty and extent of the proof required to establish the mistakes. While there is to be found much conflict in the cases upon this point outside of our own State, the rule there is that only *such full and strict evidence is required as will be sufficient to satisfy the mind of the Court.*"

The statement of the general principle announced in *Dulany* v. *Rogers, supra,* and in other cases in this State of a similar kind must be limited to such facts as were before the Court in those cases, for of course the Court did not mean to say that an instrument could not be reformed if the defendant was guilty of fraud or improper conduct, although he was not mistaken as to the terms in the instrument sought to be corrected. If there was no agreement or understanding between these parties by which the right to use the stable was to be reserved, and the defendant had it inserted in the deed without the knowledge or consent of the plaintiff, and then filed the deed for record without showing or explaining it to the plaintiff, there can be no doubt that the plaintiff would not be refused a reformation of the deed merely because the defendant was not mistaken as to what was in it. It is scarcely necessary to cite authorities to sustain that proposition, but they are by no means lacking. JUDGE PHELPS said in his work on *Juridical Equity,* section 227: "To warrant the remedy of reformation the mistake must have been mutual, or, if unilateral, the mistake must have been induced by some act or omission of the defendant." In 34 *Cyc.* 920, after showing that a mistake to be reformable must be mutual, the author says: "The other ground which will warrant the reformation of an instrument is where there is ignorance or mistake on one side, and fraud or inequitable conduct on the other," and many cases are cited in the notes. In *Chelsea National Bank* v. *Smith,* N. J., C. C. 69 At. 533, the Court said: "The general rule of equity is that to warrant the reformation of a contract for mistake the mistake must be mutual; whereas, in the case of an unilateral mistake the remedy is rescision. But a Court of Equity will reform a contract in the case of a mistake of one party, accompanied

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by fraud or other inequitable conduct of the other party. 4 *Pomeroy's Eq. Juris.* (3rd Ed.), sec. 1376." See also *Story on Eq. Juris,* sec. 151, quoted by JUDGE BRISCOE in *Cohen* v. *Numsen,* 104 Md. 679.

But it is too clear to require further citation of authorities that if it be sufficiently proven that the reservation complained of was not a part of the contract and was not authorized by the appellant, it should be stricken out. There are some material facts which were clearly and fully established beyond any reasonable doubt. It is admitted that the appellee paid the appellant more than double what the appellant had paid for the property less than three years before he sold it to the appellee, and $1,500.00 more than the purchase price and improvements made to it cost the appellant. It is satisfactorily shown that he paid more than its market value and he has since improved it. While of course that is not conclusive, it was only assessed for $3,750.00 when the appellee purchased it, which included the value of the lot on which there was then and is still an irredeemable ground rent of $96.00 per annum, which capitalized even at six per cent. would be $1,600.00. Since the appellee purchased it $400.00 has been added to the assessment for improvements made by him, but Mr. Bernard, who has been a specialist in real estate for twenty-five years, and is one of the special assessors of the Appeal Tax Court and a real estate officer of one of the trust companies, testified that in his judgment the leasehold interest was now worth $3,664.00, and that there was but little difference between its value now and in 1909, except as affected by the improvements since put on it.

The answer alleges that the defendant told the plaintiff that he would have inserted in the deed the right to use the stable during the lifetime of the defendant and his wife which was thoroughly understood and agreed to by the plaintiff before the execution of the deed and at the time the property was sold, but in the testimony of the defendant he said: "I told him if he wanted to buy the stable, the whole lot together, he could buy it for fifty-five hundred dollars and we

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would put a clause in the deed that I was to have possession of the stable as long as I lived. That was our contract." He made no claim that there was to be such a reservation as was inserted—reserving the right to himself and wife to use it. The reservation which was inserted was therefore not in accordance with what he testified had been agreed to, and he made no attempt to explain that fact. It is true that his wife was dead before this bill was filed, but she might have survived him, and he confessedly had inserted in the deed what according to his own testimony he was not justified in inserting.

He further testified: "I think I told him at the time we made the contract that if I held possession of the stable he could not sell the property without I signed off, but that I would sign off any time he wanted to sell the property," but he did not so provide in the deed, although he had the reservation inserted, and hence did not include in the deed the part of the alleged agreement in reference to the stable which was in the plaintiff's favor, even if his version of the contract be accepted. Although his son was living with him when he sold the property to him he had the deed prepared and filed it for record without letting him see it, or telling him that the reservation was in it. He testified that he had offered the property to his son without the stable for $4,500.00, but his son said, "I don't want it that way; I want the stable and all together," and he further testified that he said to his son, "I will take a thousand dollars off for the price of the stable, or you can have the stable if you want it, and I will hold my right in it as long as I live for the use of the stable as long as I lived. That was agreed upon right there."

The plaintiff in his testimony denied most positively that he had agreed to having any reservation put in the deed, and did not know it was there until 1911, after his father got it from the record office. As they thus contradicted each other in reference to the terms of the agreement, the plaintiff must be denied relief under the general rule of evidence established by our decisions, in proceedings for reformation of

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contracts, unless there be sufficient corroboration of the plaintiff or circumstances which modify that rule. The presumption is that a written instrument embodies the correct terms of the agreement between the parties, and it must be overcome or rebutted—the burden generally being on the party asking reformation. 24 *Am. & Eng. Ency of Law*, 650; 34 *Cyc.* 979, and our decisions say that it is incumbent on the plaintiff to prove the facts necessary to authorize a reformation. We will, therefore, ascertain whether the plaintiff has been sufficiently corroborated and how far the circumstances and facts of this case can modify the general rule.

The plaintiff is in part corroborated by the fact that the defendant's own testimony, if true, shows that the reservation inserted in the deed was not the one agreed upon. While the answer alleged, as we have seen, that the reservation inserted in the deed was agreed upon, the evidence of the defendant does not sustain it. The plaintiff is therefore corroborated by the defendant to the extent of showing that he did not agree to such a reservation as the defendant had inserted in the deed. As the wife of the defendant was dead when the bill was filed, indeed before the plaintiff saw the deed, he was not injured by her being included in the reservation, but it reflects materially upon the defendant's evidence, and makes the plaintiff's version much more probable than the defendant's, and it cannot be doubted that if defendant's evidence is correct, the deed should have provided for a release of the right reserved in case the plaintiff desired to sell the property.

Then as reflecting upon plaintiff's theory that the defendant agreed to sell the property, except the stable which he was to reserve, for $4,500.00, but that upon his insisting that he should have the stable with the rest of the property, the defendant accepted his proposition and agreed to sell it, including the stable, for $5,500.00, which was the amount he paid, there is a good deal in the record corroborating the plaintiff. For example, on cross-examination defendant was

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asked whether he had not told his younger son a few days before he was testifying that he would give the appellant one thousand dollars back anytime he wanted it, on account of the stable, and he replied "I think I did, sir." There then follows in the record: Q. Your son told you that you did not treat Roy right in taking his thousand dollars and then claiming the use of the stable. That is what your son told you? A. Yes, sir. Q. And you said that Roy shall have his thousand dollars back any time he wanted it? A. If he gives me a deed for the stable. If he gives me a deed for one stable, I will give him a thousand dollars, if I retain the right for the use of the stable as long as I live." If he already had the right to the use of the stable, as long as he lived, why give Roy (the appellant) $1,000.00 for a deed to retain that right?

But the plaintiff is corroborated by his wife in reference to material admissions by the defendant, which he does not even deny. The plaintiff had been paying his father $2.00 a week for his services in buying and hauling goods for him. The defendant had continued to keep his horse and wagon in the stable after he sold the property and the plaintiff had not only paid the defendant the $2.00 a week, but paid one-half of the expenses on the repairs of the wagon, which was used for both of them. In March, 1911, after the plaintiff had paid the note for the deferred purchase money (the last payment being on March 6th, 1911) the plaintiff talked with his father in the presence of plaintiff's wife about the stable while they were on their way to church. He testified: "Now, I was paying two dollars a week for the hauling and he was using my stable all the time, and me paying all the expense of it. I said, 'For the use of the stable you ought to do my hauling free of charge'. He said, 'I am satisfied to that. I will do your hauling free of charge.' There was no time mentioned how long it was to last. He was using my stable and I thought it was mine; I thought I had a clear title to it all the time, and he agreed to do my hauling and take the two dollars off." Mrs. Hesson testified as follows: "He said,

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'Father, now, I have finished paying you off for the property.' He said, 'Now, I think that you ought to be willing to do our hauling free of charge for the rent of the stable.' Then he said, 'All right.'" When the defendant was on the stand, he was asked by his counsel, "He (meaning appellant) has testified, and his wife has also testified that on one occasion you were on the way to church. He told you that inasmuch as he had paid for the house in full that the two dollars a week should cease inasmuch as you were using his stable for nothing. What have you to say about that?" and he replied, "There was a conversation that came up between us on the way to church. I don't think I can recall it; just what it was I don't recall."

That conversation, according to the plaintiff and his wife, was in March, 1911, which was before the son had seen the deed, or knew of this reservation. The defendant not only did not deny it, but the plaintiff and his wife both swore that the payments of $2.00 a week then stopped and the defendant admitted that the payments were stopped. That evidence of the plaintiff and his wife, not being denied by the defendant, but it being admitted by him that they had a conversation, is strong corroboration of the plaintiff's version of the agreement. If the defendant has a right to use the stable, there was certainly no occasion to surrender the $2.00 a week for the rent of the stable. The defendant had previously demanded payment by the plaintiff for the work he was doing for him, and in view of the uncontradicted evidence of the plaintiff and his wife as to what was said, giving up the $2.00 a week for the rent for the stable can be accounted for in no way other than by the fact that he recognized he had no right to the stable.

Then after plaintiff got the deed and discovered the reservation, he had a conversation in the presence of his wife with the defendant in reference to the reservation. The second evening after the plaintiff received the deed he and his wife went to his father's house for supper. After the other

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members of the family had gone out, the plaintiff took his father to task and asked him why he had had that reservation put in the deed. Mrs. Hesson testified, "He said to father, 'Father, why did you have that clause in the deed. that you were to have the use of the stable as long as you lived?' He said, 'Well, I did that for protection for you and for me in case anyone would sue and try to get your property away from you'. Roy said, 'Well, I don't think anything about it that way, anything of this kind. I think I can attend to my own business'. He said, 'I trusted you for a clear title and expected to get it.' And he said, 'I done that, I thought it was for protection.' And then he dropped his head, and it was seen father himself filled up and said, all the children was going against him. And of course, when he filled up my husband filled up and then they dropped the question. And then, several times after that, when we thought he was in good humor we talked to him. He said, 'Any time you want to sell there will be no trouble. Any time you want to sell I will sign off.'" The plaintiff testified to the same effect, and when the defendant was asked about it in chief he said: "I did that as well for my own protection so I would hold the use of the stable as long as I lived. Q. Did you so tell him that? A. I told him that was our contract and I had nothing less to do but that." On cross-examination he said he told his son, "that was our contract, that the deed was just according to our contract, and that is the way it would stay." He was then asked, "Well, do you mean that these conversations that Roy and his wife testified took place, when he asked that that be changed, and you told them that it was put in there for his protection, and also told them that at any time when they wanted to sell it, you would sign off, that these conversations never took place?" to which he replied: "I don't remember about it at all. You ask me such long questions, and you have got me confused. I don't know what I say. You have got me all confused up now." The Court adjourned at that point, and at the next session the

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attorney for the plaintiff referred to the defendant's saying at the previous session that he was confused, and repeated the question. The defendant replied, "I don't remember that they did."

We could refer to other evidence which tended to corroborate the plaintiff, but the above is sufficient to show that although Mrs. Hesson was not present when the original contract was made, she does corroborate her husband as to very material admissions by the defendant in her presence, which the defendant does not even deny. Under the circumstances of this case, we are of the opinion that the plaintiff was sufficiently corroborated to entitle him to relief. The fact that the defendant had continued to occupy the stable was relied on, but we cannot regard that circumstance as one of any weight in view of the other facts. The plaintiff was getting the benefit of the defendant's horse and wagon, and it was being used for the business of both, and as long as he had none of his own it could scarcely be expected that he would require his father to give the stable up. At any rate for at least a year or more, according to the evidence above referred to, the defendant paid the plaintiff rent for the stable—giving up his charge of $2.00 a week for its use. It was only after the plaintiff had gotten an automobile and had requested the defendant to dispose of one of the vehicles he kept in the stable so that there would be room for the automobile that any differences between them arose.

Probably we could rely on the salutary rule adopted by some Courts and stated in 34 *Cyc.* 980, that, "where a bill for reform is answered, and a contract different from that alleged in the bill is set up as representing the real intention of the parties, the burden is on the defendant to establish his allegations by independent evidence." It is true the answer does not set up a different contract, but the evidence of the defendant does, and it would not be putting too great a burden on him to require him to prove the contract which he relied on, inasmuch as his own evidence shows that he had

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inserted in the deed a reservation which differs from what he testified the plaintiff agreed to.

It is said in 34 *Cyc.* 989: "There is no absolute rule that in no case can a decree for reformation be made upon the uncorroborated evidence of an interested party; but it is the duty of the Court to act upon such evidence with extreme caution. Unless the circumstances are unusual, the complainant should be corroborated by the testimony of at least one competent witness besides himself, although reformation has been granted on the uncorroborated, but uncontradicted, evidence of one party, or by facts and circumstances which confirm and support his statement." In a case such as this, where the plaintiff never saw the deed until long after it was executed and recorded, and hence had no opportunity to question it or to object to such a provision being inserted, and when it is admitted that the preparation of the deed was left to the defendant and he had inserted in it a different reservation from what he testified was agreed to, we would not be prepared to require such strict and conclusive evidence as is generally necessary in proceedings for reformation. But as we are satisfied that the facts and circumstances do fully and clearly justify relief, as the plaintiff is sufficiently corroborated by his wife and admitted facts in the case, we must reverse the decree of the lower Court and remand the case in order that a decree be entered striking out the reservation in the deed herein before referred to.

We have not referred to the delay in filing the bill for three years after the deed was executed, or one year after the reservation was discovered, as the circumstances sufficiently explain that delay. The plaintiff was to be commended rather than condemned for not proceeding sooner against his father, and two days after his father sent him a notice, which in effect notified him to vacate the stable, he filed this bill.

Decree reversed and cause remanded, the appellee to pay the costs.

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D. WEBSTER GROH

vs.

ALBERT G. SOUTH.

Res judicata: suits growing out of same subject-matter; change in conditions; question for the jury. "Malice": technical—; sufficiency of declaration. Damages: subsequent to suit; exemplary damages; condition of defendant. Prayers: liable to confuse—.

In a suit between the same parties, growing out of the same subject-matter as that of a former suit, unless the evidence discloses a material change in conditions, the verdict and judgment in the former suit determines the right to recover. p. 640

And whether there had been such a change is a question proper to submit to the jury. p. 640

A charge in a declaration that certain acts therein complained of were done "intending to injure the plaintiff in the beneficial use and occupation of * * * " a certain farm, etc., is in effect an allegation of malice. p. 641

Where malice is an element of an alleged wrongful act, exemplary damages may be asked, and in such a case it is proper to inform the jury as to the means of the defendant. p. 641

Prayers liable to confuse the jury are erroneous, and are properly rejected. p. 641

Damages arising subsequent to the date of the writ, if merely incidental, and such as will continue independent of any subsequent wrongful act, should be assessed up to the time of the verdict. p. 642

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If the case is one that admits of exemplary damages, it is not error to submit in one prayer an instruction with regard to such damages and one with regard to compensatory damages. p. 642

Decided November 18th, 1913.

Appeal from the Circuit Court for Allegany County (HENDERSON, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Ferdinand Williams, for the appellant.

Charles G. Wagaman and *J. Lloyd Harshman* (with whom were *Wagaman & Wagaman* and *A. A. Doub*, on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

This is the second suit between the same parties for an injury to the plaintiff's spring, caused by the backing up of the dammed waters of Antietam Creek. The first suit resulted in a verdict for the plaintiff, and the judgment was affirmed by this Court in 119 Md. 297. The facts are substantially the same in the present as in the former record, and need not be again repeated. In the present suit the plaintiff asks for the damages to which he has been subjected since the time of the rendition of the former judgment, and for exemplary damages, if the jury shall find the continued acts of the defendant a reckless and wanton disregard of the rights of the plaintiff.

Unless the evidence disclosed a material change in conditions, the verdict and judgment in the former suit was determinative of the right of recovery. *Long* v. *Trexler*, 8 Atl. 620, and it was a question properly submitted to the jury whether there had been such change.

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The first and second exceptions relate to the admission of evidence tending to show the pecuniary worth of the defendant. The declaration had charged that the acts complained of were done "intending to injure the plaintiff in the beneficial use and occupation of said farm and of the waters of the aforesaid spring." This was in effect an allegation of malice and whenever that is an element of an alleged wrongful act, exemplary damages may be asked, and the jury are entitled for such a purpose to know the means of the defendant. *Wilms* v. *White,* 26 Md. 380; *Sloan* v. *Edwards,* 61 Md. 89; *Mertens* v. *Mueller,* 119 Md. 525; *West Chicago St. Ry.* v. *Morrison,* 160 Ill. 288; 13 *Cyc.* 112. The rulings of the trial Court upon these two exceptions were therefore correct.

At the conclusion of the evidence the plaintiff offered two and the defendant six prayers, of which the Court granted the prayers offered on behalf of the plaintiff and the defendant's second and sixth, and rejected the remainder. These rulings of the trial Court constitute the third bill of exceptions. The first prayer of the plaintiff relates only to the right of the plaintiff to recover, and that had been virtually established in the first case. The defendant's third prayer was intended to formulate for the jury a rule as to the burden and quantum of proof, and, as phrased, was susceptible of being taken as laying down the rule applicable in criminal cases or that which prevails in civil causes. It was therefore liable, if it had been granted, to have confused the jury, and hence was properly rejected. The remainder of the prayers dealt with the measure of damages, the fourth and fifth of the defendant restricting them to nominal damages, the plaintiff's second permitting them to find both compensatory and exemplary damages. Inasmuch as malice was alleged in the declaration, and was a matter to be found one way or the other by the jury, and if found entitled the plaintiff to exemplary damages, it would have been manifest error to have granted either the fourth or fifth prayers of the defendant, limiting the jury to nominal damages. For like reason the defendant's first prayer was properly refused, as by its terms

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the jury were to be restricted to compensatory damages merely.

The criticism of the appellant was directed mainly against the second prayer of the plaintiff. The objections to it were two fold, that it permitted a recovery for damages down to the time of trial instead of limiting them to the date of bringing of the suit; and secondly, that it established a different standard for the measure of damages at different times. Neither of these objections is well founded. With regard to the first it may be said that the true rule deducible from the cases is, that if the damages arising subsequent to the date of the writ are merely incidental, and will continue independent of any subsequent wrongful act, they should be assessed up to the time of the verdict, 13 *Cyc.* 254; *Jacobs* v. *Davis,* 34 Md. 204, and this case does not fall within the exception to the rule mentioned by JUDGE ALVEY in *Corner* v. *Mackintosh,* 48 Md. 374. Nor does the prayer establish a different measure of damages for different periods. What it does, is to provide for both compensatory and exemplary damages. Of course these might have been separated and an independent instruction asked as to each, but if the case was such an one as admitted of exemplary damages, it was not error to combine that and an instruction with regard to compensatory damages in one prayer. That the case was one in which, upon the finding of certain facts, the jury might award exemplary damages, has been fully shown by the cases already referred to and *McCoy* v. *Danley,* 20 Pa. St. 85; and *Oursler* v. *B. & O. R. R. Co.,* 60 Md. 372. Finding no error in the rulings of the trial Court, the judgment appealed from will be affirmed.

Judgment affirmed, with costs.

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CHESAPEAKE BEACH HOTEL COMPANY OF CALVERT COUNTY, A CORPORATION, PLAINTIFF,

vs.

JULIUS G. HALL, SHERIFF OF CALVERT COUNTY, IN THE STATE OF MARYLAND, DEFENDANT.

General liquor laws and special charter of corporation. Statutes: repeal by implication; not favored. Injunctions: to restrain criminal proceedings; allegations and exhibits; hearing on bill and answer.

Repeal of statutes by implication is not favored, and only when two Acts are so plainly inconsistent and irreconciliable that they can not stand together will the latter be held, by implication merely, to repeal the former. p. 652

Section 37 of Chapter 245 of the Acts of 1894, incorporating the Commissioners of Chesapeake Beach, authorized the Commissioners to issue to the Chesapeake Beach Hotel Company licenses to sell liquor, and Chap. 120, Acts of 1900, amending that Act made it unlawful for any licensee to sell, etc., any liquor between the hours of midnight and 5 o'clock in the morning, with permission to sell liquor at all other times; it was *held*, that these Acts did not repeal the general Sunday laws, and the right there given to sell liquor *"at all other times"* did not include the right to sell liquor Sunday. p. 653

A municipal ordinance restricted the running of slot machines to the boardwalk, the property of the Chesapeake Beach Hotel Company, upon the payment by the owners of the machines of a license fee for each machine. The Hotel Company, by an agreement with a certain C. P., allowed him the exclusive privilege to erect and operate such machines for a period of five years in consideration of his paying to the Hotel Company a certain commission on the gross receipts. The said C. P. died during the term, and his estate continued the business of the slot machines; and upon a bill being filed by the Hotel Company to enjoin the sheriff of the county from making arrests, etc., or interfering with the slot machine business during the excursion season, and while the County Court was not in session, etc., until

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a Court of competent jurisdiction could pass upon the legality of such business, it was *held,* that the license and the agreement, etc., should have been filed or exhibited, or their absence accounted for, and that it should have been made to appear whether or not the said C. P. had been the owner of such machines. p. 655

Where a plaintiff appeals to a court of equity to protect his legal rights, he must show a strong *prima facie* case in support of the right asserted, and show that irreparable or serious injury will result from the invasion of his right, the irreparable or serious injury he has sustained or will likely sustain, before such rights can be fully vindicated in the proper forum, being the equity on which the application for an injunction is founded. p. 655

When a complainant seeks the intervention of a court of equity by way of injunction, he must make out a clear case, and if he has in his possession or can produce authenticated copies of papers or instruments in writing on which his equity rests, such papers must be filed in support of the bill. p. 651

When the application for an injunction is heard upon bill and answer, the answer must be considered, and if they determine the equity of the bill in such a manner as would authorize the dissolution on motion to dissolve the injunction, the injunction ought not to be granted. p. 651

So far as they are responsive to the bill, such answers are to be taken as true, but new matters set up by way of avoidance, which can only be established by evidence, do not, in general, avail to prevent the issuing of the injunction. p. 651

But where the Court is satisfied that the complainants will not suffer by not having an injunction issued at once, and testimony can be taken in a reasonable time, if the new matter be of a character that if proven would ultimately require the dissolution of the injunction, the Court has discretion to issue the injunction or not. p. 651

Decided November 12th, 1913.

Appeal from the Circuit Court of Calvert County (BRISCOE, C. J.).

The facts are stated in the opinion of the Court.

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The cause was argued before BOYD, C. J., BURKE, URNER, STOCKBRIDGE and CONSTABLE, JJ.

John B. Gray and *William Hitz* (with whom were *Frederic D. McKenny* and *John S. Flannery* on the brief), for the appellant.

Arthur W. Dowell and *J. Frank Parran*, for the appellee.

BURKE, J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court for Calvert County, which denied the application of the plaintiff for an injunction, and dismissed the bill with costs to the defendant. This order was affirmed in a *per curiam* order filed October 31st, 1913, and the reasons upon which that order was based will now be stated.

The facts necessary to be stated are these: By the Act of 1894, Chapter 245, the inhabitants of Chesapeake Beach, in Calvert County, residing within certain specified limits, were "incorporated and created a corporation under the name and style of 'The Commissioners of Chesapeake Beach'." Large municipal powers were granted to the corporation. The inhabitants accepted the act of incorporation, and organized a municipal government under the powers conferred by the act, elected commissioners, and since has continued as a municipal corporation.

Section 37 of the Act of Incorporation made provision for the granting of licenses and the regulation of the sale of spirituous and fermented liquors within the limits of the corporation. It empowered the commissioners to issue to the Chesapeake Beach Hotel Company as many licenses as that company might require, and to certify to the clerk of the Circuit Court for Calvert County the number of licenses required. It was made the duty of the clerk to issue to the Hotel Company the number of licenses designated in the certificate of the commissioners, upon the payment of the sum

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of $240.00 for each annual license. Licenses might be issued for a fractional part of any year. Two-thirds of the amount realized from the licenses was directed to be paid to the Board of Commissioners of Chesapeake Beach and applied to the general use of the corporation. It was made unlawful for any person to sell, offer for sale, or keep for sale, any intoxicating liquors, beer or cider, within the corporate limits, unless a license was first issued as provided by the Act. There was no restriction upon the hours during which a licensee might sell.

The charter of the corporation was repealed and re-enacted by Chapter 120 of the Acts of 1900. The two charges made by this Act, which affect the questions involved in this appeal, are as follows: "First, it was made unlawful for any licensee to sell, barter or give intoxicating liquor, * * * to any person whatsoever between the hours of 12 o'clock midnight and 5 o'clock in the morning, and all places where intoxicating liquors of any description are kept for sale shall be closed between the hours of 12 o'clock midnight and 5 o'clock in the morning, and shall not be opened between such hours for any purpose whatsoever; but any licensee may sell all such spirituous and fermented liquors, wines, cordials, soda and mineral waters to all other persons and at all other times by the drink or in quantities not to exceed five gallons at any one sale, but not otherwise. Secondly, the Commissioners of Chesapeake Beach were empowered to '*regulate, restrain, license and prohibit gaming of all kinds*,' both by the Act of 1894, Chapter 245, and the Act of 1900, Chapter 120.

The power of the Commissioners of Chesapeake Beach to cause licenses to be issued for the sale of liquors was limited to the Chesapeake Beach Hotel Company. No power was given them to cause such licenses to be issued by the clerk to any other person or corporation. The intention was to provide the Hotel Company with the exclusive privilege of selling spirituous and intoxicating liquors at Chesapeake Beach.

In 1904, the Commissioners of Chesapeake Beach passed the following ordinance: "Be it ordained by the Commis-

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sioners of Chesapeake Beach this second Monday in May, 1904, that gaming, as specified in Chapter 120, section 13 of the laws of Maryland, passed in 1900, be allowed on the Boardwalk at Chesapeake Beach, and nowhere else. And be it further ordained, that the owner or owners of machines known as 'nickel in the slot,' be, and they are hereby required to obtain a license, signed by the president and secretary to the Board of Commissioners. Such license to cost $25.00 per annum, beginning May 1st in each year."

The Chesapeake Beach Hotel Company, of Calvert County, the appellant, was incorporated under the general laws of the State in May, 1899. It became and in now the owner of certain real estate and improvements thereon located in Chesapeake Beach, within the limits of the corporation, and known as the "Belvidere Hotel," "The Casino," "The Employees Building," and all the property known as the "Boardwalk." All these properties are leased by the Hotel Company to various persons for the purpose of establishing, maintaining and conducting hotels, eating houses and amusements of various kinds. It is alleged in the bill that "the exclusive right above granted to sell and dispense liquors, beer and cider in connection with said property, adds greatly to the value thereof, and has enabled, and does enable, the plaintiff to derive a rental from said property greatly in excess of what could otherwise be reasonably expected; and the various lessees of said property during the priod of more than ten years last past, and with the èxception hereinafter referred to up to the present time, have been engaged lawfully and peacefully, under licenses duly issued out of the office of the clerk of the Circuit Court for Calvert County, under the seal of said Court and the hand of said clerk, in selling, in, or about such of the property and premises above referred to as are not situated on or abutting upon the Boardwalk, such liquors, wines, cordials, beers, soda and mineral waters as the numerous persons visiting Cheasapeake Beach, either for business or pleasure, have required and called for."

The bill sets out the ordinance quoted above, and alleges: "That on or about the fifth day of February, 1906, this

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plaintiff did enter into a certain agreement with one Charles Popper, whereby for a period of ten years from said date the plaintiff granted unto the said Popper the *exclusive privilege* of conducting on the Boardwalk in said town of Chesapeake Beach, the business of maintaining and operating machines and devices commonly known as 'slot' or 'coin' machines, which are usually operated by dropping a coin, coins, money or tokens into a slot or slots in the device, in the hope or expectation of causing such machines to pay out money, and the plaintiff under said agreement receives as compensation for said exclusive privilege a percentage of the gross receipts derived from all of such machines so operated. Charles Popper has since died, but the representatives of his estate have continued to conduct said business under said agreement, and the plaintiff has received, is now receiving, and will hereafter receive, a considerable income and profit from the operation of said machines as aforesaid, if such operation is not discontinued or interfered with by the threatened action of the defendant hereinafter mentioned."

The defendant on this record is the sheriff of Calvert County. He notified the plaintiff that he intended to stop the sales of spirituous and fermented liquors on Sunday at Chesapeake Beach, and that he would arrest all persons making such sales on that day. He also notified the plaintiff that he intended to stop the operation of slot machines, or other gaming devices, at Chesapeake Beach on any day, including Sunday. The bill alleges: "So insistent, persistent, and public have lately been the declarations of the defendant in the above regard, that this plaintiff, desiring ever and always to conduct itself as a peaceful and law-abiding citizen of the State, and to avoid even the semblance of opposition to the duly constituted authorities charged with the preservation of order and enforcement of law within the county, by persuasion exerted through its officers and agents upon its various licensees engaged in the sale of liquors or operating said so-called gaming devices, did cause numerous of them to refrain on Sunday last, the twentieth day of July, now current,

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from making any such sales or conducting any such operations, all at a very material, but not exactly to be ascertained in dollars and cents, pecuniary loss, which was borne in part by said licensees, but in a greater part and measure by this plaintiff; and thus only was the good order of the municipality and its reputation for peace and quiet preserved. Notwithstanding all of the above, the defendant, Julius G. Hall, hath continued and still continues, to utter threats of arrest against the officers, agents and licensees of the plaintiff, and their employees, and thereby has caused various of them to become apprehensive of being arrested and held in confinement over the hours of Sunday, hoping that they will, because of such fear, refrain from the performance of their necessary duties on that day, and such threats will necessarily have the effect of causing many persons who would otherwise visit Chesapeake Beach, particularly on the Sabbath Day, as patrons of its various offerings, to abstain from so doing, all of which must, and inevitably will, result in immediate great and irreparable loss to the plaintiff. The plaintiff is advised by counsel, and believes, and therefore avers, that the business of selling liquors, wines, beers and cordials, and the business of operating slot machines, above referred to, as the same has been and is being conducted within the limits of the municipality of "The Commissioners of Chesapeake Beach," is lawfully and is being lawfully carried on under State and municipal licenses issued in pursuance of and strict compliance with the laws of the State of Maryland, applicable thereto, and if the defendant, Julius G. Hall, sheriff of Calvert County, shall be permitted to execute the course of action which he threatens to pursue in the immediate future, when the so-called excursion season at Chesapeake Beach is at its height, and when the grand jury of Calvert County and the Criminal Court thereof are not in session, and the question at issue cannot be submitted to the said grand jury or to such Criminal Court for determination until the November term of said Court, by or before which said excursion season will have ended, and unless this Honorable Court shall intervene

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for its protection, the business of this plaintiff and its various lessees, above described and referred to will have been practically, if not entirely, destroyed, and this plaintiff will have suffered irreparable loss and damage, both in its reputation and property rights, with respect to which damage and loss as against the wrongs and trespasses threatened by the defendant, this plaintiff will be without any adequate remedy at law." The prayer of the bill was for a preliminary injunction to enjoin the sheriff "from in anywise interfering with the business or operations of this plaintiff, or any of its lessees, of the class and character specified and referred to in the body of this bill, and now being carried on at Chesapeake Beach, either by arrest or threats of arrest, made either by said defendant, personally, or through its deputies or assistants, or otherwise, on account of any supposed violation of the general laws of Maryland, until full opportunity shall have been afforded for either this Court, or another Court of competent jurisdiction, to pass upon and to determine the legality of said business and operations."

The Court set the application for hearing, and directed that a copy of the order and the bill of complaint be served upon the defendant. The defendant answered the bill, and denied that he had threatened or intended, in any manner, to close up, discontinue, or interfere with the legal or orderly conduct of the business of the plaintiff. He further averred that "he had been advised, and is of opinion, that notwithstanding the provision of the statutes as set forth in the seventh paragraph of said bill, that the sale of liquors wines, beers and cordials within the municipal limits of Chesapeake Beach on the Sabbath day, commonly called Sunday, and the setting up, maintaining and operating, or permitting to be operated within such limits on any day, including Sunday, of so-called 'slot machines,' or other gambling tables, devices and contrivances, at which money or any other thing shall be bet or wagered, is in violation of and contrary to the laws of Maryland. And he further avers that he has been advised, and is of opinion, that as the sheriff of said Calvert County, it is his duty, and

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that he does intend, to prosecute all persons, including the plaintiff and his lessees, who may be found violating the laws of said State, so far as the same shall come to his knowledge, but that he has never threatened, nor does he intend to interfere with, close up, or in any manner obstruct the said plaintiff in the operation or prosecution of its lawful and orderly business."

The application for the injunction was heard upon bill and answer. It was said in *Riggs* v. *Winterode,* 100 Md. 439, that: "There can be no doubt that as the answers were filed before the application for the injunction was heard, they must be considered, and if it be found that they deny the equity of the bill in such manner as would authorize the dissolution on motion to dissolve, the injunction ought not to have been granted. So far as they are responsive to the bill they are taken as true. *Miller's Eq. Pro.,* sec. 578, and cases cited. But new matter set up by way of avoidance does not avail to prevent the issuing of a preliminary injunction. *Dougherty* v. *Piet,* 52 Md. 429; *Mayor, etc., of Baltimore* v. *Keyser,* 72 Md. 115. Although perhaps not necessary to refer to other authorities, the same rules are announced in 10 *Ency. Pldg. and Prac.* 1000-1002, where many cases are cited. It may be well to say, in this connection, that there may be cases in which the new matter set up in the answer is such as would justify the Court in refusing to grant the injunction at once, unless that be necessary in order to preserve the rights of the plaintiff, in case he finally establishes them. When the Court is satisfied that the plaintiff will not suffer by not having the injunction issue at once, and testimony can be taken in a reasonable time, if the new matter be of a character that would ultimately require the dissolution of the injunction, if proven, it would be useless to compel the judge to issue a preliminary injunction. Some discretion must be allowed him in such cases. On the other hand, when the answer is not responsive to the bill, but relies entirely upon new matter which can only be established, if at all, by evidence, and the status of the property or other rights

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involved may be changed, it is proper to grant a preliminary injunction, if the allegations of the bill make a proper case for that relief."

The two legal questions raised upon the record are clearly manifest from the facts stated. They are: First, did the provisions of *sec. 37 of Ch. 120* of the *Acts of 1900,* quoted above, authorize or empower the plaintiff under the licenses granted to it to sell spirituous and fermented liquors at Chesapeake Beach on Sunday? Secondly, assuming that the Commissioners of Chesapeake Beach had the power under *section 13, Chapter 120* of the *Acts of 1900,* to allow gaming on the boardwalk at Chesapeake Beach, as was in fact permitted under the ordinance above set out, were the allegations of the plaintiff's bill sufficient to have warranted the Court in enjoining the sheriff from interfering with the gambling specified therein? Upon the first question, which is one of construction of the Act, there would appear to be little difficulty. There is no express repeal of the general laws of the State which prohibit the sale of beer and spirituous liquors on Sunday, and it can not be well contended from the general language employed, that the legislature intended to make such a radical departure from its settled policy upon this subject. The contention of the plaintiff on this branch of the case rests upon the proposition that the prohibition against the sale of whiskey and beer on Sunday contained in the general law has been repealed by implication, so far as they affect Chesapeake Beach. Repeals by implication are not favored in the law, and it is only where the two Acts are so plainly and palpably inconsistent and irreconcilable that they cannot stand together, that the latter will be held to repeal the former by implication. "It is only when the two Acts are repugnant and plainly inconsistent with each other that the rule applies. If the two Acts can by a fair and reasonable construction stand together, there is no ground on which it can be held that the latter Act operates as a repeal of the former Act. *Frostburg Mining Co.* v. *C. and P. R. R. Co.,* 81 Md. 35. We can discover no reason why the Court

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should invoke the doctrine of repeal by implication. It is to be assumed that if the legislature had intended to work such a radical change as that contended for by the plaintiff, it would have so declared, or at least would have employed language from which its intention would have clearly appeared. In our opinion, the case does not call for the application of the doctrine of repeal by implication, because by the true construction of the *Act of 1900*, there is no inconsistency between its provisions and the general Sunday law. The purpose the legislature had in view in introducing into the *Act of 1900* the provisions relied upon by the appellant seems to us to be perfectly plain. It was to put a restriction upon the hours in which licensees might keep their places of business open and make sales of spirituous and fermented liquors, etc. There was no such restriction imposed by the Act of 1894. Licensees under that Act might have kept their places open all night, and sold all night, and it was doubtless thought desirable that some restriction should be placed upon this privilege, and, therefore, it was provided by the *Act of 1900* it should be unlawful for any licensee to sell between the hours of 12 o'clock midnight and 5 o'clock in the morning, and that he should keep his place closed during those hours, but that he might sell at all other times—meaning, evidently, at all times or at all hours in which it was lawful to do so. We think it would be a most unreasonable construction to give to the words "all times" the legal effect contended for by the appellant.

As to the second question. The averments of the bill upon this branch of the case are wholly insufficient to have warranted the issuing of an injunction. It is a well-settled rule of equity pleading that "if the complainant seeks the intervention of a court of equity by way of injunction, he must make out a clear case, and if he has in his possession, or can produce, authenticated copies of papers or instruments of writing on which his equity rests, such papers or instruments of writings, or copies thereof, must be filed in support of the bill, in order that the Court may see that he is entitled to the

relief prayed." *Nagengast* v. *Alz,* 93 Md. 522. In *Lamm* v. *Burrel,* 69 Md. 272, the Court said: "It is quite a familiar principle, recognized by the 15th of the rules adopted by this Court for the regulation of the pleading and practice in courts of equity in this State, that every bill in equity must contain a clear statement of the facts upon which the plaintiff relies for relief. It is equally well settled that to warrant the Court in issuing an injunction a full and candid disclosure of all the facts must be made. There must be no concealment, and the *res gestæ* must be represented as they actually are. *Johnston* v. *Glenn,* 40 Md. 200; *Garrett Co.* v. *Franklin Coal Co.,* 45 Md. 470. The Court must be informed by the bill itself and its accompanying exhibits, if any, of every material fact constituting the case of the plaintiff, in order that it may be seen whether there is a just and proper ground for the application of so summary a remedy. Strong *prima facie* evidence of the facts on which the plaintiff's equity rests must be presented to the Court. *Laupheimer* v. *Rosenbaum,* 25 Md. 219."

Tested by these rules, the averments of the bill with respect to the second question, stated above, are wholly insufficient to have warranted the issuing of an injunction. The ordinance authorizing the operation of the slot machines on the board walk is set out, and it is alleged that the plaintiff entered into "a certain agreement" with Charles Popper, whereby for a period of ten years Popper acquired the exclusive privilege of maintaining slot machines on the board walk, and that under this agreement the plaintiff receives a compensation for this exclusive privilege "a percentage of the gross receipts derived from all such machines so operated." It is alleged that Popper is now dead, and that the representatives of his estate are now operating the machines "under said agreement," and that the plaintiff has received, is now receiving, and will hereafter receive "a considerable income and profit" from the operation of the machines. There is no averment that Popper had taken out the license prescribed by the Act. The license is not exhibited, and no excuse is given

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for its non-production. If he had no license it is not pretended that he had a right to set up slot machines anywhere, and certainly, in the absence of the license, the plaintiff could not grant him the exclusive privilege or any privilege to operate slot machines. It is not alleged that Popper was the owner of the machines. None but, "the owner or owners of machines" could obtain a license under the ordinance. It nowhere appears that the representatives of Popper, conceding that he did have a license, have authority to maintain and operate machines on the board walk. The ordinance gives no such authority to the representatives of deceased licenses. The agreement, if in writing, should have been filed; if not in writing, its terms and provisions should have been fully disclosed. The broad and general statement of some of its provisions gives the Court very little information. Did it undertake to authorize the representatives of the deceased to maintain slot machines? To what percentage of the gross income therefrom was the plaintiff entitled? What amount did it, in fact, receive? If it be conceded that under such a contract the plaintiff acquired such a property right that a Court of Equity would protect, how can the Court tell from the vague and general allegations of the bill the extent of the injury suffered by the plaintiff or what injury he would sustain by the threatened acts complained of?

Where a plaintiff applies to a Court of Equity to protect his legal rights, he must show a strong *prima facie* case in support of the rights asserted, and, in addition thereto, he must show that irreparable or serious injury will result from the invasion of his rights—the *irreparable or serious nature of the injury* he has sustained, or will likely sustain, before such rights can be fully vindicated in the proper *forum*, being the equity on which the application for injunction is founded. The equities of the bill are denied by the answer, and for the other reasons herein stated, the order appealed from was affirmed by the *per curiam* order heretofore filed.

Decree affirmed, the appellant to pay the costs above and below.

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ROBERT P. GRAHAM, SECRETARY OF STATE, OF STATE OF MARYLAND,

vs.

GEORGE L. WELLINGTON ET ALS.

The Secretary of State: official office of—. Election Laws: nominations; time of filing certificates; vacancies; mandatory and directory provisions.

The official office of the Secretary of State is at Annapolis. p. 660

To comply with section 47 of Article 33 of the Code of 1912 (governing elections), requiring certificates of nomination to be filed with the Secretary of State not less than 25 days, and with the Board of Supervisors of Elections not less than 15 days before the day of election, such nominations need not be filed with the Secretary of State personally, but they should be sent or delivered at his office at Annapolis, and the absence of the Secretary of State from his office, or from the State, will not prevent such certificates from being filed within the meaning of the statute. p. 660

But it does not follow that such a delivery to the Secretary of State in person, in Baltimore or at some other place, if accepted by him, would not be a sufficient delivery. p. 660

Where a statute requires an act to be done not less than a certain number of days before a certain other date, the general

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rule, in computing the time, is to include one day and exclude the other day, and not to include or exclude both days; but where the statute indicates that there must be so many *clear* days intervening, or when the statute requires so many days at least, both the days must be excluded. p. 660

In determining the effect of a failure to comply with the terms of a statute regulating elections, the preparation of ballots, what names can be placed on them, etc., the intention of the Legislature must be sought for. p. 661

In construing statutes, the intention to be sought for may be manifested either by express declarations, or by a consideration of the general scope and policy of the Act. p. 661

Courts should hesitate to declare elections invalid merely because some of the requirements of the statute in reference to preliminary matters have not been literally complied with, unless, by express declaration or by necessary implication, such acts are essential to the validity of the election. p. 661

The directions contained in section 47 of Article 33 of the Code, as to the time for filing certificates of nominations for political offices with the Secretary of State and the Supervisors of Elections are mandatory, and not merely directory. p. 667

When such certificates of nomination are filed too late to comply with the provisions of said section 47, they are "inoperative" within the meaning of section 51, and nominations to fill the vacancy may be made as provided in the latter section. p. 669

But vacancies which exist by reason of there being no candidates for the offices at the primary elections are not embraced within the meaning of said section 51. p. 668

Decided November 12th, 1913.

Appeal from the Circuit Court for Anne Arundel County (BRASHEARS, J.).

The facts are stated in the opinion of the Court.

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The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Edgar Allan Poe, Attorney-General, for the appellant.

George R. Gaither and *Charles J. Banaparte,* for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from an order of the lower Court, directing a mandamus to issue against the appellant, the Secretary of State, of the State of Maryland, requiring him to certify to the Boards of Supervisors of Elections of Baltimore City and of the counties, the nominations of the three appellees by the Progressive Party for the offices of United States Senator, Comptroller and Clerk of the Court of Appeals, respectively. The certificates of nomination were not filed with the Secretary until October 11th; but the agreed statement of facts made by the attorneys shows that the certificates were intended to be filed by him on Oct. 10th, 1913; the Chairman of the Progressive Party, however, believing that they should be placed in the hands of the Secretary personally, called up the personal office of the appellant by telephone, in Baltimore City, and received from a subordinate in that office the message that the Secretary was not within the State and would not return until October 11th, which was correct. No further attempt was made to deliver the certificates until the morning of the 11th, when they were delivered to the Secretary in person, and were the same day mailed to the Secretary's office in Annapolis. The nominations were made by the members of the State Central Committee of that body, who were authorized, by the delegates elected at a primary election in convention assembled by a resolution unanimously passed, to fill any vacancy which might or did exist in respect to the nomi-

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nations of said party for the three offices—the members of the committee having also been elected at the said primary election. There were no candidates at the primary election for those nominations, and they were made by the committee, under the provisions of the statute authorizing vacancies to be filled which may exist by reason of there being no candidates for said offices at the primary election as the rules and regulations of the governing bodies of the respective parties may or shall provide. The certificates of nominations were not before us, but no objection was made to them for any reason other than because of the time at which they were filed. The Secretary of State, upon the advice of the Attorney-General, refused to certify the nominations to the supervisors because they were not filed as required by section 47 of Article 33 of the Code. In referring to the several sections of this Article, we will mean the Code of 1912, which must be borne in mind, as many of the sections are numbered differently in that Code from what they were in the original Acts, and from those in the pamphlet issued by the Secretary of State.

Section 47 is as follows: "Except in cases provided for by section 51 and cases of special election to fill vacancies in office caused by death, resignation or otherwise, such certificates of nomination shall be filed respectively with the Secretary of State not less than twenty-five days, and with the Board of Supervisors of Elections not less than fifteen days before the day of election."

As the day of the election was November 4th, it will be observed that the 10th day of October was "not less than 25 days before that time, unless either the 10th of October or November 4th be counted, even if it be conceded that what was done on the 10th of October was sufficient to permit the Secretary of State to treat the certificates as filed that day. But we cannot concur in the view that what was done by the chairman on that day, as set out in the petition and stipulation of the attorneys, was a compliance with the requirement of the statute. It does not require such a certificate to be

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filed with the Secretary of the State personally, but it contemplates it being filed in his official office, which is at Annapolis, although, of course, we do not mean to say that if one be delivered to the Secretary of State in person in Baltimore, or at some place other than his office in Annapolis, and he accepts it, that would not be sufficient. These certificates should have been sent to or delivered at the office of the Secretary of State in Annapolis (where his official office is) and the absence of the Secretary from his office, or from the State, would not have prevented them from being filed within the meaning of the statute. Presumably some one would be there during office hours to receive them for the Secretary of State, and it is not shown or suggested that the office of the Secretary was closed by reason of his absence from the State throughout that day, or that there was no one there who could have received them. If such conditions ever exist, and a certificate of nomination cannot for that reason be filed in time, a wholly different question from the one now before us will be presented.

Being of the opinion that what was done by the chairman on October 10th was not sufficient to excuse him for not filing the certificates before October 11th, which was undoubtedly not within the time fixed by the statute, it is not necessary to determine whether filing it on October 10th would have been in time. It will not be amiss, however, to call attention to the terms of the statute, which are, "*not less* than twenty-five days * * * *before* the day of election." While the general rule, in the computation of time, is to include one day and exclude the other, and not to include or exclude both, there are many decisions which hold that if a statute indicates that there are to be so many *clear* days, or that requires so many days *at least*, both are to be excluded. We will only refer to what was said in *Walsh, Trustee,* v. *Boyle,* 30 Md. 266 and 267, and without saying more on that subject, we will consider the effect of not filing the certificates until October 11th, which is the earliest day we can treat them as filed.

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In determining the effect of a failure to comply with the terms of statutes regulating elections, the preparation of ballots and who can be placed on them, as well as other matters connected with elections, the intention of the legislature must be sought for, and when ascertained followed: "This intention may be manifested either by express declaration, or by a consideration of the general scope and policy of the act," as was said by JUDGE BURKE in *Carr* v. *Hyattsville,* 115 Md. 545. Courts should undoubtedly hestitate to declare elections invalid merely because some of the requirements of the statute in reference to preliminary matters have not been literally complied with, unless they be declared by the Legislature to be essential to the validity of the election or be of such character as the Court can see they were so intended. But we are not now called upon to determine whether placing on the official ballots the names of those whose certificates of nomination were not filed by the time fixed by the statute could invalidate an election in other respects regular, and we do not want to be understood as intimating that such would be the result, but the real question before us is whether the Secretary of State, with whom the statute required certificates of nominations for such offices as these to be filed, not less than twenty-five days before the day of the election, can be required to certify to the Supervisors of Elections the names and descriptions of those persons specified in those certificates, although the certificates were not filed with him by the time fixed by the statute.

Section 48 of Article 33 requires the Secretary of State to certify to the Supervisors of Elections of each county and of Baltimore City the nominees for such offices as those before us, not less than eighteen days before the election. Sections 47 and 48 of Article 33 were in the original Act, (1896, Chapter 202), being there numbered sections 42 and 43, and are still just as they were originally passed in 1896, excepting in that Act section 42 provided that the certificates of nomination should be filed "respectively, with the Secretary of State, not less than *twenty* days, and with the Boards of

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Supervisors of elections not less than *ten* days before the day of election." By the Act of 1900, Chapter 366, that section was amended, so as to provide that those to be filed with the Secretary of State should be filed not less than twenty-five days, but still left ten days as the time for them to be filed with Supervisors of Elections. Then by Chapter 133 of the laws of 1902 the section was amended to read as it now does. Those amendments show that the Legislature did not consider the time originally fixed sufficient. No change has been made in what was originally section 43 (now 48) since it was passed in 1896, and the fact that such amendments were made is a strong indication that the legislature intended to require the certificates to be filed not less than the number of days respectively mentioned before the day of election. If twenty-four or twenty days would in its judgment answer, the Legislature could have had no reason for amending the original provisions which it did at its second session after the original Act was passed.

Section 43 of Article 33 (section 38 of Act 1896) authorizes nominations to be made otherwise than by a convention or primary election, usually spoken of as independent nominations or those by petition, upon compliance with its requirements. If what is now section 47 is to be held so far directory as to authorize certificates of nominations to be filed at any time, provided they be in time to have them placed on the ballots, or at least in time to enable the Secretary of State to certify them not less than eighteen days before the election, then political parties and individuals can ignore the time fixed by the statute and consult their own convenience instead of obeying the requirements of the law. The Secretary of State may have, after the twenty-five days limit, prepared his certificates for the various Boards of Supervisors of Elections, but some political party or some individual or individuals could under the construction of the appellees still file such certificates of nomination and require him to certify them, regardless of the inconvenience or possible expense and confusion caused by the delay and of the fact that the Legisla-

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ture manifestly deemed it important to have it known by the voters, as early as possible, who the nominees were.

If section 47 is to be deemed merely directory as to the certificates of nomination to be filed with the Secretary of State, it must be equally so as to those to be filed with the Supervisors of Elections. They are required by section 49, which was section 44 of Act of 1896, to publish at least eight days before the election the nominations to office which have been filed with them or certified to them under the provisions of Article 33. The ballots are required to be printed, and in possession of the supervisors at least four days before election day, which necessarily requires some days in advance of that time, for the proper arrangement and printing of them. As very many nominations are often made, it is evident that the Legislature was wise in amending section 47, so as to fix fifteen instead of ten days for the filing of certificates of nomination with the supervisors. It would certainly be remarkable if political parties or individuals could ignore the provision fixing fifteen days as the time and file the certificates, for example, ten days before the election,—the time limit which the Legislature by the amendment clearly indicated was not in its judgment sufficient, and which the Court can itself see might not be for many, perhaps most, general elections.

What is now section 51 of Article 33 (section 46 of Act of 1896) also strongly indicates that the Legislature did not intend the provisions of section 47 to be merely directory. It makes provisions for filling vacancies and so much of it as we deem necessary to quote is as follows: "Should any person so nominated die before election day or decline the nomination, as in this article provided, or should any certificate of nomination be or become insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, pro-

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ceed to fill the same; the chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination." After providing that the certificate shall be executed and acknowledged in the manner prescribed for the original certificate, it says that it "shall, except in case of a nominee dying, be filed at least eight days before the day of election, and in cases of either resignation or death shall be filed within six days after the vacancy shall have occurred, and upon being so filed shall have the same force and effect as an original certificate of nomination." It then continues: "When such certificate shall be so filed with the Secretary of State, he shall, in certifying the nomination to the Supervisors of Elections, insert the name of the person who has been thus nominated to fill a vacancy in place of that of the original nominee; and *in case he has already sent forth his certificate* he shall forthwith certify to the supervisors the name and description of the person so nominated to fill a vacancy," etc.

It is clear from those provisions that the Legislature believed and intended that the times mentioned in section 47 were imperative, for if a certificate could be filed after the times named in 47, provided it be filed early enough to enable the officers of the law to perform their duties, then why did the Legislature expressly make provision for the Secretary of State inserting the name of the person nominated to fill the vacancy in his certificate to the supervisors and provide for an additional certificate in case he had already sent the regular one? If the certificate of nomination can be filed after the time named in 47, there would be no occasion for a vacancy by reason of the certificate being or becoming insufficient or inoperative, for it could be amended and refiled and made sufficient and operative—certainly before the Secretary

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had complied with section 48. Yet the Legislature provided for such a vacancy, which could only have been on the understanding that section 47 drew the line which was to be observed. Other provisions in section 51 might be cited to show that the Legislature did not intend to allow the certificates to be filed after the times named in section 47, unless they so expressly authorized.

We stated, in the *per curiam* order filed already, that the committee of the Progressive Party could, under the authority vested in it to fill vacancies, make the nomination under section 51. The language of the statute—"should any certificate of nomination be or become insufficient or *inoperative from any cause*"—seemed to us sufficient to justify that conclusion, as we deemed the certificates of nomination inoperative because they were not filed in time, and our construction is supported by a number of decisions of other States where there are similar statutes. In *People* v. *Hartley,* 170 Ill. 370, S. C. 48 N. E. 950, the county clerk, who was the officer with whom the certificate of nomination was to be filed, refused to place the names on the ballot because it was not filed thirty-days before the election. The Central Committee then filled the alleged vacancies by nominating the same persons for the offices in question. The statute provided that, "In case a candidate who has been duly nominated under the provisions of section six (6) of this Act die before election day, or decline the nomination, as in this Act provided, or should any certificate of nomination be held insufficient or inoperative by the officer with whom they may be filed, the vacancy or vacancies thus occasioned may be filled," etc. The Court held that the refusal of the County Clerk to place upon the official ballot the names of the candidates nominated by the Convention because the certificate was not filed thirty days before the day of election was in effect a holding that the certificate of nomination was inoperative, and that vacancies so caused could be filled by the Central Committee. In *Bower* v. *Clemans,* 61 Kan. 129, s. c. 58 Pac. 969, the statute was practically in the same language as that of Illi-

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nois and the same conclusion was reached by that Court. In *Reese* v. *Hogan,* 117 Iowa, 603, s. c. 91 N. W. 907; *State* v. *Hogan,* 24 Mont. 397, s. c. 62 Pac. 683, and *State* v. *Clark,* 56 Neb. 584, s. c. 77 N. W. 87, the statutes were in effect the same as ours—providing that when certificates were insufficient or inoperative the vacancies could be filled—and the same conclusion was reached by the Courts of those States. It is true they did not determine whether the times named were directory or mandatory, but they in effect justified the action of the officers with whom the certificates were filed, in refusing to put the names on the ballots, because the certificates were not filed within the times named, as the decisions were based on the ground that vacancies had been thereby created. It could only be said that certificates of nomination had become inoperative, by reason of not being filed in time, on the theory that the time named in the statute fixed the latest date at which they could be filed, as manifestly if they could be filed after such time they were not inoperative.

It may be contended that such a construction of section 51 will enable political parties to avoid the requirements of section 47, but it is not likely that a political party will deliberately and intentionally render its certificates of nomination inoperative, or that its nominees would consent to such a course. It is difficult to see any advantage a party could obtain by postponing the filing of such certificates, especially as it can only get the names on the ballots by filling the vacancies under the terms of the statutes, which would result in additional and unnecessary trouble, and in many cases in useless expense. Certain it is that the original nominees would not be benefitted by having the certificates filed later than the times named in section 47, and it would be possible that others might be nominated in place of all or some of them.

But however that may be, the language of the statute is very broad—"insufficient or inoperative *from any cause*"—and the authorities we have found are all one way in the construction of such a provision. The object of the Legislature was to prevent political parties from being deprived of hav-

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ing their candidates on the official ballot, and inasmuch as it had named the time within which the certificates of nomination must be filed, and then, as construed by us and other Courts, treated as vacancies the places not filled by certificates filed within such times, it must follow that the times named were not intended to be merely directory.

We have not thought it necessary to refer to the many decisions in this State and elsewhere on the general question when provisions in statutes shall be deemed directory and when mandatory, but we are of the opinion that the times named in section 47 must be complied with, in filing such certificates of nomination as are included in it. The general rule apparently is that statutory provisions in regard to the time of filing certificates of nomination are mandatory; 15 *Cyc.* 338 and 10 *Am. & Eng. Ency of Law,* 638 and 654, and cases cited in the notes. It is certainly safer and better to require such certificates to be filed by the times named in the statute than to leave it to the discretion of the officers with whom they are to be filed, to accept or reject them, as they may think it would be in time to enable them and other officers of the law to properly perform their duties. As the Legislature has been very liberal in providing for filling vacancies, there can be but little danger of the nominees of any political party having injustice done them by our construction of the statute.

It was, however, contended on the part of the appellees that section 47 did not apply to them, as they were nominated under the provisions of what was originally section 160K, now section 188 of Article 33, as amended by Chapter 2 of the Acts of 1912. That section concludes as follows: "Any vacancy which may exist in respect to any office, delegates to conventions or position named in this sub-title occurring after the returns have been canvassed and finally announced, or which may exist by reason of there being no candidate for the same in any such primary election or otherwise, shall be filled as the rules and regulations of the governing bodies for the respective parties in the counties, city or State, may now

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or shall hereafter provide." That section is a part of the subtitle, "Primary Elections," added to Article 33, title "Elections." As originally enacted Ch. 737, Laws of 1908, p. 103, the provision was simply, "Any vacancy which may exist in respect to any office or position, after the returns have been canvassed and the final result announced, shall be filled," etc. By Ch. 741, Laws of 1910, p. 113, the Act of 1908 was repealed and new sections enacted in place of those in it, and section 160K concluded with the provision quoted above. Then by Chapter 2 of laws of 1912, a number of those sections were amended, including 160K, but the provision as to vacancies was continued as it was adopted in 1910. The clause added, with which we are now concerned, is, "Any vacancy * * * which may exist by reason of there being no candidate for the same in any such Primary Election." The provision for filling vacancies was a wise, and perhaps necessary one by reason of the fact that prior provisions of the primary election laws were so broad and comprehensive that there would have been some question as to the right to fill at least some of the vacancies in any way other than by primary elections. The primary election law did not fix the times when certificates of nominations should be filed, but section 160K (188 of Article 33) provides that "All nominations to be made by such conventions shall be made in like manner and certified as required by this article." When then we turn to other parts of Article 33 we find section 47 which requires certificates of nomination to be filed at the times named "Except in cases provided for by section 51 and cases of special election to fill vacancies in office caused by death, resignation or otherwise." Manifestly, vacancies which exist by reason of there being no candidates for the offices at the primary elections are not embraced in section 51, and they are the vacancies which the appellees contend existed. No reason was suggested why the certificates of the original nominations could not have been prepared and filed within the time fixed by section 47, and such as these could ordinarily be easily so prepared and filed, but however that may be, in

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our judgment as section 160K fixes no time and the certificates did not come within the exceptions to section 47, the time fixed in the latter applied to them.

Inasmuch as the Attorney-General and the attorneys for the appellees requested us to determine whether the committee of the Progressive Party could still make nominations for these offices and file certificates of the same under section 51, and as the time was so short that it would have been difficult, if not impossible, to have had a decision by us early enough to be of use, after the committee had made nominations and filed the certificates under section 51 and the question had been passed on by the lower Court, we expressed our views on that subject in the *per curiam* order, and as we have said above, we were of the opinion that the committee could proceed under section 51. The conclusion reached by us, therefore, did not prevent this party from having nominees for the three offices on the official ballot, and we can see no reason to fear that our construction of section 51 will lessen the importance of section 47, but if it does the Legislature can make such changes as it deems proper to avoid that result hereafter.

For the reason stated the order directing a mandamus to issue was reversed and the petition dismissed by the *per curiam* order heretofore filed.

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LORA M. L. CORTLAND THOMAS ET AL.

vs.

JAMES WAKEFIELD CORTLAND.

Undue influence: effective at time of execution of will; issues for jury; prayers; refusal of correct.

Where the evidence is legally sufficient to meet the burden of proof, but is conflicting, it is exclusively within the province of the jury to weigh it, upon proper instructions from the Court upon the law applicable to the facts of the case, and the jury's conclusion of fact cannot be reviewed on appeal, and must stand, unless there was substantial error in the ruling of the Court. p. 672

Unless the influence which the law terms "undue influence" was effective at the time the will was executed, the will cannot be said to be the product of undue influence. p. 675

Where issues involving the question of whether undue influence was exerted to affect the execution of a will are sent to a jury for determination, prayers are erroneous which, in submitting the question to them, do not limit the consideration as to whether *at the time the will was executed* the testator was affected by such influence. p. 675

But a prayer that requires the jury to determine from the evidence whether the testator was influenced by the caveatee or some other person in making the disposition of his estate shown by the will, is not open to objection on that ground. p. 675

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But such undue influence, to effect the validity of a will, need not be exerted *immediately* and *directly* at the time at which the will was actually being executed. p. 675

Prayers should be drawn with all the brevity consistent with a clear, accurate statement of the law affecting the facts of the case, and prolixitiy or unnecessary repetition tend rather to confuse than to enlighten the jury. p. 676

Unless it appears that the party was injured by the refusal of his prayer, such ruling, even though erroneous, can form no ground for a reversal. p. 675

Decided December 2, 1913.

Appeal from the Superior Court of Baltimore City (HEUISLER, J.).

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, STOCKBRIDGE, URNER and CONSTABLE, JJ.

Edgar Allan Poe (with whom were *J. Kemp Bartlett*, *L. B. Keene Claggett* and *R. Howard Bland* on the brief), for the appellant.

W. Thomas Kemp and *George Whitelock*, for the appellee.

THOMAS, J., delivered the opinion of the Court.

This appeal is by the caveators, plaintiffs, from the ruling of the Superior Court of Baltimore City in the trial of issues concerning the will of James Cortland.

The record contains but one bill of exceptions, and that refers only to the action of the Court below in rejecting the

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plaintiffs' prayer and to the granting of the "Court's Instruction," both of which relate to the issue of undue influence.

In order to understand the question we are to consider, it will be necessary to refer briefly to some of the evidence in the case. But in doing so we are not to be understood as emphasizing that part of the evidence to which we shall allude, or as expressing any opinion in regard to its weight. Where the evidence is legally sufficient to meet the burden of proof but is conflicting, it is exclusively within the province of the jury to weigh it, under proper instruction from the Court upon the law applicable to the facts of the case, and the jury's conclusions of fact cannot be reviewed on appeal, and must stand unless there was substantial error in the ruling of the Court.

The testator executed the will in question when he was eighty-four years old, and died about two years later at his home on Park avenue, in Baltimore City, leaving an estate valued at about $85,000.00. The will was dated the first of June, 1908, and at that time the testator had one son. James Wakefield Cortland, the appellee, a daughter, Mrs. Norton, and four grandchildren, viz: Mrs. Diggs, Mrs. Thomas, Ethel C. Cortland and Clinton W. Cortland, children of Samuel C. Cortland, who died in 1904. The entire estate was left to the son, who was unmarried, and the daughter, who was a widow without children, both of whom were living with the testator when the will was executed. At that time Mrs. Norton was in bad health and died in 1909. The will provided that in case she died before the testator her share of the estate should go to his son, and under the terms of the will he will receive the whole estate. Mrs. Diggs, Mrs. Thomas and Clinton W. Cortland filed a caveat, and the usual issues were sent to the Superior Court of Baltimore City for trial. The real ground upon which they assail the validity of the will is that it was procured by undue influence exerted by James Wakefield Cortland, the caveatee. According to the evidence produced by the plaintiffs their father deserted them in 1896, and their mother was compelled to resort to keeping a boarding house

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in Washington, D. C. They had been educated at the expense of the testator, and Mrs. Diggs and Mrs. Thomas lived with him for some years before they were married. He had always been fond of them, and was "on affectionate terms with" them at the time of his death. Mrs. Diggs' husband failed in business in 1902, and he then moved to Philadelphia, where he and his family lived "in straightened circumstances" from that time until after the death of the testator. Mrs. Thomas, whose marriage was an unhappy one, lived with her mother in Washington. Her health became seriously impaired, and from 1907 to 1909 she was practically confined to her bed. The testator frequently stated that he loved his grandchildren and that he wanted to help them, but that his son did not want him to do so. He told Mrs. Diggs in the spring of 1908 that he had made provision for his grandchildren; that his son did not want him to do it, and wanted the testator to leave his estate to him to provide for them, but that he would see that it was carried out his way. In May, 1908, Mrs. James met the testator near his home on Park avenue. She had assisted Mrs. Diggs during sickness in her family for a number of years. The testator had known her father and was apparently fond of her. He spoke to her and asked her if she would not go into his house with him, saying that his son was out, and that he would like to have a little talk with her. She helped him up the steps of the house, and when they were seated in the parlor he said to her: "Clara, I want to tell you something and I want you to remember this. It will come in some day, and when you see Mrs. Diggs tell her what I say. I love my grandchildren; I love them all. I have made provision for my grandchildren; I have made provision for them all. But they don't want me to do with my money as I want to do with it. Wake wants me to leave my money with him to divide among my grandchildren, but as long as I have the power and strength I am going to have it my way." At that point someone opened the front door of the house; the testator became very nervous and indicated to her to keep quiet. His son, Wake, the caveatee,

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came in and told his father to go to his room and lie down. After the testator left the parlor the caveatee told Mrs. James not to talk to his father any more; that he was getting old and childish, and did not know what he was talking about. The will in controversy was executed about two weeks later. It was in the handwriting of the testator, and was "executed in duplicate." There were also two drafts of the will in his handwriting, and they were found in an envelope endorsed in the testator's handwriting as follows: "The will of James Cortland, November 23rd, 1905. Null and void—see will of June first, nineteen hundred and eight." The execution of the will in question took place in the office of Alexander Yearly & Son, and the caveatee states that he accompanied his father to the door of Mr. Yearly's office and waited on the outside until he came out, when the testator told him that he had signed his will, and said to him, "and you will be satisfied."

The appellants say in their brief that all of the issues were abandoned at the trial except the issue of undue influence, and the record shows that that was the only issue submitted to the jury.

At the close of the testimony the plaintiffs, caveators, asked for but one instruction, as follows:

"The plaintiffs pray the Court to instruct the jury that if they shall find from the evidence that James Cortland was influenced by his son, James Wakefield Cortland, or by any other person, in making the disposition of his estate shown by the will offered in evidence; and if they shall find from the evidence that said influence was such as the said James Cortland was too weak or too feeble to resist, and that it deprived him of the power to dispose of his estate according to his own judgment and free will and unconstrained act in reference to the amount and situation of his estate and the relative claims of different persons who were, or should have been, the objects of his bounty, then said influence, if found by the jury, was undue influence, and they should find for the plaintiffs on the third issue, and their answer thereto

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should be 'yes;'; and that it is not necessary, in order that they should so find, that such undue influence, if found by them, should have been immediately and directly exerted at the particular time at which the will was made."

The Court below refused to grant this prayer, and in lieu thereof, and of the defendant's sixth and seventh prayers, granted the instruction to which we shall hereafter refer.

Learned counsel for the appellee earnestly contend that the prayer was properly rejected by the Court below because it was calculated to mislead the jury by directing their attention to the proposition that undue influence need not be "directly exerted at the particular time at which the will was made," without further instructing them that such influence, in order to invalidate the will, "must nevertheless be operative upon the testator's mind in the very act of executing it."

It must be conceded that unless the influence, which the law denounces as undue influence, was effective at the time the will was executed, the will cannot be said to be the product of that influence, and it is equally clear that if the plaintiffs' prayer failed to require the jury to find that the testator, at the time the will was made, was impelled by such influence it was fatally defective, regardless of the added instruction. But we do not think that the prayer was open to the objection urged by the appellee. The first question the jury were required to determine from the evidence was whether the testator was influenced by the caveatee, or some other person, "in making the disposition of his estate shown by the will." He could not have been influenced by his son, or some other person, *in making his will*, unless that influence *operated* upon him at the time the will was executed, and the obvious requirement of the prayer was that the jury should find from the evidence that the testator was, at the time the will was made, acting under the influence referred to. That being the plain meaning of the first part of the prayer, there was no reason for repeating it because of the instruction that it was not necessary for the jury to find that the undue influence

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was "immediately and directly exerted at the particular time at which the will was made." Prayers should be drawn with as much brevity as is consistent with a clear and accurate statement of the law applicable to the facts of the case, and undue prolixity or unnecessary repetition tend rather to confuse, than to enlighten the jury. The prayer presented by the plaintiffs in this case, with the exception of that part to which we have just referred, is practically the same as the plaintiff's first prayer in *Hiss* v. *Weik,* 78 Md. 439, which was as follows: "That if the jury shall find that Edward R. Ames was influenced by his daughter, Anne Ames Hiss, in making the disposition of his estate, shown by the will offered in evidence, and if they find that the extent of her influence over him in that respect was so great as to deprive him of the power to dispose of his estate according to his own judgment and free will in reference to the amount and situation of his estate and the relative claims of different persons who were or should have been the objects of his bounty, then said influence, if found by the jury, was undue influence, and they should find for the plaintiff on the first and second issues." JUDGE MCSHERRY, referring to that prayer, said: "The appellee's instruction accurately defined undue influence as understood in its legal sense, and left to the jury to find from the evidence the existence of the facts necessary to constitute such influence." The rulings of the Court below in that case could not have been affirmed by this Court except upon the theory that the plaintiff's first prayer, which we have just quoted, required the jury to find that the will there involved was the result of undue influence operating upon the testator at the time the will was executed.

The last proposition contained in the prayer of the plaintiffs in the case at bar received the sanction of this Court as early as the case of *Davis* v. *Calvert,* 5 G. & J. 269, and was again affirmed in *Moore* v. *McDonald,* 68 Md. 321. In both of those cases the Court held that it was not necessary that the undue influence should have been exerted at the time the will was executed, and in the *Davis Case* an instruction to

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that effect was, at the instance of the plaintiff, added by the Court below to the defendants' sixth prayer. It is the fact that a will was made in obedience to the dominating and controlling influence of another that invalidates it, and it can make no difference whether that influence was immediately exerted at the time of its execution or prior thereto. The plaintiffs' prayer submitted to the jury the question whether the testator was influenced by the caveatee, or some other person, in making his will, and after correctly defining undue influence, properly instructed them that in determining whether the will was procured by undue influence, it was not necessary for them to find that such influence, if found by them, was exerted at the time the will was made.

The remaining question to be determined is whether the plaintiffs' prayer is fairly covered by the instruction granted in lieu thereof, and of the defendant's sixth and seventh prayers, for unless the plaintiffs were injured by the rejection of their prayer there is no ground for a reversal of the ruling of the Court below. That instruction was as follows:

"The Court instructs the jury that the influence which will avoid the will of a testator must have been exerted on the testator to such a degree as to have amounted to force or coercion, destroying his free agency, or by importunities that could not be resisted, so that the motive was equal to force or fear. It must not have been the influence of affection or attachment, or the mere desire to gratify the wishes of another, for that would be a very strong ground in favor of the testamentary act, and the burden of proof is upon the caveator in this case to show not only that such influence existed, but that it was exerted for the purpose of procuring the execution of the will offered in evidence in this case and that the same was obtained by means of undue influence so exerted."

Without questioning the correctness of the legal proposition presented by this instruction, it is apparent that it entirely ignores the instruction sought in the conclusion of the plaintiffs' prayer. Prayers should be framed with reference to the evidence in the case so as to furnish a guide to the jury

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in the determination of the questions of fact submitted to them. The evidence produced by the plaintiffs tending to show the exercise of undue influence referred only to the caveatee and his sister, Mrs. Norton. There was no evidence to show that they were present when the testator made the will. On the contrary, it appears that neither of them was in Mr. Yearly's office when the will was executed. Under such circumstances the instruction asked for by the plaintiffs in the concluding lines of their prayer was important for the proper presentation of their theory of the case to the jury, and the refusal of the Court below to grant it was calculated to injure them, especially in view of the instruction granted in the defendant's ninth prayer, not referred to in the plaintiffs' exception, in which the jury was told that discordance between the provisions of the will and the previously or subsequently avowed intention of the testator would not alone authorize the overthrow of said will if the jury found that the testator, at the time of its execution, was *then* free from the *exercise* of undue influence.

As the plaintiffs' prayer was free from objection and was not covered by the Court's instruction, the ruling of the Court below must be reversed.

Judgment reversed and case remanded for a new trial.

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JOHN B. MARTIN

vs.

JAMES M. MUNROE, Admr. of the Estate of Louisa May Martin, Deceased, JOHN F. MARTIN and SUSANNA V. MARTIN.

Savings bank deposits: by husband for and in name of wife; title; surviving husband; administration. Evidence: conversations and transactions with deceased party.

Certain earnings and savings of a wife, together with certain moneys, gifts from her husband, were deposited by the latter to the wife's account in a savings bank; the wife could not write, and her signature was written by the husband in the identification book; when withdrawals were made, it was always by check drawn to the order of the wife and signed and endorsed by the husband in her name; *held*, that the authority possessed by the husband to withdraw the money of the wife at his pleasure did not invest him with the ownership of the account. p. 683

The bank was the depository of her savings and of the perfected gifts by the husband, and her title thereto was not divested merely because her incapacity made it necessary and proper for her husband to have entire charge of her interests. p. 683

The husband's management of the account was to be attributed to his implied agency for his wife, and not to the assertion for himself of an absolute ownership of the money; his right to withdraw the fund could be exercised only in her name and by virtue of an express or implied agency. p. 683

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In such a case, upon the death of the wife intestate, the balance of the moneys so deposited to her account, passed to her estate, and was not to be treated by the husband as his own. p. 684

In a proceeding by a surviving husband for certain moneys which had been deposited by him in bank to his wife's account and in her name, it was *held*, that under section 3, Article 35, of the Code of 1912, prohibiting a party to a cause from testifying as to any transaction had with or statements made by a decedent, etc., his testimony was inadmissible to show that all of such deposits were made with his individual money, and that his wife never had any interest in the account. pp. 684-685

Proof by other witnesses as to declarations by the wife, made a short time before her death, referring to the deposits to her credit as owner, and as being subject to her right of disposition, but which were made out of the presence of her husband, were held to be inadmissible. p. 685

The authority of an agent is presumed to be consistent with the interest and title of his principal. p. 684

Decided December 2nd, 1913.

Appeal from the Circuit Court for Anne Arundel County, in Equity (BRASHEARS, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

Jerry L. Smith and *Nicholas H. Green*, for the appellant.

Robert Moss and *James M. Munroe*, for the appellees.

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URNER, J., delivered the opinion of the Court.

In January, 1894, an account was opened in the Annapolis Savings Institution in the name of Louisa May Martin. At the time of her death in November, 1909, the balance credited was $6,030.50. The ownership of this fund is the subject of the present litigation. The appellant, who is the surviving husband of the decedent, claims the deposits on the theory that they were made exclusively with his individual money, that the account was always subject to his control, and that no gift of the funds was ever intended. This claim is resisted by the two children of the appellant and of his deceased wife, who assert that the account represents in large part their mother's own savings from a business conducted by her for many years, and that any contributions which their father may have made to the deposits must be regarded as completed gifts. Shortly after the death of his wife the appellant withdrew the money under an order which he signed in her name. He later paid it over to the appellee administrator, who now holds it subject to the determination of the question of title. A bill in equity against the other parties interested was then filed by the appellant claiming the ownership of the fund upon the grounds stated. The Court below was unable to sustain the claim upon the proof in the case, and the record is before us upon appeal from a decree dismissing the bill. There are exceptions to certain portions of the testimony, and we shall accordingly recite only such facts as are established by what we regard as the weight of the competent evidence.

When the account now in dispute was opened in 1894 the appellant was a harness dealer and his wife kept a small confectionary store. They withdrew from these enterprises in the course of a few years, and since 1897 Mr. Martin has been conducting a saloon, while Mrs. Martin was engaged in the work of providing sandwiches and other edibles for sale at the bar. The part of the business in which his wife was thus interested was treated as her independent undertaking, and the profits, amounting at times to as much as fifteen dollars

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per week, were regularly set apart as belonging to her individually. Her savings from this source during the long period indicated must have been considerable, as she was a frugal and thrifty woman and her husband was able to support the family without aid from her earnings. The evidence shows that Mrs. Martin could not read or write. The account in the Annapolis Savings Institution was opened in her name by her husband and her signature was written by him in the identification book. She was not present at the bank on that or any other occasion. The sums deposited from time to time were usually taken to the bank by Mr. Martin or by a messenger. The appellant's son, John F. Martin, testified that he was occasionally sent there by his father to deposit some of his mother's savings. There were a number of withdrawals from the account, and these were invariably made by checks drawn to the order of Mrs. Martin and signed and endorsed by her husband in her name. There is no suggestion as to the existence of any other assets representing her accumulated profits, and we can have no doubt, upon the record before us, that they were placed in the Savings Institution.

The appellant had an account in his own name in The Farmers' National Bank of Annapolis. It is shown by the proof that checks on this account were drawn by Mr. Martin to the order of his wife and were endorsed by him in her name for deposit to her credit in the other bank. According to the testimony of the son, John F. Martin, some of these checks were given for his mother's savings which his father had held for a time. But the aggregate of the checks drawn by the appellant on the Farmers' National Bank and deposited to the credit of Mrs. Martin in the Annapolis Savings Institution apparently exceeded the total amounts she could reasonably be supposed to have derived from her business. To the extent of this excess the deposits so entered may have been intended as re-payments of the withdrawals to which we have referred, or they may have been made simply as gifts from the husband to the wife. In either event they were placed by the appellant to his wife's credit in a bank

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account which was not only kept in her name, but in which her own money was currently deposited.

In view of the conditions we have described the appellant's contention is clearly not sustainable. If his wife had survived *him,* there is obviously no legal or equitable principle upon which her title to the fund could be denied. If his claim to the deposits were to be now recognized after her death, it would have to be solely upon the ground that the bank account of his illiterate wife was subject, while she lived, to his unrestricted control. The decision of the case could not justly be based upon such a theory. The authority possessed by the husband to withdraw the money of the wife at his pleasure did not invest him with the ownership of the account. It was the depositary of her own savings, and her title was not divested merely because her incapacity made it necessary and proper for her husband to have entire charge of her interests. If it be assumed that some of the deposits to the credit of Mrs. Martin in the Savings Institution were made by the appellant with his own funds, upon which his wife originally had no claim, the amounts so placed in her account must, under the circumstances, be regarded as perfected gifts, and they could not properly be held to have been deprived of that character simply because of the husband's ability to make withdrawals. His management of the account must be attibuted to his implied agency for his wife and not to the assertion for himself of an absolute ownership of her money. If Mrs. Martin had been capable of attending personally to her finances and had been in actual control of her funds in bank, it is clear that deposits by her husband to her credit and subject to her order in her current account would be presumed to be completed donations. In such case the subject of the gifts would plainly have passed under the dominion of the donee and beyond the donor's power of recall. This, in its essential legal aspects, is the condition with which we have now to deal. It is proven in the case that according to the practice of the Savings Institution money could not be withdrawn from an account except upon the order of the per-

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son to whose credit it was entered. The checks upon Mrs. Martin's account were drawn and endorsed in her name by her husband, and were honored by the bank, upon the evident theory that he was invested with authority from his wife for that purpose. His right to withdraw the funds could be exercised only in her name and by virtue of an express or implied agency. The authority of the agent is presumed to be consistent with the interest and title of his principal, and in such a case as the present we can have no difficulty in holding that deposits by the husband in the wife's bank account were not ineffective as gifts simply because her affairs were of necessity left so completely in his hands.

There is no occasion to review in this opinion the various cases to which we have been referred upon the subject of gifts in the form of bank deposits. The decisions cited were all governed by circumstances which differed materially from those now under review. The principles relating to gifts *inter vivos* are too well settled and familiar to require discussion. The only question in any case is as to their application to the particular facts. Upon the present record we have been unable to reach any other conclusion as to the title to the money in dispute than the one we have indicated.

The testimony of the appellant has been excluded from our consideration of the case in so far as his statements relate to the ownership of the fund. It is provided by Article 35, section 3 of the Code that in such an action as the present no party to the cause shall be allowed to testify as to any transaction had with or statement made by the decedent, except under conditions which do not here exist. It has been urged that the appellant's testimony is admissible because it describes transactions which occurred with the Savings Institution and not with his deceased wife. In our view of the case the prohibition of the statute is clearly applicable. The effect of the appellant's narrative, if admitted, would be to show that all of the deposits to his wife's credit were made with his individual money and that she never had any interest in the account. It is difficult to see how any evidence could more

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immediately affect her rights. The disposition by the appellant of funds deposited in his wife's name and subject to her order could hardly be regarded otherwise than as a transaction with the wife, and his denial of her interest in the account is not sufficient to exempt him from the disqualification of the statute.

We have likewise excluded, under the Code provision cited, the testimony of the appellee, John F. Martin, as to acts and declarations of his mother in reference to the earning and deposit of the profits from her business. It has not been necessary, however, to disregard the statement of this witness as to his being sent to bank by his father with his mother's savings. This related to a transaction between the witness and a living party to the suit, and it is not affected by the terms or intent of the Act.

Objection was made to the proof by other witnesses of declarations by Mrs. Martin a short time before her death, referring to the deposits to her credit in bank as her own and as being subject to her right of disposition. These assertions of ownership appear to have been made out of the presence of her husband, and in view of previous decisions of this Court they have not been considered. *Duvall* v. *Hambleton*, 98 Md. 12; *Taylor* v. *Brown*, 65 Md. 371.

Upon the admissible evidence in the case we concur in the conclusion of the learned Court below, and the decree will accordingly be affirmed.

Decree affirmed; the costs to be paid out of the fund.

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MARYLAND CASUALTY COMPANY, A CORPORATION,

vs.

STEVES J. LACIOS, TRADING AS STEVES LACIOS & CO.

Mechanics' liens: statutory remedy; Baltimore City; labor only; entire contracts.

The right to a mechanics' lien for labor, work done and materials furnished, under the law, is not a vested right, but is a remedy only created by positive statutory enactment. p. 690

The right to a lien depends entirely upon the statute, and the party seeking the remedy for the lien must come within its provisions. p. 690

In Baltimore City, under an indivisible building contract, including the furnishing of materials and labor, there is no lien for the payment of the labor furnished any more than for the materials supplied. pp. 690-691

Under an entire contract for both labor and materials furnished in painting a structure, the fact that the party, a subcontractor, doing the work, agreed to buy the paint from the con-

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tractor who was erecting the building, and to deduct the cost from the consideration in the contract, did not change the character and nature of the contract, so as to give a lien for labor only. **p. 693**

Decided December 2, 1913.

Appeal from Circuit Court No. 2 of Baltimore City (GORTER, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

S. S. Field (with whom were *John S. Biddison* and *John B. Gontrum* on the brief), for the appellant.

Fielder C. Slingluff and *T. Rowland Slingluff* submitted the case on a brief filed for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is a proceeding in equity to enforce an alleged mechanics' lien for labor and materials furnished upon a "Tower Building" owned by the appellant and situate in the City of Baltimore.

The appellant is a corporation, duly incorporated, under the laws of the State, and is engaged in casualty insurance and other business connected therewith, in Baltimore City.

The appellee is a resident of the State of New York, and conducts the business of painting structural steel work, under the name of Steves J. Lacios, trading as Steves Lacios and Company and was a sub-contractor of Kellogg and Park, Inc., a corporation of the State of New York, to paint the structural steel work on the building owned by the appellant company.

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The painting of the building was completed by the appellee under the contracts, and was approved by the architect, and the general contractor for the erection of the building.

Kellogg and Park, Inc., were insolvent at the date of the completion of the work and upon demand, failed to pay the appellee. Thereupon, the notice required by the statute, under Article 63 of the Code, was served upon the appellant, the general contractor and the sub-contractors, of a lien claim under the Mechanics Lien Law, of $714.47 against the grounds and building owned by the appellant.

On the 15th of April, 1912, the appellee's lien claim was recorded in the office of the Clerk of the Superior Court of Baltimore City, and on the 1st day of June, 1912, these proceedings were instituted to enforce the lien.

The lien claim of the appellee is set out in the record, as Exhibit A, and embraces the following items:

March 23, 1912.

Kellogg and Park, A Body Corporate, to Steves J. Lacios, Trading as Steves J. Lacios and Company,
Dr.

To painting 1,094 tons of structural steel framework on Maryland Casualty Company's building, on the north side of Baltimore Street, Baltimore, Md., and adjoining on the west, the building now occupied by said company located at the northwest corner of Baltimore Street and Guilford Avenue, Baltimore, Md., as per proposal of June 3, 1911, and acceptance of same of August 22, 1911, with one coat of paint at 43 cents a ton..........................	$470.42
To painting 1,094 tons of structural steel framework on the above-named building as per proposal of October 19, 1911, and acceptance of the same of October 24, 1911, with an additional coat of paint at 50 cents	547.00
Total..............................	$1,017.42

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Cr.

By paint and thinner furnished by Kellogg and Park as per above-named proposals and acceptances, being all the materials used by said Steves J. Lacios under said contracts in doing said work, as per said Kellogg and Park's bill of January 4, 1912, to wit:	
October 5, 1911..................$63.25	
October 19, 1911.................. 62.70	
October 30, 1911.................. 10.25	
December 7, 1911.................. 79.75	
	$224.95
	$792.47
By paint returned to Kellogg and Park of Baltimore, Md..........................	22.00
	$814.47
By payment on account, January 4, 1912...	100.00
Balance due	$714.47

The two contracts between Kellogg and Park, and the appellee for the painting of the structural steel are embraced in four letters filed as exhibits in the case; and with the testimony upon the part of the plaintiff and defendant, in connection therewith and set out in the record, form the basis of this controversy.

The defense relied upon to defeat the plaintiff's claim, is fully stated in the 5th paragraph of the defendant's answer to the bill, and is as follows: That the claim of the plaintiff, which is sought to be made the basis of a mechanics' lien against the property herein mentioned, arose out of one entire and indivisible contract between the plaintiff and Kellogg and Park for furnishing labor and materials for one entire consideration, and that the action of Lacios, in now endeavoring to divide the contract into two parts, one for material and one for labor, is entirely unauthorized and unwarranted. And that the application of Lacios of the respective credits set out

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in "Exhibit A," filed with his bill of complaint, for and on account of work and labor, exclusive of materials, is unauthorized and was not done by the consent of the defendant, or of Kellogg and Park, the said Dietrich Brothers, or John Waters.

The Court below construed the contracts in this case, as contracts for furnishing work and labor only, and not for both labor and materials. A lien for $675.47 and interest was awarded the plaintiff in the Court below, and from a decree, directing this sum to be paid, the defendant has appealed.

It is settled by numerous decisions of this Court, that the right to a mechanic's lien for labor, work done and materials furnished under the law, is not a vested right, but is a remedy only created by positive statutory enactment. The right to the lien depends entirely upon the statute, and the party seeking the remedy for the lien must come within the provisions of the statute.

The statute, as applicable to Baltimore City gives "a lien for the payment of all debts contracted for work done for or about the same," as specified therein, and it has been distinctly held, that this statute gives a lien to secure compensation for labor only and not for materials furnished. *Dunn* v. *Brager,* 116 Md. 242.

By section 1, Article 63 of the Code, it is provided that: "Every building erected and every building repaired, rebuilt or improved, to the extent of one-fourth its value in Baltimore City and in any of the counties shall be subject to a lien for the payment of all debts contracted for work done for or about the same, and in the counties every such building shall also be subject to a lien for the payment of all debts contracted for materials furnished for or about the same."

In *Dunn* v. *Brager, supra,* it was held, that under this Act in Baltimore City, the mechanics' lien laws apply only for work done and do not apply to contracts for materials furnished. And where a building contract includes furnishing materials as well as labor, and is an indivisible contract,

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there is in Baltimore City no lien for the payment of the labor furnished any more than for the materials supplied.

In *Evans Marble Co.* v. *International Trust Co.,* 101 Md. 210, it was said, that under such a contract there was no enforceable lien whatever.

While the contracts in the case at bar as evidenced by the letters, are somewhat general and indefinite in terms, yet when read and construed in the light of the testimony disclosed by the record, we are of opinion, that they were entire contracts for both labor and material furnished in painting the structural steel framework on the appellant's building.

The fact, that the appellee contracted to buy the paint from Kellogg and Park, Inc., and to deduct its cost from the consideration in the contract between them, to wit, from the contract price of 93 cents per ton of iron, could not change the character and nature of the contract, so as to give a lien for labor only, under the statute.

It is true that the plaintiff testified that under the contracts, he was to furnish labor only, but in this, he is not only contradicted by the other witnesses in the case, but by his former admissions and statements as to the true construction of the contract, prior to the institution of these proceedings.

The witness Ernest D. Kellogg, president of Kellogg and Park, Inc., testified, that the contracts with the plaintiff were at a price which included the furnishing of the paint, labor, tools, scaffolding and brushes and that he purchased the paints from us at $1.10 a gallon.

The witness Goodwin, superintendent for Kellogg and Park, who negotiated the contracts, in answer to the following questions, testified: 16 Q. What was the understanding between you and Lacios in regard to the Maryland Casualty Tower Building? A. I asked him (meaning Lacios) to give me a price for painting the steel work of the building, subject to the same conditions as he had painted the Baltimore Bargain House, which were, he would have to use the same kind of paint and buy that paint through us, and we would deduct the cost of that paint at the rate of $1.10 per gallon from

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any moneys due him for his work on that building. 18 Q. He was to supply the material, do all the work, as I understand it, furnish the brushes, scaffolding, and whatever was necessary? A. Yes.

The witnesses Andrew J. Dietrich and William C. Schanabel testified that the plaintiff, in conversation with them about these contracts, admitted that he was to furnish the material, labor, paint and brushes.

Besides this, the plaintiff testified that he had agreed with Dietrich Brothers to do the same character of work as in this case, at 95 cents per ton and the price to include work, labor and materials.

It is thus apparent from the testimony in the case, and from the interpretation which the parties themselves placed upon these contracts, that they were entire contracts for labor and material upon a building in Baltimore City and as the statute gives no lien except for money due upon a contract for labor only, there can be no recovery in this case.

In 20 *Am. & Eng. Ency. of Law* (2nd Ed.) 359, it is said, when lienable and non-lienable items are included in one entire contract for a specific sum and the value of the lienable and non-lienable items is not apportioned but is made the basis of a lump charge, no lien can be enforced.

In *Evans Co.* v. *Trust Co.,* 101 Md. 218, JUDGE JONES, in speaking for this Court, said: "As the right to the lien depends entirely on the statute, logically there can be no lien for what does not fall within the statutory provision. Now the statute here in question gives a lien to secure compensation for labor only. The contracts in the cases at bar, with the exception mentioned, are for the furnishing of both labor and materials. The compensation to be paid therefor is one entire price or lump sum for both labor and material so as to make indistinguishable what is intended to be paid for labor and what for materials. In a contract of this nature the profits arise out of the whole contract. No specific or definite part of the compensation is earned by the performance of labor alone nor by the furnishing of materials alone.

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In the contemplation of the parties it is the inseparable intermingling of both that earns the compensation. Each dollar of the compensation provided for, is to be paid, and when paid, is for labor and materials so intermingled. How can such a contract be said to fall within the scope and meaning of a statute giving a lien for labor only, and it may be said one passed with that specific design? It seems clear that such a contract does not gratify the terms of a statute which provides only for a lien for the payment of all debts contracted for work done. For the Courts to enforce a lien upon such a contract by undertaking, by extrinsic evidence to fix a definite price for labor performed thereunder apart from its connection with the materials provided for, would be for them to make a contract for the parties which they had not made for themselves, or would be to allow one of the parties to the contract, by undertaking to assign by estimate and approximation a definite price for labor disconnected with the obligation to furnish materials in connection with it, to enforce a contract which he had not made and to which the other party never assented."

If an entire contract for labor and materials could be changed into a contract for labor only, in the manner attempted by the plaintiff, in this case, then the object of the statute will not only be defeated, but the lien law of Baltimore City would be enlarged and extended to cover materials furnished, as well as work and labor.

Being of opinion, that the Court below committed an error, in allowing the lien claim in this case, the decree will be reversed and as there can be no recovery, the bill will be dismissed.

Decree reversed, and bill dismissed, with costs.

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MEMORANDUM.

Cases Designated by the Court Not to be Reported.

EDITH W. ROBBINS*

vs.

ERNEST A. ROBBINS, JR.

Divorce: when granted; adultery; proof; inferences.

The marriage relation is not to be disturbed for any but the gravest reasons, and then only upon such state of facts as show to the entire satisfaction of the Court, that it is impossible for the duties of married life to be discharged.

On a bill for a divorce on the ground of adultery, the burden of proof is upon the plaintiff, and the evidence must establish affirmatively that adultery was actually committed; while direct proof is not required, yet where it is sought to establish the fact from circumstantial evidence, the evidence must lead to the conclusion of guilt as a necessary consequence by a fair inference.

The circumstances, when reviewed together, must be incompatible with innocence; and if reasonably capable of two interpretations, that one which favors innocence will be adopted.

Evidence of a certain malady contracted by one of the parties is not necessarily conclusive proof that such party had been guilty of adultery.

Decided February 2nd, 1911.

Appeal from the Circuit Court of Baltimore City (Dobler, J.).

The cause was argued before Boyd, C. J., Briscoe, Pearce, Schmucker, Pattison and Urner, JJ.

Edgar Allan Poe, for the appellant.

John E. Semmes, Jr., and *Jesse N. Bowen,* for the appellee.

Briscoe, J., delivered the opinion of the Court.

*Reference to this case was accidently omitted from 115 Md., where it should have appeared.

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WILLIAM E. CECIL *vs.* COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY,

AND

G. THOMAS BEASLEY, SHERIFF, *vs.* SAME.

Sheriff's fees: constitutional limitation; office expenses; discretion of legislature; extra fee for applying death penalty.

Chapter 23 of the Acts of 1912, allowing to a sheriff a sum of money for the expenses of his office (in addition to his salary), is not a violation of Article 15, section 1 of the Constitution, limiting the salaries of certain public officers.

Such a matter is within the legislative control; if the amount so appropriated exceeds the actual expenses, the sheriff must account therefor to the Comptroller and pay the excess over to the Treasurer.

The provision in the Act allowing the Sheriff, besides his salary, a fee of $300 for executing the death penalty, is unconstitutional.

Decided April 30th, 1913.

Two appeals from the Circuit Court for Anne Arundel County (BRASHEARS, J.).

The causes were argued together before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

W. Hallam Claude and *Robert Moss*, for the appellants.

Ridgely P. Melvin, for the appellees.

STOCKBRIDGE, J., delivered the opinion of the Court.

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ABORTION.

Evidence.

In a trial on a charge of having committed an abortion upon the prosecuting witness, the State may offer evidence tending to prove that the traverser had had connection with her prior to the alleged commission of the offense; but it is error for the State to show that the traverser had had connection with other women, either by the testimony of the prosecuting witness, or by that of the women themselves. *Avery v. State.* p. 231

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1. Parol evidence.

When a contract is reduced to writing, the presumption is that the entire actual agreement of the parties is contained in it, and parol evidence as to any negotiations or covenants prior to its execution is not admissible to vary or explain it.

Fowler v. Pendleton. p. 301

2. When a deed or mortgage regular in appearance and bearing a genuine signature and the duly certified acknowledgment of the grantor or mortgagor is attacked, the evidence to impeach it must be clear and convincing. *Fowler v. Pendleton.* p. 301

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ADMINISTRATORS *d. b. n.* See DECEDENTS' ESTATES.

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Neither under section 74, nor section 76, of Article 16 of the Code, relating to the capacity of adopted children to inherit, can a child inherit property devised, by the mother of the person who adopted it, to the "right heirs" of the testatrix.

Eureka Life Ins. Co. v. Geis. p. 199

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ALLUVION.

Lands formed by alluvion, or receding waters, belong, in general, to the riparian proprietor. *Conrad v. Williams.* p. 40

AMENDMENTS. See ATTACHMENT PROCEEDINGS, 1. PLEADING AND PRACTICE, 1.

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1. **Prayers: "no evidence."**

When a prayer of the defendant recites that, under the pleadings, there is no evidence in the case legally sufficient to entitle the plaintiff to recover, on appeal all the pleadings are open for review. *Tyng and Company v. Woodward.* p. 437

2. **Record: transmission.**

An appeal will not be dismissed for failure to transmit the record in time, when it appears that the delay was attributable to the Clerk of the Court.

Whittington v. Commrs. of Crisfield. p. 395

3. **Remanding for new trial, although judgment affirmed.**

When a judgment, found by the Court of Appeals to be correct, is based on grounds with which the Court of Appeals does not concur, the judgment may be affirmed, but the cause remanded, under section 22 of Article 5 of the Code of 1912, for a new trial. *Tyng and Company v. Woodward.* p. 438

4. **Remanding of causes for further proceedings; criminal law.**

On an appeal, in a criminal case, where an error in the judgment or sentence itself is the only error committed by the Court below, the Court of Appeals may reverse the judgment and remand the record, in order that a proper judgment may be pronounced upon the indictment and conviction.

Kenny v. State. p. 123

5. **——; in equity.**

Under section 38 of Article 5 of the Code of 1912, the Court of Appeals, upon reversing an order, may, without any final decree, remand the cause for such further evidence and proceedings as will advance the cause of justice and equity between the parties. *Tobin v. Rogers.* p. 253

6. **Reversals: harmless error.**

To justify a reversal on account of erroneous rulings, it must be apparent from the record that some injury was thereby done to the party complaining. *Bregenzer v. Hutzler.* p. 386

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APPEALS: COURT OF—*Continued.*

7. **Reversals: none, where error is harmless.**

There can be no reversal because of the refusal of the trial court to permit certain questions to be asked, where it appears that the evidence thereby sought to be introduced was ultimately admitted. *Avery v. State.* p. 234

8. **——; record must show prejudicial error.**

There can be no reversal, on appeal, for error without injury; and the Court of Appeals can not determine whether the appellant was injured by answers to improper questions, where the answers are not set out in the record.

Avery v. State. p. 232

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ATTACHMENT PROCEEDINGS.

1. **Amendment of proceedings.**

The statute in regard to amending attachment proceedings is liberal; and answers signed by the garnishee, which were previously signed and filed for him by his attorney, were *held* to be admissible, even though the twenty days in which the garnishee is required to file such answers had passed (the answers, however, having been signed by the attorney within that time).

Wilmer v. Mann. p. 244

2. **Exemptions: wages; employee; salesman.**

A salesman for a piano dealer is an employee, within the meaning of section 33 of Article 9 of the Code, exempting from attachment the wages or hire of any employee or laborer in the hands of the employer, unless actually due at the date of the attachment. *Wilmer v. Mann.* p. 248

3. **——; liberal construction.**

Statutes exempting wages from attachment are to be given liberal interpretation. *Wilmer v. Mann.* p. 248

4. **——; "nulla bona"; by employer.**

In such a case, where an attachment is laid in the hands of the employer, if no wages were due at the time of bringing the attachment, the employer may plead *"nulla bona,"* although wages may have become due and have been paid at the date of the trial. *Wilmer v. Mann.* p. 248

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ATTACHMENT PROCEEDINGS—*Continued.*

5. Garnishee's answers to interrogatories: no oath required.

Neither section 13 nor section 15 of Article 9 of the Code requires the answers of the garnishees, to the interrogatories filed in attachment proceedings, to be made under oath.

Wilmer v. Mann. p. 244

ATTORNEYS AT LAW. See COSTS AND COUNSEL FEES.

In general, whatever is done by an attorney in the scope of his duty, in the progress of the trial of a case, will, in the absence of proof to the contrary, be presumed to have been done by the authority of his principal. *Houston v. Wilcox.* p. 100

AUTOMOBILES. See MASTER AND SERVANT.

BALTIMORE CITY. See MUNICIPAL CORPORATIONS. ORDINANCES OF—. STREETS.

1. Fallsway.

Chapter 110 of the Acts of 1910, relating to the construction of the Fallsway in Baltimore City, did not qualify or restrict the charter power of the City or of the Commissioners for Opening Streets to assess property specially benefited by the undertaking; a City ordinance empowered the Commissioners to condemn and open the thoroughfare by procedure in accordance with the said Act, and in accordance with such of the provisions of the City Charter as might be applicable; it was *held,* that the fact that the Act provided for a fund to meet the cost and expenses of the improvement, had no effect on the power of the City and the Commissioners to assess for benefits.

P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 510

2. No considerations of public interest or private right make it proper to hold that by the permissive terms of Chapter 114 or Chapter 110 of the Acts of 1910 (as to the creation of the Commission on City Plan), the City of Baltimore was *required* to delegate to the commission the execution of the plan contemplated for the construction of the Fallsway.

P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 514

3. **——; adjacent land.**

The acquisition of the "adjacent land" authorized by Chapter 110 of the Acts of 1910, in connection with the Fallsway, was such as might be incident to the accomplishment of that object.

P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 513

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BALTIMORE CITY—*Continued.*

4. **Ordinances: title and subject.**

The object of section 221 of the City Charter, providing that every ordinance enacted shall contain but one subject which shall be described in its title, as in the case of section 29 of Article 3 of the Constitution, is to prevent the incorporation in one Ordinance of distinct and separate matters of legislation having no connection with each other, and not referred to in the title.
State v. Gurry. p. 540

5. **Police power.**

Under its Charter, the City of Baltimore, in the exercise of the police power, has the same power to pass ordinances for the maintenance of the peace, good government, health and welfare of the City as the Legislature has to enact statutes for that purpose. *State v. Gurry.* p. 540

6. **——; reasonableness of ordinance.**

In determining the constitutionality of an ordinance passed under the exercise of the police power, courts must take into consideration the reasonableness of their provisions, and determine whether or not they are so reasonable or oppressive as to cause the assumption that the Legislature did not intend to empower the municipality to enact them.
State v. Gurry. p. 541

7. **Segregation ordinance.**

The Mayor and City Council of Baltimore has the power to pass ordinances for the segregation of races in Baltimore City.
State v. Gurry. p. 548

8. In sections 1 and 2 of the Ordinance No. 692 of the Mayor and City Council of Baltimore, of May 15th, 1911, providing for the segregation of white and colored people in different residential districts, the words "in whole or in part" modify the words "residences or places of abode," and the section means that where the buildings in a block, "so far as the same are occupied," are used in whole or in part as residences or places of abode by members of one race, then no member of the other race shall occupy any building in that block as a residence. The words "in whole or in part" apply to blocks where all of the houses are wholly occupied, as well as to blocks where, although some are vacant, the other buildings are occupied by members of one race only. *State v. Gurry.* p. 539

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BALTIMORE CITY—*Continued.*

Segregation ordinance—Continued.

9. Where some of the houses are partly used as residences and partly as shops and stores, or for purposes other than for residences, only portions of the houses used as residences are to be considered in determining the question as to whether or not the block shall come under the operation of the ordinance.
State v. Gurry. p. 539

10. This ordinance is not a violation of section 221 of the City Charter. *State v. Gurry.* p. 540

11. It is for the preservation of peace, the prevention of conflict and ill-feeling, between the white and colored persons in Baltimore City, and for promoting the general welfare of the City; provisions applicable to the white race are made precisely applicable to the colored race, and the ordinance does not present any case of discrimination prohibited by the 14th Amendment to the Constitution of the United States, or by Article 23 of the Bill of Rights of Maryland. *State v. Gurry.* p. 540

12. **——; vested rights.**

Ordinance No. 692 is unconstitutional, however, because its provisions are made applicable to property owned before its passage; under the guise of the police power, it is a taking away of vested rights. *State v. Gurry.* pp. 550, 551

13. It is not to be presumed that the Legislature meant to confer upon the City the power to prohibit by ordinance one who was the owner of a dwelling when the ordinance was passed, from moving into it, simply because he is of a different color from other persons using the block, in which his house is situated as a dwelling or place of abode. *State v. Gurry.* p. 551

14. **United Railways.**

If the Legislature has the authority to amend the charters of the Railway Companies so as to require them to repave between their tracks, it must be by an Act whose title gives some reference to such amendment.
U. Rwys. and E. Co. v. M. and C. C. of Balto. p. 561

BANKRUPTS.

1. **Discharge: new promise.**

The promise of a bankrupt to pay a debt sued on, made between the date of the adjudication and the date of the discharge, will revive the debt.
Old Town Nat. Bk. of Balto. v. Parker. p. 63

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BANKRUPTS—*Continued.*

2. ——; **personal.**

The discharge of a debtor in bankruptcy is personal to him, and does not release his fraudulent grantees for liability for the formal conveyances made to them by the bankrupt.

Blick v. Nimmo. p. 142

3. ——; **trustee's rights.**

The discharge of a bankrupt does not affect the right of the trustee in bankruptcy, or of creditors of the bankrupt, to have the bankrupt's property that was previously disposed of for the purpose of defrauding his creditors, applied to the payment of his debts. *Blick v. Nimmo.* p. 142

4. Under the Bankrupt Act, the trustee may institute proceedings in a court of bankruptcy or in a state court, for the recovery of the property fraudulently disposed of by the bankrupt.

Blick v. Nimmo. p. 143

5. **State courts: jurisdiction.**

And where a judgment creditor, more than four months prior to the filing of a petition in bankruptcy against his debtor, filed a bill in a state court to set aside a fraudulent transfer of the latter's property, and the state court acquires jurisdiction of the parties and the subject-matter of the suit, its jurisdiction is not divested by subsequent proceedings in bankruptcy against the debtor. *Blick v. Nimmo.* pp. 144-145

BILL OF RIGHTS OF MARYLAND.

Art. 8.—Governmental powers to be separated. p. 28

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BONDS. See GUARDIANS. INCOME BONDS.

1. **Suits on——.**

Trustees were appointed by a decree of a court of equity to sell property for the purpose of enforcing a mechanics' lien: An injunction was issued to prevent the sale, but on appeal the order for the injunction was reversed; and suit on the injunction bond was filed by the trustees for damages suffered by them because of the injunction proceedings and for the deterioration of the property, and for the expenses, etc.; it was *held,* that the trustees were not entitled to recover.

Williams v. Fidelity and Dep. Co. p. 227

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BONDS—*Continued.*

2. Joint obligees.

The trustees were not joint obligees with the other equitable plaintiffs on the bond.

Williams v. Fidelity and Dep. Co. p. 227

BROKERS. See LICENSES.

1. If a broker is to be paid by the purchaser, he can not recover unless the sale is consummated on the terms agreed upon, unless it was owing to the purchaser's improper conduct that the sale was not so consummated. *Carrington v. Graves.* p. 572

2. But if a broker procures an agreement to sell on terms satisfactory to the proposed purchaser, on the latter's promise to pay a commission, and the sale fails of consummation only because of the improper conduct of the purchaser, the payment of the commissions may not be lawfully refused.

Carrington v. Graves. p. 572

3. A prospective purchaser agreed with a broker to pay him "upon the consummation of the purchase of said property; that is, the payment of the balance of the purchase money, after the delivery of the deed, the sum of $300, etc."; on the ground that he had been deceived by a misrepresentation as to the location of the property, the purchaser refused to consummate the purchase. In a suit by the broker for the commissions, it was *held,* that if the misrepresentation complained of was as to a material fact, and one which had induced the party to agree to take the property, it would form a valid defense to the declaration; but that if the misrepresentation was not as to a material fact, or if the purchaser's refusal to consummate the purchase was arbitrary and capricious, the purchaser was liable for the commissions. *Carrington v. Graves.* p. 576

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9 & 10 Vic., ch. 93.—Lord Campbell's Act: damages for death by negligence. p. 458

CASES EXPLAINED OR MODIFIED.

1. Goeller v. State, 119 Md. 61: liquor laws; second offense.

The scope and report of *Goeller* v. *State,* 119 Md. 61, is merely to declare unconstitutional that portion of section 14 of Chapter 179 of the Acts of 1908, which authorizes the Judge to ascertain from the documents of the Court, in connection

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CASES EXPLAINED OR MODIFIED—*Continued.*
with the evidence, whether the party accused of violating the provisions of that statute by the sale of liquor on Sunday, etc., had already been indicted and convicted for other such violations of the Act; and the decision does not affect the constitutionality of the whole Act. *Hall v. State.* p. 582

2. Wicks v. Westcott, 59 Md. 270: parties entitled to appeal.

In the case of *Wicks* v. *Westcott,* 59 Md. 270, in explaining Code (1860), Art. 5, sec. 27 (now section 37), the Court did not mean to limit the application of that section to the original defendants, as distinguished from defendants who might be brought in afterwards upon the petition of the plaintiff, or who were made such upon their own application; the Court made that section applicable only to defendants in regular chancery proceedings, as distinguished from proceedings such as objections to sales. *Carrington v. Basshor Co.* p. 78

CHARACTER. See EVIDENCE, 1.

CHARTERS. See CORPORATIONS.

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COLLATERAL INHERITANCE TAX.

1. **Corporations: liability for—.**

The provision in the charter of a corporation exempting from taxation its real and personal property, is not an exemption from liability for payment of the collateral inheritance tax.

Washington Co. Hospital v. Mealey's Estate. pp. 280, 281

2. **——; charter; no exemption.**

The charters of the Washington County Hospital Association and the Washington County Free Library do not exempt them from liability for the payment of the collateral inheritance tax imposed by section 120 of Article 81 of the Code.

Washington Co. Hospital v. Mealey's Estate. p. 281

3. **Tax on succession, not on property.**

The collateral inheritance tax is not a tax on the property, but a tax on the privilege of succeeding to the inheritance or becoming a beneficiary under the will.

Washington Co. Hospital v. Mealey's Estate. p. 280

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COMMISSIONERS FOR OPENING STREETS. See
Condemnation of Land, 5.

CONDEMNATION OF LAND.

1. **"Adjacent lands."**

The acquisition of the "adjacent land" authorized by Chapter 110 of the Acts of 1910, in connection with the Fallsway, was such as might be incident to the accomplishment of that object.
P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 513

2. **Agreements made part of proceedings.**

In condemnation proceedings, inquisition may take the place of a deed in conveying the interest and estate acquired by such proceedings, and the land condemned may be made subject to the terms and conditions imposed by agreement between the parties, and made part of the condemnation proceedings, and be binding on them and those claiming under them.
Russell v. Zimmerman. pp. 339, 340

3. **Baltimore City: assessment of benefits.**

The power to assess property in particular localities to the extent that it is deemed specially benefited by local improvements is one that has been expressly granted to the Mayor and City Council of Baltimore, and one that the City has long exercised. *P., B. and W. R. R. Co. v. M. and C. C. of Balto.* p. 508

4. **——; assessment for benefits and special fund provided for the improvement.**

The right to assess such benefits does not depend upon the insufficiency of the fund intended to meet the expenditure with which the municipality is primarily chargeable.
P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 511

5. **——; Commissioners for Opening Streets.**

By section 175 of the Charter of Baltimore City, the Commissioners for Opening Streets are required to assess benefits whenever they are directed by ordinance to act in connection with street projects; the exercise of such power is not to be denied the commission merely because of the creation of a special fund for the purpose of providing the costs and expenses the improvements.
P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 510

6. **——; taxing power.**

Such a right is to be referred to the power of taxation.
P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 508

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CONDITION SUBSEQUENT. See DEEDS. ESTATES UPON CONDITION.

CONSTITUTIONAL LAW. See BILL OF RIGHTS. POLICE POWER.

CONSTITUTION OF MARYLAND (1851).

Art. 3, sec. 47.—General Incorporation Law. p. 282

CONSTITUTION OF MARYLAND (1867).

Art. 3, sec. 29.—Laws to contain but one subject. pp. 539, 557, 561

Art. 11, sec. 7.—Debts of Baltimore City: sanction of Legislature; ratification by voters. p. 506

Art. 4, sec. 8.—Trial by court without jury. p. 100

Art. 15, sec. 1.—Salaries of public officers. p. 696

CONSTITUTION OF THE UNITED STATES.

14th Amendment, sec. 1.—Prohibiting the taking of property without due process of law. p. 557

14th Amendment, sec. 1.—Equal protection of the laws. pp. 540, 557

Art. 1, sec. 10.—Prohibiting impairing the obligation of contracts. p. 557

CONTRACTORS. See LIENS.

CONTRACTS: BREACH OF—.

1. **Duty of plaintiff to reduce damages.**

Where a person wrongfully discharged brings suit against the employer for his loss of wages, etc., he is required to show that he used all reasonable exertion to minimize the loss resulting from the breach of the contract. *Dolby v. Laramore.* p. 624

2. **Suit on—: goods bargained and sold.**

The fact that there was a contract between the plaintiff and defendant for the sale and purchase of the plaintiff's crop, does not negative or modify the cause of action set out in a suit for goods bargained and sold; it only affects the price, terms and conditions of the sale. *Dolby v. Laramore.* p. 624

3. **——; damages; contract price; bill of particulars.**

In a suit upon a contract, specially declared on, as such, and where such contract forms the basis of the claim, the price named in the contract, and not the actual value of the articles sold,

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CONTRACTS: BREACH OF—*Continued.*
must be the measure of recovery, limited to the extent, that if, in such a case, the plaintiff files a bill of particulars, he cannot recover in excess of what he sets out in the bill.

Dolby v. Laramore. p. 623

4. **Refusal of vendee to accept goods.**

In an action by a tomato grower against a canner with whom he had a contract for the purchase of his crop, the defendant, by a certain prayer, sought relief from liability as to all the tomatoes not accepted and receipted for, on the ground of the alleged unmerchantable character of some of the tomatoes tendered or delivered, constituting, as he claimed, a violation of the contract on the part of the plaintiff; at the time of such rejection the defendant did not annul the contract on this ground, but, on the contrary, according to his own evidence, invited the plaintiff to send other tomatoes of a different quality, etc.; it was *held*, that such a prayer was improper.

Dolby v. Laramore. p. 625

CORPORATIONS. See COLLATERAL INHERITANCE TAX. MORTGAGES, 11. RECEIVERS, 1. STOCK AND STOCKHOLDERS.

1. **Charters: amendment or repeal.**

All charters granted since the Constitution of 1851, Article 3, section 47, are subject to be repealed or altered even though such right is not reserved in the charter itself.

Washington Co. Hospital v. Mealey's Estate. p. 282

2. But such an amendment can not be made by a statute whose title does not describe or make reference to the alteration.

U. Rwys. and Electric Co. v. Baltimore. p. 561

3. **Mortgages: income bonds; sale of machinery.**

A manufacturing company executed a mortgage conveying all its mill property, machinery and real estate, etc., to trustees, to secure its bondholders; the mortgage provided that the machinery, tools, equipment, etc., conveyed, or intended to be thereby conveyed, should be real estate for all intents and purposes thereof, and should be used and sold therewith, and not separated therefrom, except as therein provided; the mortgage made provision for releases of such real estate and leasehold property as might no longer be necessary or expedient to retain, no such property to be released, however, unless sold, or con-

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CORPORATIONS—*Continued.*
tracted to be sold or exchanged, and provided that all proceeds from such sales, etc., be set apart and held in trust for the purchase of other property, or in betterment of, or in addition to the mortgaged premises; new property acquired in exchange for any property so released, *ipso facto,* to become and be covered by the lien of the mortgage. The mortgage also provided that the company might from time to time dispose of any part of its machinery, equipment, etc., which might become obsolete, etc., to be replaced by other machinery, which should be subject to the lien of the mortgage. The mortgage contained a provision requiring the company to keep the mills and machinery in repair. The company dismantled and sold certain mills, receiving in payment therefor a note for $300,000, which it deposited with the trustee. Subsequently the corporation sold certain other machinery in another mill, and acquired new machinery under a leasing agreement, by which the title to the new machinery should remain in the vendors until all payments had been made. The company filed a bill to compel the trustee to apply the note to the account of the new machinery so acquired; on appeal the order of the lower Court denying such petition was affirmed.
Mt. Vernon-Woodberry Cotton Duck Co. v. Continental Trust Co. p. 172

COSTS AND COUNSEL FEES. See TRUSTEES, 3.

COURTS.
Trials without jury: issues from Orphans' Court.

Under section 8 of Article 4 of the Constitution, parties to any cause may submit the same to the Court for determination, without the aid of a jury; and issues sent by the Orphans' Court to a court of law for trial constitute "a cause" within the meaning of this section of the Constitution, where such issues are submitted or tried by the Court sitting as a jury.
Houston v. Wilcox. p. 100

COURTS: TERMS OF—. See TERM OF COURT.

COVENANTS RUNNING WITH LAND.
Relief in equity.

If a covenant, although not running with the land, is of a character to create a right and an equity in favor of the vendor or lessor and those claiming in his right as against those holding and occupying the land, a court of equity will assume jurisdiction and administer relief. *Russell v. Zimmerman.* p. 341

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CREDITORS' RIGHTS. See FRAUDULENT CONVEYANCES. STOCK AND STOCKHOLDERS, 4.

CRIMINAL LAW. See ABORTION. INDICTMENTS. LIQUOR LAWS. "SECOND OFFENSE."

1. **Appeals: remanding record for correction.**

On an appeal, in a criminal case, where an error in the judgment or sentence itself is the only error committed by the Court below, the Court of Appeals may reverse the judgment and remand the record, in order that a proper judgment may be pronounced upon the indictment and conviction.

Kenny v. State.. p. 123

2. **Indictments: invalid; new trial.**

Where the indictment under which a traverser is indicted is declared invalid he may be indicted and tried again for the same offense. *Kenny v. State.* p. 125

3. An indictment must contain an averment of every fact essential to justify the punishment inflicted.

Hall v. State. p. 580

4. **"Second offense."**

An indictment of a traverser for violating as licensee under section 14 of Chapter 179 of the Acts of 1908 (which section relates to the punishment of licensees found guilty a second time for violating the provisions of the liquor laws), is void, unless it alleges that the traverser was a licensee at the time of his conviction for the first offense. *Kenny v. State.* pp. 123, 124

5. **——; verdict.**

A simple verdict of "guilty" in such a case does not justify the penalty provided by the statute for a second offense; to justify a sentence for a second offense it must appear from the verdict that the jury have found the party guilty of such second offense. *Kenny v. State.* p. 123

6. **——; "guilty of second offense."**

If a party be indicted on the charge of the commission of a "second offense," and the sentence prescribed is different from or severer than that for a first offense, the indictment must set out the former conviction, and the jury, by their verdict, must find the traverser guilty of such second offense before the penalty therefor can be imposed. *Hall v. State.* p. 580

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CRIMINAL LAW—*Continued.*

7. Prior conviction.

In general, an averment of a prior conviction can only be sustained by the production of the record, or its duly authenticated copy, and by proof as to the identity of the person on trial with the one described in the former trial.

Hall v. State. p. 580

8. A mere averment of a former conviction does not charge an offense. *Hall v. State.* p. 580

9. ——; question for jury.

The scope and report of *Goeller* v. *State*, 119 Md. 61, is merely to declare unconstitutional that portion of section 14 of Chapter 179 of the Acts of 1908, which authorizes the Judge to ascertain from the documents of the Court, in connection with the evidence, whether the party accused of violating the provisions of that statute by the sale of liquor on Sunday, etc., had already been indicted and convicted for other such violations of the Act; and the decision does not affect the constitutionality of the Act as a whole. *Hall v. State.* p. 582

10. Sufficient indictment.

An indictment charging the accused with the sale of liquor in violation of section 14 of Chapter 179 of the Acts of 1908 contained, in relation to a former conviction, the allegation that on a day certain at the September Term of a certain Court, "one F. F. H., etc., having a license to sell * * * liquors, under the provisions of Chapter 179 of the Acts of 1908, was indicted * * * in said County for the unlawful sale of * * * on the 28th day of July, 1912, and on the 11th of November, 1912, at a session of said Court, under the said indictment, * * * the said F. F. H. was convicted and judgment entered that the said F. F. H. pay a fine of $200 and costs * * * as by the record * * * will more fully * * * appear"; *held*, that the allegations as to the prior offense and conviction were as full as need be. *Hall v. State.* p. 581

DAMAGES.

1. Exemplary—; prayers.

If the case is one that admits of exemplary damages, it is not error to submit in one prayer an instruction with regard to such damages and one with regard to compensatory damages.

Groh v. South. p. 642

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DAMAGES—*Continued.*

2. ——; **means of defendant.**

Where malice is an element of an alleged wrongful act, exemplary damages may be asked, and in such a case it is proper to inform the jury as to the means of the defendant.

Groh v. South. p. 641

3. **Damages subsequent to suit.**

Damages arising subsequent to the date of the writ, if merely incidental, and such as will continue independent of any subsequent wrongful act, should be assessed up to the time of the verdict. *Groh v. South.* p. 642

DAMAGES: NOMINAL. See TRESPASS *q. c. f.*

DECEDENTS' ESTATES.

1. **Administrators d. b. n.: duty and rights of—.**

The authority conferred upon an administrator *d. b. n.* by section 70 of Article 93 of the Code, is to administer all things, not already administered, which are described as assets and which have not been converted into money, nor distributed and delivered, nor retained by the executor or former administrator, under the Court's direction. *Lawson v. Burgee.* p. 208

2. **Administrator d. b. n. of deceased administrator or executor.**

Under section 72 of Article 93 of the Code, the Orphans' Court has the power on application by an administrator *d. b. n.* to order the administrator or executor of a deceased administrator or executor "to pay over to him money in his hands as such," and upon a refusal to comply with the order, the Court may order the bond of the deceased administrator to be put in the suit. *Lawson v. Burgee.* p. 208

3. **Executors: decease of—.**

When an executor dies without having made a full distribution and delivery of the estate and assets, it is necessary to appoint an administrator *d. b. n.*, and it is not competent, as a general rule, for the executor's executor to interfere with such assets or to render an account for the deceased executor.

Lawson v. Burgee. p. 207

4. **Executors: duty of—; investments.**

Where a legacy consists of money or of property whose use is its conversion into money, it is the duty of the executor to invest the same in productive funds, or put it out on adequate security, under the direction of the Orphans' Court, or

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DECEDENTS' ESTATES—*Continued.*
of a court of equity, so that the dividends or income may be received by the legatee for life, and the principal, after the death of the legatee for life, may be received by the legatee in remainder. *Foley v. Syer.* pp. 87-88

5. **Life tenant: non-resident.**

Where the life tenant in such a will is a non-resident, and the property is not within the jurisdiction of the courts of this State, such protection, even though desirable, can not be furnished by the courts of equity in this State.
Foley v. Syer. p. 90

6. But where a testator indicated by his will his intention that a life tenant should take the rest and residue of the estate, with full authority to invest and re-invest the principal according to her preference, and to use the income as she pleased, a distribution of the estate made to the legatees and to the life tenant is sufficient to show a full and complete administration.
Foley v. Syer. pp. 85, 89

7. **Remaindermen.**

The remaindermen have the right to seek aid of a court of equity for the protection of their interest, if they are shown to be in jeopardy, provided such courts have jurisdiction over the parties or property. *Foley v. Syer.* p. 90

8. **Title to personalty.**

Title to the personal estate of a decedent can be transmitted only through the medium of letters of administration; the law vests the personal estate in the administrator who represents the deceased and the next of kin must derive their title through him. *Lawson v. Burgee.* p. 208

9. **Waste: equitable relief.**

If the fund has been lost, wasted or misapplied by the deceased executor, a court of equity may, upon proper application, appoint a trustee who would be entitled to maintain an action for the recovery of the fund. *Lawson v. Burgee.* p. 209

DECLARATIONS. See PLEADING AND PRACTICE, 6, 8.

"Money counts."

Unless the "money" counts of the common counts in a declaration be preceded by the words "for money payable by the defendant to the plaintiff," they are demurrable.
Tyng and Co. v. Woodward. p. 438

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DEDICATION. See STREETS.

DEEDS. See ACKNOWLEDGMENTS. COVENANTS RUNNING WITH THE LAND. FIDUCIARY RELATIONS. LAND OFFICE. RECTIFICATION OF INSTRUMENTS.

1. Condition subsequent: right of re-entry.

By Chapter 50 of the Act of 1829, a corporation was formed under the name of the Trustees of St. Charles College, for the purpose of educating young men of the Roman Catholic religion for the ministry. In 1830 Charles Carroll of Carrollton conveyed to the corporation a certain tract of land, to it and to its successors forever in trust for the uses and objects set forth in the act of incorporation. The deed contained the proviso that the tract of land should never be sold or aliened by the said corporation or its successors, but that they should forever apply the proceeds of the land to the use, objects and trusts in the Act of Assembly referred to, and also that the Trustees of St. Charles College should, as soon as they came into possession of the tract of land, and their funds would allow, cause to be erected on the same the buildings proper and necessary for the trust; and also that said trustees and their successors should forever continue the seat and location of said college upon the premises conveyed; and provided that upon the breach of any of the conditions it would be lawful for the grantor, his heirs and assigns to re-enter into the premises conveyed and enjoy the same as in his former estate, and that in such a case the deed should thenceforth be void and of no effect in law or in equity. In 1911 the college, which had been erected and maintained on the property conveyed for the purpose of the trust, was destroyed by fire, and another set of buildings was erected by the college at another location. In an action of ejectment brought by one of the assignees and devisees of the grantor to recover his undivided interest in the tract of land, it was *held,* that the language employed in the proviso was plain and unequivocal, and that it created a condition subsequent. and that the successors of the grantee in the original deed, by abandoning the premises as the seat and location of the college, had committed a breach of the covenant, and the heirs of the grantor had the right to re-enter and take possession of the property under the deed of 1830.

Trustees of St. Charles College v. Carroll. p. 478

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DEEDS—*Continued.*

2. Courses and distances.

Where the courses and distances in a grant do not agree with a call, the latter must prevail. *Conrad v. Williams.* p. 40

3. Grantor's right.

A grantor has the right to dispose of property under any terms he pleases which do not contravene some principle of public policy or positive rule of law.

Trustees of St. Charles College v. Carroll. p. 475

4. Representative capacities.

Where a party has various capacities and executes an authority delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the party does not profess to execute it in virtue of that particular power.

Barroll v. Benton. pp. 177-178

DEMURRER.

Effect of—.

Upon a demurrer to a bill, the truth of its allegations is to be assumed. *Wilson v. Shaw.* p. 58

DISCHARGE. See BANKRUPTS.

DISTRIBUTION. See ADOPTED CHILDREN. DECEDENTS' ESTATES.

DIVORCE.

1. Adultery: proof; inference.

The marriage relation is not to be disturbed for any but the gravest reasons, and then only upon such state of facts as show to the entire satisfaction of the Court, that it is impossible for the duties of married life to be discharged.

Robbins v. Robbins. p. 695

2. On a bill for a divorce on the ground of adultery, the burden of proof is upon the plaintiff, and the evidence must establish affirmatively that adultery was actually committed; while direct proof is not required, yet where it is sought to establish the fact from circumstantial evidence, the evidence must lead to the conclusion of guilt as a necessary consequence by a fair inference.

Robbins v. Robbins. p. 695

3. The circumstances, when reviewed together, must be incompatible with innocence; and if reasonably capable of two interpretations, that one which favors innocence will be adopted.

Robbins v. Robbins. p. 695

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DIVORCE—*Continued.*
4. Evidence of a certain malady contracted by one of the parties is not necessarily conclusive proof that such party had been guilty of adultery. *Robbins v. Robbins.* p.695

DOMICILE.
1. Infants.

Where the mother of a minor, whose father is dead, has made her domicile in a certain county, the Orphans' Court, of such county, upon her death, has jurisdiction to appoint a guardian for the infant. *Sudler v. Sudler.* p. 52
2. A minor can not by his own intention or act fix or change the place of his legal domicile. *Sudler v. Sudler.* p. 50
3. The domicile of a minor for purposes of guardianship is that of the parents or of those standing *in loco parentis*. even though at the time of such appointment such infant may be residing in another county or State. *Sudler v. Sudler.* p. 50

EJECTMENT.
1. Title to land.

An action of ejectment may involve simply the question of title to a piece of land in regard to the location and boundaries of which there is no dispute, or the contention may be whether the land in controversy, truly surveyed and located, is within the lines of the plaintiff's or defendant's title papers.
B. and O. R. R. Co. v. Silbereisen. p. 419
2. But the plaintiff can only recover provided the title to the disputed tract is in him.
B. and O. R. R. Co. v. Silbereisen. p. 419

ELECTION LAWS.
1. Failure to comply with provisions.

In determining the effect of a failure to comply with the terms of a statute regulating elections, the preparation of ballots, what names can be placed on them, etc., the intention of the Legislature must be sought for.
Graham v. Wellington. p. 661
2. Courts should hesitate to declare elections invalid merely because some of the requirements of the statute in reference to preliminary matters have not been literally complied with, unless, by express declaration or by necessary implication, such acts are essential to the validity of the election.
Graham v. Wellington. p. 661

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ELECTION LAWS—*Continued.*

3. Nomination: filing with Secretary of State.

To comply with section 47 of Article 33 of the Code of 1912 (governing elections), requiring certificates of nomination to be filed with the Secretary of State not less than 25 days, and with the Board of Supervisors of Elections not less than 15 days before the day of election, such nominations need not be filed with the Secretary of State personally, but they should be sent or delivered at his office at Annapolis, and the absence of the Secretary of State from his office, or from the State, will not prevent such certificates from being filed within the meaning of the statute. *Graham v. Wellington.* p. 660

4. ——; place of delivery.

But it does not follow that such a delivery to the Secretary of State in person, in Baltimore or at some other place, if accepted by him, would not be a sufficient delivery.

Graham v. Wellington. p. 660

5. When such certificates of nomination are filed too late to comply with the provisions of said section 47, they are "inoperative" within the meaning of section 51, and nominations to fill the vacancy may be made as provided in the latter section.

Graham v. Wellington. p. 669

6. The directions contained in section 47 of Article 33 of the Code, as to the time for filing certificates of nominations for political offices with the Secretary of State and the Supervisors of Elections are mandatory, and not merely directory.

Graham v. Wellington. p. 667

7. ——; vacancies.

But vacancies which exist by reason of there being no candidates for the offices at the primary elections are not embraced within the meaning of said section 51.

Graham v. Wellington. p. 668

ELECTRIC COMPANIES. See PUBLIC SERVICE COMMISSION, 8.

EQUITY. See INJUNCTIONS. PLEADING IN EQUITY. RECEIVERS. RECTIFICATION OF INSTRUMENTS. SALES IN EQUITY.

1. Jurisdiction.

Where neither the defendants nor the property in question are within the jurisdiction of the courts of the State, a court of equity can not furnish relief. ***Foley v. Syer.*** **p. 90**

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EQUITY—*Continued.*

2. Land in different counties.

Where the defendants, or any of them, reside in a different county from that in which the land lies, which is affected by a suit in chancery, the Circuit Court for the county (or Baltimore City), where the land, or any part thereof, lies, shall alone have jurisdiction. *Fowler v. Pendleton.* p. 299

ESTATES UPON CONDITION.

1. Conditions subsequent.

An estate upon condition is one which has a qualification, or by which, on the happening of a particular event, it may be created, ended or destroyed. If set forth, the condition is express; if it allows the estate to vest, and then to be determined in consequence of the non-observance of a requirement, it is a condition subsequent.

Trustees of St. Charles College v. Carroll. p. 477

2. Conditions subsequent are not favored by the law, because on breach there is a forfeiture; but they may be annexed to a grant, and when the intention of the parties is clear it should be respected. *Trustees of St. Charles College v. Carroll.* p. 478

EVIDENCE. See ABORTION. DIVORCE. PAROL EVIDENCE. WITNESSES: EXAMINATION OF—.

1. Character: chastity.

Evidence in regard to the general character of the prosecutrix for truth and veracity, or for chastity, is admissible; but not proof of specific acts which tend to show that she is an immoral person. *Avery v. State.* p. 237

2. Conditions after the event.

Suit was brought for damages to a building claimed to have been occasioned by the digging of a sewer near it without the precaution having been taken to prevent the sinking of the land, etc. To prove what precautions had been taken, a considerable time after the accident the cobblestone pavement was taken up and boards which had been driven in the ground for the purpose of shoring it up, and left in the ground after the sewer was constructed, were drawn out so as to show the depth and character of the soil. *Held,* that, under such circumstances, as the depth to which the boards had been driven had not been changed since the accident, the evidence was admissible.

Whiting-Middleton Construction Co. v. Preston. p. 219

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EVIDENCE—*Continued.*

3. **Condition after event: evidence concerning; admissibility.**

Where it is a question of the condition at the time of the accident, evidence of the condition of the place after considerable time has elapsed, is not, in general, admissible, unless accompanied by evidence that such conditions had not changed since the accident.

Whiting-Middleton Construction Co. v. Preston. p. 220

4. **Court and jury: province—.**

Courts may pass upon the admissibility and legal sufficiency of the evidence, but in so doing must assume the truth of the statements offered or made, and can not undertake to determine their weight. *Balto. and Ohio R. R. Co. v. Harris.* p. 270

5. **Conflicting—: question for jury.**

Where the evidence is legally sufficient to meet the burden of proof, but is conflicting, it is exclusively within the province of the jury to weigh it, upon proper instructions from the Court upon the law applicable to the facts of the case, and the jury's conclusion of fact cannot be reviewed on appeal, and must stand, unless there was substantial error in the ruling of the Court. *Thomas v. Cortland.* p. 670

6. **Estimates.**

A competent witness may give in evidence his estimate of the number of animals, articles or persons, etc., observed by him, provided the inference be founded on adequate data.

Dolby v. Laramore. p. 622

7. **Experts.**

In an action for damages because of the careless digging of a trench near the wall of the plaintiff's house, by reason of which the wall and house were injured, a person who, although not there the day the trench was dug, was there the day following when the trench had not been filled up, and while he could still see in the trench and see what had been done, and who had been an inspector of buildings, was *held* to be qualified to testify as an expert.

Whiting-Middleton Construction Co. v. Preston. p. 218

8. Such a witness should not be allowed to testify that the work had been negligently done, without first having told the jury how it had been done.

Whiting-Middleton Construction Co. v. Preston. p. 218

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EVIDENCE—*Continued.*

9. ——; **vegetable grower and canner.**

In an action for damages for the breach of a contract between a tomato grower and a canner, one shown to have been both a tomato grower and a canner is properly qualified to express an opinion as to the merchantable character of the tomatoes in question, which he had seen. *Dolby v. Laramore.* p. 622

10. **Improper exclusion of evidence.**

There can be no reversal because of the refusal of the trial court to permit certain questions to be asked, where it appears that the evidence thereby sought to be introduced was ultimately mately admitted. *Avery v. State.* p. 234

11. **Irresponsive answers.**

Answers of witnesses that are irresponsive to the questions asked may be properly stricken out, whether the answers were intended to be evasive or not. *Dolby v. Laramore.* p. 622

12. **Means and condition of defendant.**

Where malice is an element of an alleged wrongful act, exemplary damages may be asked, and in such a case it is proper to inform the jury as to the means of the defendant.

Groh v. South. p. 641

13. **Party to cause: transactions or statements with decedent.**

In a proceeding by a surviving husband for certain moneys which had been deposited by him in bank to his wife's account and in her name, it was *held,* that under section 3, Article 35, of the Code of 1912, prohibiting a party to a cause from testifying as to any transaction had with or statements made by a decedent, etc., his testimony was inadmissible to show that all of such deposits were made with his individual money, and that his wife never had any interest in the account.

Martin v. Munroe. pp. 684-685

14. Proof by other witnesses as to declarations by the wife, made a short time before her death, referring to the deposits to her credit as owner, and as being subject to her right of disposition, but which were made out of the presence of her husband, were inadmissible. *Martin v. Munroe.* p. 685

15. **Wrongful admissions: when no ground for reversal.**

The wrongful action of the Court below in overruling an objection to the evidence of a witness, is not ground for a reversal when evidence of the same character had already been admitted without objection. *Dolby v. Laramore.* pp. 621-622

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EXCEPTIONS.

1. Time for preparing—.

Where a rule of Court provides that, unless otherwise expressly allowed by the Court, bills of exception shall be prepared and submitted during a sitting of the term at which such exceptions were taken, exceptions submitted after the adjournment of the term of Court at which they were taken are too late.

Boyd v. Kellog. pp. 43-45

2. ——; after term of court.

The sittings of the term referred to in the rule do not include special sittings, held after the sittings of the term, for the transaction of such business as may arise from time to time, after the regular term was ended. *Boyd v. Kellog.* p. 44

EXECUTORS. See DECEDENTS' ESTATES. DUTY OF—.

1. Co-executors.

Co-executors are regarded in law as one individual, and the acts of one in respect to the administration of the estate are deemed to be the act of all. *Crothers v. Crothers.* p. 117

2. Possession by one executor is possession by all, and powers and duties of executors that remain unexecuted or unfulfilled pass to the survivor. *Crothers v. Crothers.* p. 117

3. ——; failure to act.

Where an executor rests inactive for years (15) and until his co-executor dies, before making any move towards the administration of the estate, he is not in a position to recommend himself to a court as a party injured by his co-executor.

Crothers v. Crothers. p. 117

4. Waste.

Where such an executor makes no allegation of waste committed or assets concealed by his co-executor, a petition filed by him in the Orphans' Court against the executor of the latter, requiring him to file a full itemized and detailed statement of the assets of the deceased executor, can not be treated as an application by one executor against his co-executor upon either of these grounds. *Crothers v. Crothers.* p. 117

5. ——; account.

But where such a petitioner is not only a co-executor, but is also a legatee under the will, the Orphans' Court has jurisdiction to entertain the petition and to hear and determine exceptions that may be filed to the account.

Crothers v. Crothers. p. 119

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EXECUTORS—*Continued.*

6. Waste: vouchers.

When such a petitioner takes a position antagonistic to the deceased co-executor and denies all the payments claimed to have been made by the latter, he has no right to have all the vouchers of the deceased executor turned over to him.
Crothers v. Crothers. p. 119

7. Such vouchers should be retained by the executor of the deceased executor for the protection of the estate, subject, however, to be produced before the Court at any hearing upon exceptions to the account rendered by them.
Crothers v. Crothers. p. 119

EXPERTS. See WITNESSES: EXAMINATION OF—.

FALLSWAY. See BALTIMORE CITY.

FIDUCIARY RELATIONS.

1. Where an aged parent makes a conveyance to a child, the burden is cast on the grantee of establishing the fairness of the transaction, and if where confidence is reposed, it is abused, courts of equity will grant relief. *Beinbrink v. Fox.* p. 104

2. A conveyance made by an aged parent to a daughter was attacked on the ground of undue influence and absence of consideration: *Held,* that upon careful consideration of the testimony there was no evidence of any undue influence attributable to the actions of the grantee, and that the consideration named in the deed was a valid one. *Beinbrink v. Fox.* p. 110

FRAUD. See RECTIFICATION OF INSTRUMENT.

FRAUDULENT CONVEYANCES.

1. Bill to set aside—: parties; heirs.

The grantor of such a deed being dead, a creditor proceeded by a bill against the wife alone, praying that the deed be annulled and the property therein mentioned sold and that the proceeds, after payment of costs, etc., be applied to the payment of the plaintiff's claim: *Held,* that the heirs at law of the grantor should have been made parties and that the bill was demurrable. *Wilson v. Shaw.* p. 60

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FRAUDULENT CONVEYANCES—*Continued.*

2. **Bill to set aside—: parties; trustee with dry legal title.**

Although the trustee of a dry legal title has no interest in the property, he is a necessary party to any proceedings whereby it is sought to convey, etc. *Wilson v. Shaw.* p. 60

3. **Husband to wife.**

A voluntary conveyance from a husband to his wife is absolutely void under the provisions of the Code, Article 45, section 1, as against existing creditors. *Wilson v. Shaw.* p. 59

4. **——; creditors' rights.**

Where such a deed is fraudulent in fact and without consideration, the title remains in the grantee for the use of his then existing creditors. *Wilson v. Shaw.* p. 60

FRIGHT. See NEGLIGENCE, 5.

GARNISHEES. See ATTACHMENT.

GAS COMPANIES. See PUBLIC SERVICE COMMISSION, 8.

GROUND RENTS. See REVERSIONARY INTERESTS.

GUARDIANS.

1. **Administrators as guardians.**

Section 151 of Article 93, providing that when no guardian is appointed the administrator of the testator's estate should take charge of the estate and discharge the duties of the guardian to the infant, only contemplates the temporary care of the infant's property. *Sudler v. Sudler.* pp. 55-56

2. The appointment of the administrator of a decedent's estate as guardian for the decedent's infant children is not favored. *Sudler v. Sudler.* p. 56

3. **Bond.**

Under the Code, a guardian, before proceeding to act as such, must file bond in such security as the Court shall approve. *Sudler v. Sudler.* p. 53

4. On the death of the minor's father and mother, one of her uncles removed her from the county to Baltimore City, where she and he intended her permanent home to be made; the uncle appealed from the order of the Orphans' Court of the county, where the parents had died and which had been their residence, appointing a guardian for the infant. *Held,* that, without regard to other questions, since the uncle had not qualified as guardian by giving bond, he could not act as guardian

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GUARDIANS—*Continued.*
for the purpose of changing the domicile of the infant, and the order of the Orphans' Court appointing the guardian was affirmed. *Sudler v. Sudler.* p. 53

5. Appointment by Orphans' Courts: appeal.

An appeal will not lie from an order of the Orphans' Court appointing a guardian, when the Court had jurisdiction to make such appointment. *Sudler v. Sudler.* p. 48

6. ——; jurisdiction; domicile.

The provisions of the Code (section 144, Article 93), conferring jurisdiction for the appointment of guardians of minor children on the Orphans' Courts where the infants reside, refers to the domicile and not to the mere place of the infants' residence. *Sudler v. Sudler.* pp. 48, 49

7. Infants: natural guardians.

The father of a legitimate child, and, upon his death, the mother, is the natural guardian of the children.
Sudler v. Sudler. pp. 50, 52

8. Next of kin.

Semble: the next of kin will not succeed to such office as of right. *Sudler v. Sudler.* p. 53

HABERE FACIAS POSSESSIONEM. See MORTGAGES, 10.

HEIRS. See FRAUDULENT CONVEYANCES. PARTIES.

HUSBAND AND WIFE. See FRAUDULENT CONVEYANCES. SAVINGS BANK DEPOSITS.

INCOME BONDS. See CORPORATIONS, 3.

INDICTMENTS. See CRIMINAL LAW, 2.

INFANTS. See ADOPTED CHILDREN. DOMICILE. GUARDIANS.

INJUNCTIONS. See MORTGAGES, 7. PLEADING AND PRACTICE IN EQUITY. RIGHT OF WAY. SURETY COMPANIES.

1. Allegations.

The mere allegation, in a bill for an injunction, that irreparable loss and injury will ensue, is not sufficient, unless such facts be stated as will satisfy the Court that the apprehension is well founded. *Fowler v. Pendleton.* p. 300

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INJUNCTIONS—*Continued.*

2. Where a plaintiff appeals to a court of equity to protect his legal rights, he must show a strong *prima facie* case in support of the right asserted, and show that irreparable or serious injury will result from the invasion of his right, the irreparable or serious injury he has sustained or will likely sustain, before such rights can be fully vindicated in the proper forum, being the equity on which the application for an injunction is founded.

Ches. Beach Hotel Co. v. Hall. p. 655

3. **Production of papers, etc.**

When a complainant seeks the intervention of a court of equity by way of injunction, he must make out a clear case, and if he has in his possession or can produce authenticated copies of papers or instruments in writing on which his equity rests, such papers must be filed in support of the bill.

Chesapeake Beach Hotel Co. v. Hall. p. 651

4. **Subsidiary questions.**

Under section 199 of Article 16 of the Code of 1912, the Court may, at any stage of the cause or matter, on the application of any party thereto, or party in interest, issue an injunction commanding any party to such a cause or matter to do or abstain from doing any act or acts, etc.

B. and O. R. R. Co. v. Silbereisen. p. 413

5. **Trespass: title to land.**

One who owned land adjacent to and bordering along a railroad embankment filed a bill, alleging that the railroad was encroaching upon his land by extending the embankment and by placing dirt, or letting it fall and extend beyond the railroad's lines, and prayed for an injunction to restrain the railroad from such acts; pending the injunction proceedings, the complainant began to cut away part of the embankment that he claimed encroached upon his land. The railroad filed a petition alleging that such cutting away of the embankment weakened the structure and disturbed the stability of the ties and rails, and endangered the lives of the traveling public, and prayed for an order restraining the complainant from interfering with the embankment until the final hearing, and further prayed that in the meanwhile it might be given leave to make and maintain the embankment in a safe condition for the traveling public and for other relief; at the final hearing, the injunctions and the petition were dismissed without prejudice to

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INJUNCTIONS—*Continued.*
any proceedings at law either party might be advised to take. On an appeal by the railroad from the order dissolving the injunction and dismissing the petition, the cause was remanded, (as it was impossible for the Court of Appeals, from the record, to determine the true location of the parties' lines) without affirming or reversing the order appealed from, the Court below to continue the injunction, with the relief prayed by the railroad and to provide for further proceedings at law to have the title determined within a day to be named in its order.

B. and O. R. R. Co. v. Silbereisen. p. 420

ISSUES FROM ORPHANS' COURTS. See COURTS.

JOINT OBLIGEES. See BONDS, 2.

JUDGMENTS.

Motion to strike out—.

In general, an application to strike out a judgment must be made within the time allowed to take an appeal and within a reasonable time of the discovery of the facts relied on.

Houston v. Wilcox. p. 100

JURY. See COURTS. EVIDENCE, 4, 5. RES ADJUDICATA, 2.

LAND OFFICE.

1. Caveat: hearing; extension of time.

When a caveat filed in the Land Office can not be heard on the day fixed, within twelve months of entering the same, the commissioner should extend the time upon proper cause shown.

Conard v. Williams. p. 41

2. Patents for land.

No patent should issue for land for which a patent has been previously granted, so long as such patent remains in force.

Conrad v. Williams. p. 39

3. ——; vacant land; evidence.

An appeal was taken from the ruling of the Commissioner of the Land Office, deciding that the patent applied for, for certain land alleged to be vacant, was valid and should issue as prayed; the evidence in the case was considered by the Court of Appeals and the ruling of the Commissioner affirmed.

Manor Mining and Mfg. Co. v. Sincell. p. 365

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LICENSES.

1. Insurance brokers.

Section 219 of Article 23 of the Code of 1912, relating to licenses for carrying on the business of insurance brokers, does not apply to an artificial person or body corporate.

Shehan v. Tanenbaum, Son and Co. p. 287

2. Revenue Measure.

This Act, in addition to the regulation of the insurance business, had for its purpose the raising of revenue.

Shehan v. Tanenbaum, Son and Co. p. 285

LIENS. See MECHANICS' LIEN.

Material men: city contracts.

Ordinance No. 25, approved April 4, 1898, provided that in the building contracts of the City of Baltimore there shall be a clause requiring the contractor, before delivering the building, etc., to produce and exhibit vouchers showing a settlement by him in full with all persons or corporations who were engaged by him in the construction of the building, etc. A similar provision was inserted in Sanitary Contract No. 51 for the construction of the Baltimore Sewerage System. *Held,* that neither the ordinance nor the terms of the contract gave material men who had furnished materials for such construction any lien for the materials furnished under the contracts; nor does it give such material men any right to any lien by invoking the interposition of a court of equity.

Lombard Gov. Co. v. M. and C. C. of Balto. p. 312

LIFE TENANTS. See DECEDENTS' ESTATES.

LIQUOR LAWS. See "SECOND OFFENSE." STATUTES: REPEAL OF—, 2.

1. Second offense.

An indictment of a traverser for violating as licensee under section 14 of Chapter 179 of the Acts of 1908 (which section relates to the punishment of licensees found guilty a second time for violating the provisions of the liquor laws), is void, unless it alleges that the traverser was a licensee at the time of his conviction for the first offense. *Kenny v. State.* pp. 123, 124

2. Verdict.

A simple verdict of "guilty" in such a case does not justify the penalty provided by the statute for a second offense; to jus-

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LIQUOR LAWS—*Continued.*
tify a sentence for a second offense it must appear from the verdict that the jury have found the party guilty of such second offense. *Kenny v. State.* p. 123

MALICE. See PLEADING AND PRACTICE, 8.

MALICIOUS PROSECUTION.

1. **Burden of proof.**

In order to enable a plaintiff to recover in a suit for malicious prosecution, in addition to the fact that he was prosecuted and acquitted, he must show that he was prosecuted at the instance of the defendant, and that such prosecution was both malicious and without probable cause on his part. *Chapman v. Nash.* p. 611

2. **Want of probable cause.**

The want of probable cause in such a case is a mixed question of law and fact. *Chapman v. Nash.* p. 611

3. In such a case probable cause is such a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the party accused to be guilty. It is wholly immaterial whether the party was guilty or not, if the facts known to the defendant, and only known to him, were such as would warrant a cautious man in believing the party to be guilty. *Chapman v. Nash.* p. 612

4. **Malice: inference of—.**

While malice may be inferred from the want of probable cause, a want of probable cause may not be inferred from even the most express malice. *Chapman v. Nash.* p. 616

5. In an action for malicious prosecution, where the defendant in such action had caused the plaintiff to be arrested on the charge of conspiracy to defraud (by means of false certificates of weight as to several loads of hay), it was *held*, that the plaintiff had failed to establish want of probable cause and that he was not entitled to recover. *Chapman v. Nash.* p. 617

MARRIED WOMEN.

Under Chapter 457 of the Acts of 1898, a married woman has the same power to dispose of her property as that enjoyed by a married man (provided she be 18 years of age); and the limitation of her capacity to convey without the joinder of her hus-

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MARRIED WOMEN—*Continued.*
band is removed, subject, however, to his rights which he has acquired by virtue of the marital relation.
Beinbrink v. Fox. pp. 112, 113

MASTER AND SERVANT.
1. **Third parties: liability to—; injury by servant.**

A master is not liable to third persons for the negligence of his servant, if at the time of the accident the servant was not acting within the scope of his employment, but was acting contrary to his master's express orders and exclusively for his own individual purpose. *Symington v. Sipes.* p. 315

2. A chauffeur having been sent back with his master's automobile from Virginia and ordered to take the machine to the garage in Baltimore City, instead of so doing, when near Baltimore spent the day driving about with friends and going from road house to road house with them, and while so engaged ran into and injured the plaintiff's carriage; *held,* that under such circumstances the servant alone was responsible for the consequences of his negligence. *Symington v. Sipes.* p. 315

3. **Wages: suits for—; duty of plaintiff.**

Where a person wrongfully discharged brings suit against the employer for his loss of wages, etc., he is required to show that he used all reasonable exertion to minimize the loss resulting from the breach of the contract. *Dolby v. Laramore.* p. 624

MAXIMS.
1. He who seeks equity, must do equity. *Tobin v. Rogers.* p. 253
2. *Salus populi, suprema lex.* *State v. Gurry.* p. 542

MECHANICS' LIEN. See LIENS.
1. **Baltimore City: labor only.**

In Baltimore City, under an indivisible building contract, including the furnishing of materials and labor, there is no lien for the payment of the labor furnished any more than for the materials supplied. *Md. Casualty Co. v. Lacios.* p. 686

2. Under an entire contract for both labor and materials furnished in painting a structure, the fact that the party, a subcontractor, doing the work, agreed to buy the paint from the contractor who was erecting the building, and to deduct the cost from the consideration in the contract, did not change the character and nature of the contract, so as to give a lien for labor only. *Md. Casualty Co. v. Lacios.* p. 686-687

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MECHANICS' LIEN—*Continued.*

3. In order to gratify the requirements of the mechanics' lien laws as to notice of intention to claim a lien, a notice within 60 days from the last item furnished is sufficient to cover all items furnished under a contract, although furnished at different times; but the right of a material man to a lien for furnishing materials can not be kept alive by furnishing materials outside of and in addition to those specified by the contract, after such contract has been performed. *Brunt v. Farinholt Co.* p. 133

4. Statutory remedy.

The right to a mechanics' lien for labor, work done and materials furnished, under the law, is not a vested right, but is a remedy only created by positive statutory enactment.
Md. Casualty Co. v. Lacios. p. 686

MINORS. See MARRIED WOMEN.

MISTAKE. See RECTIFICATION OF INSTRUMENTS.

"MONEY COUNTS." See DECLARATIONS.

MORTGAGES. See CORPORATIONS.

1. In equity, a mortgage is deemed a purchase to the extent of the debt secured thereby. *Houston v. Wilcox.* p. 98

2. Application of payments.

Where the mortgagor is indebted to the mortgagee for loans other than the one specifically secured by the mortgagee, the mortgagee may, with the assent of the mortgagor, apply a portion of the sum realized from the sale of the property under foreclosure proceedings in partial liquidation of the unsecured debts; and if the mortgagor voluntarily assents to such application of funds, he can not afterwards be heard to complain of the attendant reduction in the value of his equity of redemption. *Hawkins v. Bouic.* p. 162

3. Foreclosure: advertisement.

Where the advertisement of a mortgage foreclosure was published in full in a paper published in the county where the land lay, and also in a paper published in the City of Baltimore, for the full time required by law, and an abbreviated form of advertisement was inserted in another Baltimore paper, and large placards were placed on the property and galley-proof

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MORTGAGES—*Continued.*

Foreclosure: advertisement—Continued.

copies of the full advertisement were mailed by the auctioneer to more than a hundred persons likely, in his judgment, to be interested as possible purchasers, and where in all of said advertisements there was the information that copies of the plat of the property and fuller details with regard to it could be had on application, etc., it was *held,* that this advertisement was greater than required by law, and that no valid objection could be made to the sale because of the means provided for public notice. *Edgecombe Park Co. v. Finney.* p. 324

4. **——; description.**

It was further held, that objection to the sufficiency of description in the advertisement was not sustained by the proof.
Edgecombe Park Co. v. Finney. p. 324

5. **——; whole tract or separate lots.**

Certain suburban land was sold under foreclosure proceedings subject to the lien of a prior mortgage; the prior mortgage contained provisions for releasing the land from time to time in one or more blocks into which it had been subdivided; according to the terms of the advertisement, the land was first offered by separate blocks and finally sold as an entirety; upon objection to the ratification of the sale on the ground that the land should have been divided and offered in separate lots instead of in bulk, it was *held,* that upon all the facts of the case no valid exception could be made on this ground to the ratification.
Edgecombe Park Co. v. Finney. p. 326

6. **——; sale by acre or by lots.**

In a mortgage foreclosure it is the duty of the trustee to offer the property in such a manner as to bring its fair market value, and to exercise the same judgment and prudence that a careful owner would use in the sale of his own property. Whether it is advisable to sell the land by the acre or by building lots depends largely upon the location of the property and the surrounding cricumstances.
Edgecombe Park Co. v. Finney. p. 325

7. **Injunctions.**

Courts of equity will not grant relief by injunction to stay a sale or prevent the foreclosure of a mortgage, except in special cases, and those mentioned in section 16 of Article 66 of the Code. *Fowler v. Pendleton.* p. 300

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MORTGAGES—*Continued.*

8. Parol evidence.

Parol evidence is not admissible to contradict or vary the terms of a mortgage. *Fowler v. Pendleton.* p. 301

9. Verbal agrements.

Where a mortgage is executed in proper and regular form and duly recorded as required by law and appears binding in every way, its foreclosure will not be enjoined merely upon the allegation of a verbal agreement, inconsistent with and in contradiction to its express terms. *Fowler v. Pendleton.* p. 301

10. Possession: habere facias possessionem.

A writ in the nature of a *habere facias possessionem* is the appropriate remedy in equity to compel the mortgagor in possession to surrender the property sold to the purchaser thereof, after final ratification of sale under foreclosure proceedings.
Hawkins v. Bouic. p. 162

11. Power of sale.

The power of sale authorized by section 6 of Article 66 of the Code to be exercised by the mortgagee, or the person named in the mortgage, implies a personal trust, and is an obligation that a corporation is incapable of performing.
Barroll v. Benton. p. 176

12. ——; rights of assignees.

Where the power of sale is in the first instance given to a mortgagee who is a natural person, the power is regarded as incident to the mortgage security, and as such passes to the successive assigns, even in the absence of any stipulation in the mortgage to that effect.
Barroll v. Benton. p. 177

13. ——; by corporations.

A power of sale in a mortgage to a corporation or its unnamed attorney or agent is inoperative and void.
Barroll v. Benton. pp. 176-177

14. ——; its successors and assigns.

But if the mortgage confers the power of sale upon a mortgagee corporation, "its successors and assigns," or a designated person as attorney or agent, the assignee (and named attorney or agent) may execute the power if the mortgage so provides.
Barroll v. Benton. p. 177

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MORTGAGES—*Continued.*

15. Power of sale: to attorney of corporation.

In a mortgage a power of sale was conferred upon a corporation or H. H. B., its attorney or agent; the mortgage was transferred to another corporation, and by it assigned to the said H. H. B. for collection; he signed the advertisement as "assignee of the mortgage"; the report of sale was signed "assignee and trustee"; the bond (although referring to the assignment) was executed by him in his individual capacity; the condition of the bond was that he should well and faithfully perform "the trust reposed in him by said mortgage and any decree or order in the premises." *Held*, that a sale made by him in distinct reference to a power expressly and lawfully conferred upon him by the mortgage, was not rendered ineffective merely because the capacity in which he acts was not correctly stated.

Barroll v. Benton. p. 177

16. Priorities: second mortgages; foreclosure.

A sale under a second mortgage is subject to the effects of a prior mortgage, unless the mortgagee in such prior mortgage assents to a sale free and clear of his lien or voluntarily releases the same, or unless he intervenes in the proceedings and subjects himself and his mortgage to the jurisdiction of the Court. *Tobin v. Rogers.* p. 252

17. Where the mortgagee under a first mortgage was not made party to foreclosure proceedings under a second mortgage and did not release his mortgage, but simply filed a claim for its amount and interest, an account allowing such claim should not be ratified, without proof of the payment and release of the first mortgage, or unless the first mortgagee by apt proceedings has been made a party, so as to be bound thereby.

Tobin v. Rogers. p. 252

18. A mortgagee who takes his mortgage for value and without notice of prior equities, occupies the position of a *bona fide* purchaser, and is entitled to protection afforded to such a purchaser by a court of equity. *Houston v. Wilcox.* p. 98

19. In such cases, where the mortgage is sought to be vacated. because of alleged equities of which he had no notice, equity will allow the instrument to stand as a security for the money actually paid by the mortgagee. *Houston v. Wilcox.* p. 99

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MUNICIPAL CORPORATIONS. See CONDEMNATION OF LAND. STREETS.

Agency: discretion.

When Acts of the Legislature leave to a municipality the authority to delegate certain powers to different commissions, the discretion as to which agency should be selected is in the municipality.

P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 514

MUNICIPAL ORDINANCES. See BALTIMORE CITY, 4. ORDINANCES, ETC.

NEGLIGENCE. See AUTOMOBILES. MASTER AND SERVANT.

1. Employer and employee.

To entitle an employee to recover against a master on the ground of negligence, the foundation of the right rests upon the negligence of the master, and unless there has been some breach of duty on his part there can be no liability because there has been no neglect. *Casparis Stone Co. v. Boncore.* p. 454

2. Equitable plaintiff: release by party injured.

Where a party, injured by the negligence of another, dies, but, before dying, for a valuable consideration executes a release to the defendant for all claims that he had, or might have, because of such injury, no suit can be brought by the State for the use of the equitable plaintiffs for damages, under Article 67, section 1 of the Code of 1904, because of such injury.

Melitch v. United Rwys. and E. Co. p. 463

3. The distinction drawn between this Act and the provisions of sections 103 and 104 of Article 93 of the Code of 1912.

Melitch v. United Rwys. and E. Co. p. 463

4. "No evidence."

In an action for damages for injuries received from the alleged negligence of the defendant, whatever the facts and circumstances may be, unless there is some evidence of negligence, or evidence from which negligence may be legally inferred, as the result of some act or omission on the part of the defendant, the case should be withdrawn from the consideration of the jury.

Casparis Stone Co. v. Boncore. p. 450

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NEGLIGENCE—*Continued.*

5. Fright.

Where a plaintiff claims damages because of injuries she received through a fall occasioned by a fright wrongfully caused her by the defendant, it is incumbent upon the plaintiff to show that she was frightened and that her fall was the result of the fright, and any evidence tending to support her statement that fright caused her fall was admissible.

Balto. and Ohio R. R. Co. v. Harris. p. 272

6. Railroad crossings: blowing off steam.

The plaintiff was entitled to no greater caution on the part of the servants of the defendant, than she would have been entitled to had she crossed the tracks of the defendant on the street crossing while the engine was standing near, and if the engineer in answer to the signals of the brakeman had blown only an ordinary blast from the whistle, as required by the rules of the defendant, and in the usual manner had permitted only the usual amount of steam to escape, the plaintiff would not be entitled to recover. *Balto. and Ohio R. R. Co. v. Harris.* p. 270

7. ——; escaping steam.

An engine and train of the defendant corporation were blocking a street crossing, and the plaintiff in order to pass on her way from her work, at the direction of the engineer and brakeman, walked around in front of the engine in full view of the engineer; when directly in front of the engine, the engineer suddenly blew an unusually long and unnecessarily loud blast from the engine's whistle, and allowed an unusual and unnecessary amount of steam to escape from the engine; the sudden noise caused the plaintiff such fear that she fell to the ground and in so doing received severe injuries. *Held,* that under such circumstances, the plaintiff was as much entitled to recover for the injuries sustained as a direct result of fright caused by such conduct on the part of the servants of the defendant, as she would have been had the servants, in disregard of her position, suddenly moved the train forward and injured her.

Balto. and Ohio R. R. v. Harris. pp. 269-270

8. Stone quarries: no evidence.

In an action of damages against a quarry company for injuries received by a workman who was employed in tamping dynamite and earth in a hole preparatory to a blast, it did not appear

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NEGLIGENCE—*Continued.*
by any evidence, except the conjecture of an expert, that the shape or kind of tool complained of had any connection with the accident; *held,* that the case should have been withdrawn from the consideration of the jury.
Casparis Stone Co. v. Boncore. p. 156

NOMINATIONS FOR OFFICE. See ELECTION LAWS.

OBITER DICTA.
Where the Court of Appeals in deciding a cause declares that, although, according to its view of the case the decision of a certain question is not before it and is not essential, but, in order to prevent further litigation on that score, it proceeds to dispose of the question, and after a motion for a re-argument, although it rescinds the decree, yet reaffirms its opinion on the same question, its ruling upon such question can not be treated as mere *obiter dicta.*
U. R. and Electric Co. v. M. and C. C. of Balto. p. 558

ORDINANCES OF THE MAYOR AND CITY COUNCIL OF BALTIMORE.
1879, No. 36.—Laying of tracks on Linden avenue. p. 555
1881, No. 54.—Tracks on Linden avenue. p. 555
1911, No. 692.—Segregation Law. pp. 538-539
1912, No. 70.—The Fallsway. p. 507
1912, No. 114.—Acquiring property for "Fallsway." p. 507
1912, No. 153.—Street railways: paving between tracks. p. 554

ORPHANS' COURTS. See DECEDENTS' ESTATES.
1. While Orphans' Courts are courts of limited jurisdiction, yet, by the Code, Article 93, section 235, they are vested with power to direct the accounting of executors and administrators, superintend distribution of estates of intestates and administer justice in all matters relating to the affairs of deceased persons; the language of this section vests in them power to protect the interests of all concerned. *Crothers v. Crothers.* p. 119
2. **Guardians: appointment; appeals.**
An appeal will not lie from an order of the Orphans' Court appointing a guardian, when the Court had jurisdiction to make such appointment. *Sudler v. Sudler.* p.48

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ORPHANS' COURTS—*Continued.*

3. **——; jurisdiction; domicile.**

The provisions of the Code (section 144, Article 93), conferring jurisdiction for the appointment of guardians of minor children on the Orphans' Courts where the infants reside, refers to the domicile and not to the mere place of the infants' residence. *Sudler v. Sudler.* pp. 48, 49

4. **Issues from—; trial without jury.**

Under section 8 of Article 4 of the Constitution, parties to any cause may submit the same to the Court for determination, without the aid of a jury; and issues sent by the Orphans' Court to a court of law for trial constitute "a cause" within the meaning of this section of the Constitution, where such issues are submitted or tried by the Court sitting as a jury.

Houston v. Wilcox. p. 100

PARENT AND CHILD. See ADOPTED CHILDREN. FIDUCIARY RELATIONS.

PAROL EVIDENCE. See ACKNOWLEDGMENTS. AUTHENTICATION OF STATUTES.

PARTIES. See PLEADING AND PRACTICE.

1. **Heirs at law: setting aside fraudulent conveyances.**

The grantor of a fraudulent conveyance to his wife being dead, a creditor proceeded by a bill against the wife alone, praying that the deed be annulled and the property therein mentioned sold and that the proceeds, after payment of costs, etc., be applied to the payment of the plaintiff's claim. *Held,* that the heirs at law of the grantor should have been made parties and that the bill was demurrable. *Wilson v. Shaw.* p. 60

2. **Trustees: with dry legal title.**

Although the trustee of a dry legal title has no interest in the property, he is a necessary party to any proceedings whereby it is sought to convey, etc. *Wilson v. Shaw.* p. 60

PARTITION OR SALE IN EQUITY.

1. On petition for a partition, or sale and division, of trust property, a decree directed the sale of all certain lots, including ground rents, when it should be deemed most advantageous, with leave to report to the Court from time to time for approval any sales of all or any of the property; the trustee was appointed to receive from the owner of the leasehold interest the redemp-

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PARTITION OR SALE IN EQUITY—*Continued.*
tion money for the reversionary interest in any lots where the rents were or might be redeemable, and to execute deeds to extinguish the rents; *held*, that the Court having jurisdiction of the parties and the subject-matter, and the trustee being required to bring the money into Court for distribution, the decree was binding on all parties interested, whether *in esse* or not, and that the sale of a ground rent so made was not subject to exception by the purchaser, even though the sale was made long after the sale of the other property.
Saml. Ready School v. Safe D. and T. Co. p. 521

2. Averments under section 228 of Article 16 of Code.

What averments are sufficient to give a court of equity jurisdiction, upon a bill for a sale or partition under section 228 of Article 16 of the Code of 1912.
Saml. Ready School v. Safe D. and T. Co. p. 519

3. Parties: trustees.

A trustee holding the legal title is a proper party to file a bill for a partition or sale for the purpose of division, and the mere lapse of time between the date of the decree and the sale will not, in general, be sufficient grounds for setting the sale aside. *Saml. Ready School v. Safe D. and T. Co.* p. 521

4. Title of defendant.

On a bill for a sale of land for partition, etc., a court of equity has power to decide that one of the parties defendant has no interest or title to the property in question.
Eureka Life Ins. Co. v. Geis. p. 201

PATENTS FOR LAND. See LAND OFFICE.

PAYMENTS. See MORTGAGES, 2. USURY.

1. Moral obligation.

A party is not entitled to recover payments which he was under moral obligation to pay.
Chipman v. Far. and Mer. Natl. Bk. p. 356

2. Voluntary—.

Voluntary payments can not be recovered.
Chipman v. Far. and Mer. Natl. Bk. p. 356

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PLEADING AND PRACTICE. See ATTACHMENT. DECLARATIONS. DEMURRER. EXCEPTIONS. JUDGMENTS. PRAYERS. WITNESSES: EXAMINATION OF—.

1. **Amendment to pleadings.**

The title to certain property was in an infant, and on a petition for an appeal from an inquisition allowing damages and assessing benefits in condemning and opening a right of way through the property, the caption of the petition and affidavit was in the name of the infant by N. B. Y., *his next friend,* but the petition itself was signed by N. B. Y.; it was *held,* that a motion to amend the petition so as to make it read correctly, signed in the name of the infant by N. B. Y., *his next friend,* was proper and should be allowed.

Mayor and C. C. of Balto. v. Yost. p. 376

2. —; **new parties.**

Such an amendment was not the introduction of a new party plaintiff, in violation of section 41 of Article 75 of the Code of 1912. *Mayor and C. C. of Balto. v. Yost.* p. 375

3. —; **appeals.**

The action of the Court below in allowing such amendment can not be made the subject of exception, or of review by the Court of Appeals. *Mayor and C. C. of Balto. v. Yost.* p. 376

4. **Appeals: reversals; harmless errors.**

To justify a reversal on account of erroneous rulings, it must be apparent from the record that some injury was thereby done to the party complaining. *Bregenzer v. Hutzler.* p. 386

5. **Declarations: "money counts."**

Unless the "money" counts of the common counts in a declaration be preceded by the words "for money payable by the defendant to the plaintiff," they are demurrable.

Tyng and Co. v. Woodward. p. 438

6. **Parties.**

A declaration filed against defendants with interests so diverse that it is impossible for them to file pleas which would be able to stand the test of a demurrer or which would bring the case to issue, is demurrable.

Williams v. Fidelity and Dep. Co. p. 228

7. In an action *ex contractu* where there are too many, or too few, parties, and the effect is apparent on the face of the declaration, a demurrer will lie.

Williams v. Fidelity and Dep. Co. p. 228

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PLEADING AND PRACTICE—*Continued.*

8. **Malice.**

A charge in a declaration that certain acts therein complained of were done "intending to injure the plaintiff in the beneficial use and occupation of * * * " a certain farm, etc., is in effect an allegation of malice. *Groh v. South.* p. 641

PLEADING AND PRACTICE IN EQUITY. See INJUNCTIONS. RECEIVERS.

1. In the case of *Wicks* v. *Westcott,* 59 Md. 270, in explaining Code (1860), Art. 5, sec. 27 (now section 37), the Court did not mean to limit the application of that section to the original defendants, as distinguished from defendants who might be brought in afterwards upon the petition of the plaintiff, or who were made such upon their own application; the Court made that section applicable only to defendants in regular chancery proceedings, as distinguished from proceedings such as objections to sales. *Carrington v. Basshor Co.* p. 78

2. **Preliminary questions of law.**

Under section 205 of Article 16 of the Code of 1912, a court of equity may have preliminary questions of law determined before the trial of any issue of fact in the case.

P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 507

3. **Injunctions: hearing on bill and answer.**

When the application for an injunction is heard upon bill and answer, the answer must be considered, and if they determine the equity of the bill in such a manner as would authorize the dissolution on motion to dissolve the injunction, the injunction ought not to be granted.

Chesapeake Beach Hotel Co. v. Hall. p. 651

4. **——; new matters.**

So far as they are responsive to the bill, such answers are to be taken as true, but new matters set up by way of avoidance, which can only be established by evidence, do not, in general, avail to prevent the issuing of the injunction.

Chesapeake Beach Hotel Co. v. Hall. p. 651

5. But where the Court is satisfied that the complainants will not suffer by not having an injunction issued at once, and testimony can be taken in a reasonable time, if the new matter be of a character that if proven would ultimately require the dissolution of the injunction, the Court has discretion to issue the injunction or not. *Chesapeake Beach Hotel Co. v. Hall.* p. 651

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PLEDGES OF PERSONAL PROPERTY.

1. Redemption: right of—.

A pledge partakes of the nature of a mortgage, and is subject to the pledgor's equity of redemption.
Tyng and Co. v. Woodward. p. 430

2. Sale: right of—.

A pledgee of stock has, in general, no right to dispose of it at private sale, unless the pledgor has given such authority.
Tyng and Co. v. Woodward. p. 431

3. Sale of—: stock that is not listed.

When stock is not listed or dealt in on the exchange, but is only sold by certain firms or parties dealing in it by correspondence, telegrams, etc., with brokers or others owning or interested in the stock, such stock may be sold privately, provided that the sale be fair, and the mere fact that, in such a case, the pledgee buys the stock himself does not make the sale invalid.
Tyng and Co. v. Woodward. p. 436

4. ——; to third parties.

Whether a sale, under such circumstances, was actually made to a third party for himself, or to him for the benefit of the pledgee, is always open to judicial examination, as it reflects on the question of fairness. *Tyng and Co. v. Woodward.* p. 436

POLICE POWER. See BALTIMORE CITY.

1. Constitution of U. S.

The 14th Amendment to the Constitution of the United States does not take from the states the police power that they possessed before the Constitution was adopted; and the states still possess those powers subject to the observance of the fundamental principles of civil rights. *State v. Gurry.* p. 544

2. Private property.

The absolute control of property by an owner may be subject to reasonable regulations under the police power of the State; and the owner may not use his property as he pleases, if such use injuriously affects others. *State v. Gurry.* p. 550

PRAYERS. See APPEALS: COURT OF—.

1. Brevity: desirable.

Prayers should be drawn with all the brevity consistent with a clear, accurate statement of the law affecting the facts of the case, and prolixitiy or unnecessary repetition tend rather to confuse than to enlighten the jury. *Thomas v. Cortland.* p. 767

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PRAYERS—*Continued.*
2. Conceded facts.

Prayers that do not correctly state the law according to the conceded facts are erroneous. *Carrington v. Graves.* p. 575

2a. Confusing to jury.

Prayers liable to confuse the jury are erroneous, and are properly rejected. *Groh v. South.* p. 641

3. Erroneous—; when no ground for reversal.

There can be no reversal by the Court of Appeals for erroneous rulings, when it appears that the rulings complained of worked no injury to the party excepting.
Mayor and C. C. of Balto. v. Yost. p. 383

4. No evidence.

In such a case, if any count in the declaration is sufficient to support a verdict under the evidence for the plaintiff, the prayer ought to be rejected. *Tyng and Co. v. Woodward.* p. 437

5. A prayer instructing the jury that there is in the case no legally sufficient evidence from which the jury could find a verdict for the plaintiff, and that their verdict must be for the defendant, amounts to a demurrer to the evidence.
Lawson v. Burgee. p. 205

6. Where, at the end of all the evidence, both of the plaintiff and the defendant, the defendant prays for an instruction directing a verdict in his favor, on the ground that the plaintiff has offered no evidence legally sufficient to establish his case, on appeal, the Court must consider the whole evidence and not that of the plaintiff alone. *Chapman v. Nash.* p. 610

7. Amounts to demurrer.

Such a prayer amounts to a demurrer to the whole evidence, and the Court, in dealing with it, must assume the truth of the facts adduced in support of the plaintiff's case.
Chapman v. Nash. p. 610

8. In such a case, the Court may consider other facts appearing in the record that have been proved, and not denied by the plaintiff. *Chapman v. Nash.* p. 610

9. ——; waiver.

The defendant, by offering evidence after the refusal by the Court to grant his prayer taking the case from the jury on the ground of lack of evidence, thereby waives his right to object to the rejection of such prayer.
Casparis Stone Co. v. Boncore. p. 450

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PRAYERS—*Continued.*

10. Refusal of—; reversal.

Unless it appears that the party was injured by the refusal of his prayer, such ruling, even though erroneous, can form no no ground for a reversal. *Thomas v. Cortland.* p. 675

11. Withdrawing facts from consideration of jury.

A prayer instructing the jury that the plaintiff is entitled to recover, provided they find certain facts, withdraws from their consideration all facts other than those mentioned; and if from any facts so excluded the jury would have been justified in drawing a conclusion different from that which the prayer requires them to find, the prayer is erroneous.

Dolby v. Laramore. p. 624

PRESCRIPTIONS. See STREETS.

PRESUMPTIONS. See PUBLIC OFFICIALS. WRITTEN INSTRUMENTS.

PRINCIPAL AND AGENT.

Agent's authority.

The authority of an agent is presumed to be consistent with the interest and title of his principal.

Martin v. Munroe. p. 684

PROPERTY RIGHTS. See POLICE POWER.

PUBLIC OFFICIALS.

1. Presumptions.

The presumption is always in favor of the proper performance of duty by public officials until the contrary is alleged and proved. *Gregg v. Public Service Commission.* p. 31

PUBLIC SERVICE COMMISSION.

1. Effect: existing statutes.

The purpose of the Public Service Commission Act was to place all corporations handling public utilities under the supervision and control of the Public Service Commission, with power to it to regulate the rates charged for service; but until the commission does so regulate such rates, any Act or Acts in force respecting them should remain unimpaired.

Gregg v. Public Service Commission. p. 30

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PUBLIC SERVICE COMMISSION—*Continued.*

2. ——; **repeal.**

By such an Act, the Legislature itself repeals the former enactments, and only leaves to the commission the power to fix the time when the repeal shall become operative.

Gregg v. Public Service Commission. p. 31

3. **Hearings and orders.**

By a certain order of January 2, 1912, the Public Service Commission promulgated an order prescribing the rate for telephone charges in the City of Baltimore, to be effective on and after the following 1st of May, with an opportunity to a certain class of subscribers to continue their then existing contracts until the 1st of the next October; this option was further extended to April 1st, 1913, with the right to an association of that class of subscribers to show cause against the said rates up to January 1, 1913, and by another order dated October 20, 1913, such extension was made to be effective until January 1, 1913. The original order of January 2, 1912, under the Act, was so far final as to form the ground for a motion for a rehearing, and was such an order from which an appeal could have been taken within sixty days after its promulgation; the parties made no move for such a rehearing and took no action to stay the order within the time prescribed by section 43 of the Act, and therefore could not, in December, 1912, be heard to complain that an execution had been issued against them without an opportunity to be heard. *Gregg v. Public Service Commission.* p. 33

4. **Hearings on proposed rates: legislative act.**

The proceedings of the Public Service Commission, established under the Act of 1910, in having hearings upon telephone rates proposed to be adopted, and its right to promulgate the rates which the telephone company may be permitted to charge, is a legislative rather than judicial or administrative act, and is not objectionable on constitutional grounds to Art. 8 of the Declaration of Rights.

Gregg v. Public Service Commission. p. 29

5. ——; **on motion of corporation.**

The fact that the proceedings for the investigation of the rates of the telephone charges were instituted by the telephone company when it submitted to the commission its schedule of

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PUBLIC SERVICE COMMISSION—*Continued.*

proposed rates, and asked approval of them, does not differentiate the case from one where the investigation was instituted by the commission.

Gregg v. Public Service Commission. p. 32

6. Legislative control of rates.

The Legislature can establish the rates to be required by the corporations operating public utilities, and change them from time to time; provided that the rates established be not confiscatory. *Gregg v. Public Service Commission.* p. 30

7. ——; power to delegate.

And such regulations may be made either by the Legislature directly or through a board, with such power as may be delegated. *Gregg v. Public Service Commission.* p. 31

8. Repeal of prior laws: gas or electric companies.

Chapter 180 of the Acts of 1910, in section 31½, by express terms, repeals all prior Acts or parts of Acts that prescribe or limit the price at which any gas corporation or electric company or any other corporation subject to the Act may furnish or sell its gas, etc., or other product or utility.

Gregg v. Public Service Commission. p. 29

9. Rights and powers.

The Public Service Commission has the right to require all corporations conducting public utilities to lay before them the facts relating to issues of stock and bonds or debentures or certificates of indebtedness, with statements including the amount of such issues, and in a general way the purposes for which such issues are to be made; and where the enterprise is one to be conducted wholly within a single state, the commission may sanction or disapprove of the proposition.

Laird v. Balto. and Ohio R. R. Co. p. 188

10. But the Public Service Commission is not and can not be invested by the legislature with supervisory powers over the expenditures of money by corporations in other states, nor the apportionment of expenditures of moneys as between different states, nor can it pass upon, approve or condemn the wisdom or unwisdom of construction work to be performed in other states. *Laird v. Balto. and Ohio R. R. Co.* pp. 190-191

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PUBLIC SERVICE COMMISSION—*Continued.*

11. The final determination of matters of this nature must rest with the officers and directors of the corporation.

Laird v. Balto. and Ohio R. R. Co. p. 191

12. Railroads: Baltimore and Ohio Railroad.

The Public Service Commission may require the B. & O. R. R. to file applications or reports with it, stating with reasonable fullness such facts as may be required to enable the Commission, and those legitimately interested therein, to decide upon the *bona fides* of any prospective issue or sale of bonds or certificates of indebtedness and the value of the same.

Laird v. Balto. and Ohio R. R. Co. p. 193

13. The Baltimore and Ohio R. R. is subject to the jurisdiction of the Public Service Commission in respect to those matters which, coming under the police power of the state, have been confided to the commission; it is also subject to the control of the Public Service Commission in the matter of service, transportation, etc., and rates, as far as concerns business conducted within the State. *Laird v. Balto. and Ohio R. R. Co.* pp.184-185

14. But the B. & O. R. R. is not subject to the jurisdiction of the Commission as to the financing of its whole system extending through a number of states, either in respect to determining the aggregate amount of its capital stock, or bonded indebtedness; this power having been given to the B. & O. R. R., in terms, by an amendment to its charter, Chapter 313 of the Act of 1845, and being one which the state has not the power to annul or take from. *Laird v. Balto. and Ohio. R. R. Co.* p. 188

15. Neither may the commission control the price at which its bonds or certificates of indebtedness shall be sold, nor why or how the moneys realized from the sale of them shall have been expended. *Laird v. Balto. and Ohio R. R. Co.* p. 193

16. The extent of the power of the Public Service Commission in such cases is to require that there be presented to it the price at which bonds about to be issued have been agreed to be disposed of, or have been disposed of, so that the investing public may know the value that is to go into the company for the furtherance of its operation, and the bonds, which they are being asked to purchase, represent a *bona fide* transaction for which the company has received value.

Laird v. Balto. and Ohio R. R. Co. pp. 188, 191

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PUBLIC SERVICE COMMISSION—*Continued.*

17. Telephone companies.

Telephones and telephone service are a utility within the meaning of section 31½ of Chapter 180 of the Act of 1910, and telephone companies are subject to the provisions of the Act.
Gregg v. Public Service Commission. p. 29

QUARRIES. See NEGLIGENCE, 8.

RAILROAD CROSSINGS. See NEGLIGENCE.

RECEIVERS.

1. Applications for—.

Courts of Equity have jurisdiction, upon proper averments, to appoint receivers for corporations.
Carrington v. Basshor Co. p. 75

2. ——; practice.

Under sections 36 and 37 of Article 5 of the Code of 1912, on appeal from an order or decree of a Court of Equity, no objection can be made to the sufficiency of the averments of the bill, nor to the jurisdiction, unless it appears by the record that the objections were made in the Court below.
Carrington v. Basshor Co. p. 75

3. ——; bill alone.

Where a receiver is appointed upon a bill alone, and an appeal is taken, under section 27 of Article 5 of the Code of 1912, the Court, in passing upon the propriety of the order, is confined to the case as made by the bill and exhibits, and can not consider the defendant's answer.
Carrington v. Basshor Co. p. 76

4. ——; answer: effect of.

But when the order appointing a receiver is not passed until after the defendant has had notice and files his answer, the answer is considered below, and, on appeal, it may be considered by the Court of Appeals. *Carrington v. Basshor Co.* p. 76

5. When the defendant, who has notice of an application for the appointment of a receiver, files his answer before the appointment and fails to object in the court below to the sufficiency of the averments of the bill, or to the jurisdiction of the Court, he can not be heard to make such objections in the Court of Appeals. *Carrington v. Basshor Co.* p. 76

6. Parties.

And where a person is not a necessary party to the bill, but has such an interest in the subject-matter as entitles him to

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RECEIVERS—*Continued.*
defend the suit, and, upon his own application, is made a party defendant after an order appointing a receiver has been passed on a bill and answer of the defendant admitting the fact and consenting to such appointment, and he desires to question the propriety of the order, he must do so by appropriate proceedings in the court below; otherwise he can not question its right on appeal, unless the case is one in which no circumstances whatever could give the Court jurisdiction.
Carrington v. Basshor Co. p. 77

RECORD. See APPEALS: COURT OF—, 2.

RECTIFICATION OF INSTRUMENTS.
1. **Fraud or mistake.**

A court of equity will, upon proof of fraud, mistake or surprise, rectify an agreement according to the intent of the parties; but it will not interfere when the instrument is such as the parties themselves designed it to be; if they voluntarily chose to express themselves in the language of the deed, they must be bound by it. *Fowler v. Pendleton.* pp. 301-302

2. A court of equity has ample power to correct and reform an instrument, and make it conform to the intention of the parties if, by mistake, it fails to express their real intention, or contains terms or stipulations contrary to their common intention, provided the evidence be of a character to justify such action by the Court. *Hesson v. Hesson.* p. 629

3. ——; **burden of proof.**

It is incumbent, however, upon the party seeking to reform a written instrument to show by conclusive proof that it does not embody the final intention of the parties
Hesson v. Hesson. p. 629

4. ——; **common mistake.**

In the absence of fraud, courts will not rectify instruments unless executed under a common mistake, where both parties have done that which neither of them intended.
Hesson v. Hesson. pp. 630-631

5. ——; **intention.**

The fact, however, that there was a mistake as to what the contract was intended to be, must be established by clear and satisfactory proof. *Hesson v. Hesson.* p. 629

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RECTIFICATION OF INSTRUMENTS—*Continued.*

6. **——; mistake of one party.**

A mistake on one side may be ground for rescinding the instrument, but, in the absence of fraud, it is not ground for reforming a written instrument. *Hesson v. Hesson.* p. 629

7. **——; proof conflicting.**

Where the evidence of the complainant as to the terms of the agreement is contradicted by the defendant, courts will not rectify the contract unless there be sufficient evidence to corroborate that of the plaintiff, or unless the circumstances be such as to warrant a modification of the rule.

Hesson v. Hesson. pp. 632, 633

8. **——; delay not always laches.**

Where a son who had purchased land from his father, filed a bill to have the deed reformed, one year after he discovered that the deed put on record by the parties did not correctly express the intention of the parties, it was *held,* that, in view of all the facts in the case, the delay was no ground for refusing relief. *Hesson v. Hesson.* p. 638

9. Where, without the knowledge of the grantor, the defendant put on record a deed for a certain piece of property which contained a reservation clause not contained in, and different from, the agreement between the parties in reference to it, it was *held,* to constitute a case where reformation of the deed could not be refused solely because the defendant was not mistaken as to what was in it. *Hesson v. Hesson.* p. 638

RE-ENTRY: RIGHT OF. See CONDITION SUBSEQUENT.

REMANDING OF CAUSES. See APPEALS: COURT OF—, 3, 4.

REMAINDERMEN. See DECEDENTS' ESTATES, 7.

REPRESENTATIVE CAPACITIES. See DEEDS, 4.

RES ADJUDICATA.

1. **Change in conditions.**

In a suit between the same parties, growing out of the same subject-matter as that of a former suit, unless the evidence discloses a material change in conditions, the verdict and judgment in the former suit determines the right to recover.

Groh v. South. p. 640

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RES ADJUDICATA—*Continued.*

2. ——; **question for jury.**

And whether there had been such a change is a question proper to submit to the jury. *Groh v. South.* p. 640

REVERSIONARY INTERESTS.

1. **Ground rents: analogous to mortgages.**

The landlord's interest in the land, out of which an irredeemable ground rent issues, is but a money investment analogous to that secured by a mortgage.

Whiting-Middleton Construction Co. v. Preston. p. 216

2. ——; **injury to.**

For the owner of the reversion in a lot of land, leased for 99 years, renewable forever, under an irredeemable ground rent, to be able to recover damages for an injury to a building thereon, he must show that his reversionary interest was damaged in consequence of the injury or partial destruction of the house.

Whiting-Middleton Construction Co. v. Preston. p. 216

RIGHT OF WAY.

1. **Injunction to prevent obstruction of—.**

An electric railway condemned from a large tract of land a strip binding on an avenue from its intersection with a turnpike road; by agreement of the parties there was incorporated in the condemnation proceedings (to be taken as part of them), a provision that the railway should construct and maintain crossings over its tracks for each *dwelling* that should be built on the tract *fronting* on the avenue, for the benefit of the owners of the land condemned, their heirs and assigns; subsequently a corner lot of the tract on the turnpike, and running 120 feet along the strip so condemned, was sold to Z. by the successor in title to the tract; the deed reserved to the grantor, his heirs and assigns, the right to use a strip of the land conveyed ten feet wide along said avenue, as a sidewalk or footway. Subsequently the railway removed its tracks from the said right of way fifty feet binding on the lot adjacent to the turnpike road, and deflected the tracks to those of a line running parallel to the right of way, and by deed released the land so abandoned to the successors in title of the land that had been condemned, who in turn deeded such strip of the land to X.; X. claimed the land in fee and proceeded to erect a building thereon; Z.

RIGHT OF WAY—*Continued.*
filed a bill for an injunction to restrain its erection on the ground that it cut off the access, over the railroad tracks, to the building he had erected on his property; and on appeal from a decree of the lower Court granting the writ, it was ***held,*** that the injunction should issue. *Russell v. Zimmerman.* p. 392

2. The erection of the building on part of a right of way separating the plaintiff's property from the avenue amounted to an unauthorized obstruction in violation of an agreement relating thereto, and inconsistent with its purposes, in so far as it deprives the plaintiff of his property right, acquired thereunder, to cross said right of way in front of his building in reaching the avenue, and the erection of the building was enjoined.
Russell v. Zimmerman. p. 342

3. From the construction and use of the building, it must be considered as "fronting" on both the turnpike and the avenue.
Russell v. Zimmerman. p. 333

4. The fact that the building was used as a store and for other business purposes, does not prevent it being entitled to a crossing over the railway tracks, according to the provisions incorporated in the condemnation proceedings.
Russell v. Zimmerman. p. 341

5. The right of way along the avenue was conveyed, by the agreement and condemnation proceedings, to the owner of the land and her assignees, and the railway company could not be permitted to place upon the right of way any obstructions that would abridge or interfere with the exercise of such right.
Russell v. Zimmerman. p. 339

6. Injunction.

A court of equity has power to restrain the railway or its grantees from any attempt to violate the right.
Russell v. Zimmerman. p. 341

RIPARIAN RIGHTS. See ALLUVION.

SALE: CONTRACT OF—.

1. Evidence.

In a suit by a broker against one who refuses to accept or pay for stock that had been purchased for him at his request, the broker may offer in evidence the unpaid draft that he had drawn on the purchaser, and to sustain the fairness of the transaction, where he sells and himself purchases the stock at private

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SALE: CONTRACT OF—*Continued.*
sale, he may offer in evidence letters from other brokers who dealt in the stock to show its market price on the day of the sale. *Tyng and Co. v. Woodward.* pp. 436, 439

2. **Refusal of vendee to accept: resale by vendor; difference of price.**

When upon the refusal of a purchaser to take or pay for stock bought for him at his request, the vendor resells the same at a less price and sues the purchaser for the difference, a common count for goods bargained and sold is not sufficient.
Tyng and Co. v. Woodward. pp. 437-438

3. **——; suit for difference; declaration.**

In such a suit a common count, reciting that the defendant purchased stock from the plaintiff at a price named, and agreed to pay the price thereof to the plaintiff, and that the plaintiff offered and tendered the stock to the defendant, who refused to pay for the stock or any part thereof, is bad.
Tyng and Co. v. Woodward. p. 438

4. **——; notice of resale.**

A count which, to the aforegoing, adds that the plaintiff, after due notice, sold such stock, in the usual way, for a certain sum named, less than the purchase price, it being the best price then obtainable for the stock, is bad unless it is further alleged that the plaintiff refused and still refuses to pay the difference.
Tyng and Co. v. Woodward. p. 438

SALES IN EQUITY. See MORTGAGES. PARTITION OR SALE, ETC. TRUSTEES' SALE

1. **Inadequacy of price.**

Mere inadequacy of price is not sufficeint ground upon which to set aside a sale, unless it be so gross as to indicate mistake or fraud on the part of the trustee or mortgagee making the sale, or unless there is some just cause which the purchaser may be responsible for, which affords reasonable ground to suppose that the sale was improperly made.
Edgecombe Park Co. v. Finney. p. 326

2. Suburban property, consisting of 106 acres on the Pimlico Road near Baltimore, was sold under foreclosure proceedings for $36,000, subject to a prior mortgage of $66,000 and to other liens, costs and charges, making the actual aggregate purchase price $110,676; upon an exception to the ratification of the sale

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SALES IN EQUITY—*Continued.*
on the ground of inadequacy of price, it was *held,* that the price could not be said to be so grossly below its full value as to make proper a reversal of the decree ratifying the sale.
Edgecombe Park Co. v. Finney. p. 327

3. Irregularities: purchaser's title.

Where a court of equity has jurisdiction of the subject-matter and the parties, a mere irregularity in the proceedings under which a sale is made by a trustee appointed by the Court, will not be inquired into or deemed sufficient to sustain the exceptions to the sale by a purchaser, if such irregularities do not in any way affect the purchaser's title.
Saml. Ready School v. Safe D. and T. Co. p. 518

4. Trustees: appointed by court.

A will provided for three trustees; on their resignation a court of equity of competent jurisdiction appointed one trustee to make sale of the property; *held,* that the objections of a purchaser at a sale of the property under such decree to the ratification of sale could not be inquired into, when the Court had full jurisdiction over the subject-matter and the parties.
Saml. Ready School v. Safe D. and T. Co. p. 518

SAVINGS BANK DEPOSITS.

1. Deposits by husband for wife.

Certain earnings and savings of a wife, together with certain moneys, gifts from her husband, were deposited by the latter to the wife's account in a savings bank; the wife could not write, and her signature was written by the husband in the identification book; when withdrawals were made, it was always by check drawn to the order of the wife and signed and endorsed by the husband in her name; *held,* that the authority possessed by the husband to withdraw the money of the wife at his pleasure did not invest him with the ownership of the funds.
Martin v. Munroe. p. 683

2. ——; survivorship.

In such a case, upon the death of the wife intestate, the balance of the moneys so deposited to her account, passed to her estate, and was not to be treated by the husband as his own.
Martin v. Munroe. p. 684

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SAVINGS BANK DEPOSITS—*Continued.*

3. ——; **title not divested because of certain incapacity.**

The bank was the depository of her savings and of the perfected gifts by the husband, and her title thereto was not divested merely because her incapacity made it necessary and proper for her husband to have entire charge of her interests.
Martin v. Munroe. p. 683

4. ——; **agency.**

The husband's management of the account was to be attributed to his implied agency for his wife, and not to the assertion for himself of an absolute ownership of the money; his right to withdraw the fund could be exercised only in her name and by virtue of an express or implied agency.
Martin v. Munroe. p. 683

"SECOND OFFENSE." See CRIMINAL LAW, 4.

SECRETARY OF STATE.

The official office of the Secretary of State is at Annapolis.
Graham v. Wellington. p. 660

SEGREGATION OF RACES. See BALTIMORE CITY, 8.

SHERIFFS.

1. **Office expenses.**

Chapter 23 of the Acts of 1912, allowing to a sheriff a sum of money for the expenses of his office (in addition to his salary), is not a violation of Article 15, section 1 of the Constitution, limiting the salaries of certain public officers.
Beasley v. Anne Arundel Co. p. 696

2. **Salary.**

Such a matter is within the legislative control; if the amount so appropriated exceeds the actual expenses, the sheriff must account therefor to the Comptroller and pay the excess over to the Treasurer. *Beasley v. Anne Arundel Co.* p. 696

3. **Special fees: death penalty.**

The provision in the Act allowing the sheriff, besides his salary, a fee of $300 for executing the death penalty, is unconstitutional. *Beasley v. Anne Arundel Co.* p. 696

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STATUTES. See ACTS OF ASSEMBLY. BRITISH STATUTES. STATUTES: CONSTRUCTION OF—, ETC. U. S. STATUTES.

1. Authenticity: parol evidence.

When the formalities required by law and established practice for preserving the identity of an Act of the General Assembly appear of record to have been duly observed, the proof thus afforded gives to the enactment such a degree of authenticity as to place it beyond the reach of contradictions which rest merely on parol and are subject to the infirmities and diversities of memory. *Jessup v. M. and C. C. of Balto.* p. 564

2. Legislative journals.

Even the legislative journals do not have a probative quality, sufficient of themselves to contradict a statute duly authenticated, and are entitled to be considered, for such a purpose, only in connection with other competent proof.

Jessup v. M. and C. C. of Balto. p. 566

3. When an Act of Assembly has been duly authenticated with all the formalities provided by law, it can not be contradicted by the parol testimony of an engrossing clerk, to the effect that after the bill was engrossed he erased certain provisions merely by drawing lines through them, although it also appears that the journals of the two houses did not show any authority for any alteration of the bill.

Jessup v. M. and C. C. of Balto. p. 566

STATUTES: CONSTRUCTION OF—. See ACTS OF ASSEMBLY. BRITISH STATUTES. STATUTES: TITLE OF—.

1. Intention

The object of all construction of statutes is to arrive at the intention of the legislature.

Shehan v. Tanenbaum, Son and Co. p. 285

2. ——; policy of Act.

The intention is to be sought for first by the express declarations of the Act, and then by a consideration of its general scope and policy. *Graham v. Wellington.* p. 661

3. Effect of—.

In determining the effect of a failure to comply with the terms of a statute regulating elections, the preparation of the ballots, what names can be placed on them, etc., the intention of the legislature must be sought for.

Graham v. Wellington. p. 661

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STATUTES: CONSTRUCTION OF—*Continued.*

4. ——; **same subject-matter; to be harmonized.**

All statutes upon the same subject-matter are to be harmonized as far as possible, even though passed at different dates and although the time of their passage may be separated by a long or short interval, and this rule of construction is to be applied even when the construction of the statute is called in question. *Gregg v. Public Service Commission.* p. 30

5. **Constitutional, if possible.**

Where statutes are reasonably susceptible of two constructions, it is the duty of courts to adopt such a one as will save the constitutionality of the statute, and, to avoid constructions which raise grave and doubtful constitutional questions, the statute can be so construed as to avoid such questions.
Gregg v. Public Service Commission. p. 30

6. **Good in part.**

A statute may be good in part, while other parts are invalid; and portions of one section may be valid, while others are invalid. *Hall v. State.* p. 582

7. **"Corporation" and "person."**

Although section 14 of Article 1 of the Code provides that the word "person" shall include "corporation," unless such construction would be unreasonable, yet in construing statutes the rule can not override the clear intention of the legislature.
Shehan v. Tanenbaum, Son and Co. p. 286

8. **Election Laws.**

Courts should hesitate to declare elections invalid merely because some of the requirements of the statute in reference to preliminary matters have not been literally complied with, unless, by express declaration or by necessary implication, such acts are essential to the validity of the election.
Graham v. Wellington. p. 661

9. ——; **extraneous aid.**

If the language of a statute is ambiguous, courts are not confined to it, but may make use of extraneous aid to arrive at the meaning of the Act; in such cases the intention may be deduced from a view of the subject-matter, the necessity of the Act, and the object of the legislature.
Shehan v. Tanenbaum, Son and Co. p. 285

10. **Mandatory and directory provisions.**

The directions contained in section 47 of Article 33 of the Code, as to the time for filing certificates of nominations for

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STATUTES: CONSTRUCTION OF—*Continued.*
political offices wiht the Secretary of State and the Supervisors of Elections are mandatory, and not merely directory.

Graham v. Wellington. p. 667

11. Penal statutes.

While penal statutes are to be strictly construed, their construction must not be unreasonable or forced.

State v. Gurry. p. 538

STATUTES: REPEAL OF—.

1. ——; by implication are not favored.

Repeal of statutes by implication is not favored, and only when two Acts are so plainly inconsistent and irreconciliable that they can not stand together will the latter be held, by implication merely, to repeal the former.

Chesapeake Beach Hotel Co. v. Hall. p. 652

2. Liquor laws and charter of corporation.

Section 37 of Chapter 245 of the Acts of 1894, incorporating the Commissioners of Chesapeake Beach, authorized the Commissioners to issue to the Chesapeake Beach Hotel Company licenses to sell liquor, and Chap. 120, Acts of 1900, amending that Act made it unlawful for any licensee to sell, etc., any liquor between the hours of midnight and 5 o'clock in the morning, with permission to sell liquor at all other times; it was *held*, that these Acts did not repeal the general Sunday laws, and the right there given to sell liquor *"at all other times"* did not include the right to sell liquor Sunday.

Chesapeake Beach Hotel Co. v. Hall. p. 653

STATUTES: TITLE OF—.

The titles of Chapter 401 of the Acts of 1906, and of Chapter 202 of the Acts of 1908, describe the statutes as empowering Baltimore City to create a paving commission, to provide for submitting to popular vote the question of issuing bonds for paying the cost of the work of said commission, etc., and as authorizing the assessment of the whole or part of the cost of the streets, upon the abutting property owner; besides these objects, the body of the Act provides that the Railways Company, on the improved streets, shall repave between their tracks, etc., with the same character of improved pavement used on such streets; *held*, that the title of the statutes did not contain such reference to or notice of this provision as to comply with section

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STATUTES: TITLE OF—*Continued.*
29 of Article 3 of the Constitution, and the provision was invalid as to those railway companies, whose charter required them only to repave the pavement between the tracks and for two feet on either side.
U. Rwys. and E. Co. v. M. and C. C. of Balto. pp. 560, 561

STOCK AND STOCKHOLDERS.
1. Subscriptions to stock.

A payment of money to a corporation (in so far as the creditors were concerned), was *held,* to be an addition to its capital stock, and not to be a mere loan to the concern.
Cantor v. Balto. Overall Mfg. Co. p. 70

2. To constitute a subscription to stock, an actual subscription is not necessary. *Cantor v. Balto. Overall Mfg. Co.* p. 70

3. A virtual subscription may be inferred from the acts and conduct of the party. *Cantor v. Balto. Overall Mfg. Co.* p. 70

4. Creditors' rights.

A stockholder of an insolvent corporation, as such, or partner of an insolvent firm, can not participate in the distribution of the assets until the claims of the undisputed creditors are satisfied. *Cantor v. Balto. Overall Mfg. Co.* p. 70

5. Title to property.

A stockholder, as such, is not the owner of any portion of the property of the corporation, and, apart from his stock, has no interest in the assets capable of being assigned.
Cotten v. Tyson. p. 604

6. Where a person is the owner of all the capital stock of a corporation, his acts in reference to the property bind the corporation. *Cotten v. Tyson.* p. 604

7. But, in general, a stockholder, while retaining his ownership, can not assign the interest represented by his stock in any particular claims of the corporation's assets.
Cotten v. Tyson. p. 605

8. Certain *cestui que trusts* charged their trustee with having diverted the funds of a solvent corporation, of which he was the president and in which their estate, as well as said trustee individually, were the principal stockholders, into certain insolvent corporations, in the stock of which latter both were also interested, thereby incurring a large loss to the stockholders of said solvent corporation. In an agreement between the said *cestui*

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STOCK AND STOCKHOLDERS—*Continued.*
que trusts on behalf of their estate and their trustee, the latter agreed to pay the former a large sum of money to compensate them for the losses so incurred by them, and the former agreed to assign to him in consideration thereof "all the interest, estate, title, claim and demand of every description" of their estate "in the capital stock and shares of stock, property and assets of every description" of said insolvent companies; said estate, however, in which said *cestui que trusts* were interested, to retain its stock in the solvent corporation. Shortly afterwards the entire stock of the solvent corporation was sold, but the original holders thereof individually reserved and retained all of their claims (based on the advances so made by the said trustee as its president) against the insolvent corporations. *Held,* that the agreement did not operate as an equitable assignment, on the part of the estate in which said *cestui que trusts* were beneficially interested, to assign said estate's interest in claims originally due by said insolvent companies to said solvent company.

Cotten v. Tyson. pp. 605, 606

STREETS. See BALTIMORE CITY.

1. Acceptance.

The dedication of a street to the public use by plats or deeds does not make it a public highway; such conveyance does not become final and irrevocable unless there has been an acceptance of it on the part of the public authorities.

Whittington v. Commrs. of Crisfield. p. 392

2. Where a municipality never formally accepted a street that had been so dedicated and laid out, and never made any repairs on it or exercised control over it, and where the use the public made of it had been but slight, it was *held,* that there was no evidence sufficient to justify the inference that the street had been accepted as a public street or highway.

Whittington v. Commrs. of Crisfield. p. 393

3. ——; delay.

Mere delay in the acceptance of a dedication will not bar the right of a municipality to control or open such a street.

Whittington v. Commrs. of Crisfield. p. 393

4. Laches.

But where a street that has been dedicated to the public had never been accepted by the municipality, it was *held,* that one

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STREETS—*Continued.*
who had for forty years occupied a dwelling in the bed of the street could not be dispossessed thereof or the building removed, without just compensation.

Whittington v. Commrs. of Crisfield. p. 393

5. Dedication: references to plats, etc.; implied covenants.

Where a party sells property within the limits of a city and the conveyance binds it by streets designated as such in the conveyance or on a map made by the city, or by the owner of the property, there is an implied covenant that the purchaser shall have the use of such streets.

Mayor and C. C. of Balto. v. Yost. p. 378

6. ——; streets actually laid out.

Where such a street is actually opened and laid out with clearly defined width and is capable of being definitely located and described, an implied covenant to dedicate the street will arise from a conveyance describing land as bordering along such street, even without reference to any maps or plats.

Mayor and C. C. of Balto. v. Yost. pp. 378-379

7. ——; location of street; intention.

But in such cases the location of the road and such other facts as might be necessary to arrive at the intention of the grantor in relation to the land or extent of land that was intended by him to be dedicated should be clearly proven; for the intention of the owner to dedicate his land to such use is absolutely essential, and unless such intention is clearly shown no dedication exists. *Mayor and C. C. of Balto. v. Yost.* p. 379

8. Unlocated.

Where a deed simply describes the land conveyed as bordering on a street which was only referred to once, and whose width was not given, and where there was no other evidence of any dedication, it was *held*, that no dedication could be presumed from the deed. *Mayor and C. C. of Balto. v. Yost.* p. 380

9. Prescription.

Where user or prescription is relied upon to establish a public highway, it must be an uninterrupted user by the public for at least twenty years; and such a user for a less period of time will not suffice. *Whittington v. Commrs. of Crisfield.* p. 393

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SURETY COMPANIES.

1. **Re-insurance agreements.**

In a re-insurance agreement between two surety companies, a certain kind of business was excluded from a general accounting between the parties; when proceedings were had to terminate the contract, there was an agreement as to the apportionment of overhead charges, executive costs, etc.; in the absence of any other evidence or method of apportionment, it was *held,* that an apportionment of such charges according to the volume of the business excluded, although probably liberal, could not be held to be erroneous.

Munich Re-Ins. Co. v. U. Surety Co. p. 487

2. Two surety companies had entered into a re-insurance agreement, but owing to litigation between them no settlement had ever been had under the contract; in proceedings for an accounting between them, it was *held,* that in construing their mutual obligations, the accounting should include the ascertainment of the annual profits and losses required to be made during the currency of the contract, and also the final settlement for which the contract provided, after a notice of withdrawal should be given. *Munich Re-Ins. Co. v. U. Surety Co.* p. 488

3. **——; effect of contract; interest.**

The agreement of the parties was that both the premium "reserve for unexpired risks at the end of the previous year" and the "reserve for unadjusted claims" at the end of the previous year, should be charged as disbursements in accounting for the five-year period antecedent to any notice of termination, and that the profits and losses so determined should be in the proportion and manner provided in the contract; *held,* that such being the effect of the contract and the direction being positive as to the immediate payment of the annual balance so ascertained, interest was to be allowed on those sums from the time they were respectively due.

Munich Re-Ins. Co. v. U. Surety Co. p. 494

4. **——; termination of contract; commissions.**

In the re-insurance agreement it was provided that one of the companies should receive as "reimbursement for good will" 5% of its share of the net premiums for the five years previous to the termination of the contract; the fact that that company instituted legal proceedings which ended in the termination of

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SURETY COMPANIES—*Continued.*
the contract did not prevent it from being allowed the 5% commissions so provided for.
Munich Re-Ins. Co. v. U. Surety Co. pp. 495-496

TAXATION. See ASSESSMENTS FOR BENEFITS. COLLATERAL INHERITANCE TAX. LICENSES.

Exemption.

Exemptions from taxation are to be strictly construed.
P., B. and W. R. R. Co. v. M. and C. C. of Balto. p. 510

TELEPHONE COMPANIES. See PUBLIC SERVICE COMMISSION.

TERM OF COURT.

The words "*sitting of a term of court*" do not, in general, include special sittings, held after the term, for the transaction of such business as may arise from time to time, after the regular term was ended. *Boyd v. Kellog.* p. 44

TIME.

Computation of—; days included.

Where a statute requires an act to be done not less than a certain number of days before a certain other date, the general rule, in computing the time, is to include one day and exclude the other day, and not to include or exclude both days; but where the statute indicates that there must be so many *clear* days intervening, or when the statute requires so many days at least, wards, both the days must be excluded.
Graham v. Wellington. p. 660

TITLE. See ALLUVION. DECEDENTS' ESTATES. EJECTMENT. ESTATES ON CONDITION.

TRESPASS *q. c. f.* See INJUNCTIONS, 5.

1. Title to land.

An action of trespass *quare clausum fregit* will lie to determine questions of title.
B. and O. R. R. Co. v. Silbereisen. p. 419

2. Damages.

Any unauthorized entry upon the lands of another is a trespass, and whether the owner suffers substantial injury or not, he at least sustains a legal injury which entitles him to a verdict for damages, although they may be merely nominal.
Timanus v. Leonard. p. 588

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TRESPASS *q. c. f.*—*Continued.*

3. In such a case, in order to entitle the plaintiff to a verdict, it is not necessary that he should give affirmative proof that he had sustained that particular amount of damages.
Timanus v. Leonard. p. 588

4. To entitle a plaintiff in such a case to more than nominal damages, it must be shown from the evidence that he has sustained special damages in consequence of the wrong complained of, or that the unauthorized entry or trespass was willful, wanton or malicious, or that the trespass was committed with such reckless disregard of the rights of the plaintiff as to entitle him to punitive or exemplary damages.
Timanus v. Leonard. p. 588

5. Where a contractor employed in changing the grade and in paving a street, by mistake, took some loads of gravel from a vacant lot, in a way which caused it no injury, it was *held,* that owner of the lot was not entitled to any more than nominal damages. *Timanus v. Leonard.* p. 590

TRUSTEES. See JOINT OBLIGEES. PARTIES, 2. SALES IN EQUITY.

1. **Authority of court of equity over.**

If a court of equity is administering a trust, the Court has complete charge of every step. The trustees are merely the officers of the Court to carry out its orders. If the trustees are named in a will with certain powers, not personal, thereunder, the moment they submit the administration to a court of equity, then it becomes necessary to have the sanction of that Court for all their acts. *Whitelock v. Dorsey.* p. 503

2. This authority is not a mere perfunctory authority, but one in which the Court is to exercise its judgment.
Whitelock v. Dorsey. p. 503

3. **Costs and counsel fees.**

Where a trustee's administration of the estate, in view of a conflict of interests, can not be safely completed without judicial construction, the costs of the necessary proceedings are properly chargeable to the fund. *Cotten v. Tyson.* p. 607

4. **Discretion.**

Ordinarily, where a trustee is vested with discretionary power he will not be disturbed in the exercise of it; but if the circumstances show that it is for the benefit of the estate not to permit

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TRUSTEES—*Continued.*
him to exercise such discretion arbitrarily, the Court will deny him the right. *Whitelock v. Dorsey.* p. 503

5. ——; **co-trustees.**

One of two trustees, with his wife, who was the daughter of the testatrix, had long occupied as their home a cottage which the testatrix had remodeled and improved for her daughter, and to which the testatrix wished to give her a permanent right, as she had done in providing homes for other children; the daughter had refused, thinking the whole tract of which the cottage and grounds formed a part would sell better if finally sold as one tract; upon the death of the testatrix, the daughter and her husband, by an agreement with the co-trustee, continued to occupy the house at an annual rent which was its full value, in view of the fact that there was an agreement that they should vacate at any time should the property be sold; it was further agreed that unless sixty days' notice to vacate should be given, they might occupy the cottage for another term. The trustees by the terms of the will had full power "in their discretion," from time to time, to sell, dispose of, assign and convey absolutely or otherwise the whole or any portion or portions of the property or securities" * * * and to invest and hold the proceeds subject to the same trusts the property sold had been held under. The will also directed that the trusts should be administered under the supervision of a court of equity. The cottage had been so occupied for several years after the death of the testatrix, when the appellant W., without any consultation, or reasons given, gave due notice to the other trustee that he and his family must vacate the property at the end of the year; the trustee D. filed a petition reciting the above facts, and prayed the Court to adjust the differences between himself and the co-trustee, and to pass an order authorizing him to continue for another year under the same rental and terms, etc., as the tenancy then provided; the co-trustee, without filing an answer to the petition, satisfied himself with demurring thereto; on appeal from an order overruling the demurrer, it was *held,* that the petition presented facts which called for an answer and that the demurrer was properly overruled. *Whitelock v. Dorsey.* p. 503

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TRUSTEES—*Continued.*

6. Purchaser at own sale.

In general, trustees may not directly or indirectly purchase the trust property; however fair the sale, the courts will set it aside at the mere suggestion of the *cestui que trust*.

Whitelock v. Dorsey. p.502

7. It is a rule of universal application to all persons coming within the principle, that no party can be permitted to purchase an interest when he has a duty to perform inconsistent with the character of purchaser. *Whitelock v. Dorsey.* p. 502

8. But in Maryland many exceptions to the rule have long been recognized, where equity treats such sales as voidable only, according to circumstances and as the interest of the *cestui que trust* may require, and are sometimes not allowed to be disturbed. *Whitelock v. Dorsey.* p. 502

TRUSTEES' SALES.

1. And in order for the Court to stop such a trustee from making the sale, it is not necessary for the Court to issue an injunction. *Williams v. Fidelity and Dep. Co.* p. 225

2. Trustees were appointed by a decree of a court of equity to sell property for the purpose of enforcing a mechanics' lien: An injunction was issued to prevent the sale, but on appeal the order for the injunction was reversed; and suit on the injunction bond was filed by the trustees for damages suffered by them because of the injunction proceedings and for the deterioration of the property, and for the expenses, etc.; it was *held*, that the trustees were not entitled to recover.

Williams v. Fidelity and Dep. Co. p. 227

3. The trustees were not joint obligees with the other equitable plaintiffs on the bond.

Williams v. Fidelity and Dep. Co. p. 227

4. The interest of such trustees to the commissions is not a joint interest with that of the other equitable plaintiffs in the suit on the bond.

Williams v. Fidelity and Dep. Co. p. 227

5. Where trustees have title to the property to be sold and it is their duty to sue, etc., other principles apply.

Williams v. Fidelity and Dep. Co. pp. 227-228

6. Where a trustee is appointed by decree of a court of equity to make a sale of property, the sale is a transaction between the court and the purchaser.

Williams v. Fidelity and Dep. Co. p. 225

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TRUSTEES' SALES—*Continued.*

7. The court in such a case is the vendor, and the trustee is merely the court's agent to carry the order into effect.

Williams v. Fidelity and Dep. Co. p. 225

8. The trustee has no title, by virtue of his office, to the property decreed to be sold, and no interest as to the proceeds of the sale. *Williams v. Fidelity and Dep. Co.* p. 225

TRUSTS.

1. Creation of—.

Where by a deed or will property is conveyed or devised to a corporation capable of taking it for its charter purposes, some of which purposes are precisely those indicated in the deed or will as the ones to which the funds or property is to be devoted, the conveyance or bequest is to be considered as not to the grantee or devisee *in trust,* but to it for its legitimate corporate uses, and is free from restrictions other than the conditions that may be by the deed or will imposed; and such conveyance or bequest is not to be construed as a trust, even though words capable of *creating a trust* may be used in the instrument.

Trustees St. Charles College v. Carroll. pp. 471-474

2. Waste: equitable relief.

A court of equity will always actively interfere for the purpose of preventing waste of the corpus of a trust estate.

Mt. Vernon-Woodberry Cotton Duck Co. v. Continental Trust Co. p. 171

3. Following the funds.

In general,, the *cestui que trust* has the right in equity to follow and recover, or impress the trust upon the trust fund or property which has been wrongfully diverted, in whatsoever form or hands it may come, so long as it may be distinctly traced and identified, and until it comes into the hands of a *bona fide* purchaser for value without notice, or until the rights of innocent third parties have intervened.

Gault v. Hosp. for Consumptives. p. 594

4. When trust money becomes so blended with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases.

Gault v. Hosp. for Consumptives. p. 594

5. When trust property can not be traced, the equitable right of the *cestui que trust* to follow it fails.

Gault v. Hosp. for Consumptives. p. 596

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UNDUE INFLUENCE.

1. **Time when effective.**

Unless the influence which the law terms "undue influence" was effective at the time the will was executed, the will cannot be said to be the product of undue influence.

Thomas v. Cortland. p. 675

2. Where issues involving the question of whether undue influence was exerted to effect the execution of a will are sent to a jury for determination, prayers are erroneous which, in submitting the question to them, do not limit the consideration as to whether *at the time the will was executed* the testator was affected by such influence. *Thomas v. Cortland.* p. 675

3. **——; need not be immediately at time of execution.**

But such undue influence, to effect the validity of a will, need not be exerted *immediately* and *directly* at the time at which the will was actually being executed. *Thomas v. Cortland.* p. 675

U. S. STATUTES.

1898, secs. 23B, 67E, 70E.—Bankrupt Act. pp. 142,143

USURY.

Payment by third parties.

One of the conditions of a written agreement under which a bank made a loan to a debtor was that, in addition to the legal rate of interest, a debt owed by a third party to the bank should be paid by the borrower, if not paid before a certain date by certain relatives of the third party. Such payment was in fact made by the relatives. *Held*, that there being no evidence that such payment was made at the request of the borrower, the bank was not guilty of usury.

Chipman v. Far. and Mer. Natl. Bk. p. 357

USURY LAWS.

1. **Chattel mortgages.**

Chapter 629 of the Acts of 1894, prohibiting corporations from making any loan on the security or chattels, etc., otherwise than in its own name, or at any rate higher than 6 per cent., and declaring such contracts in violation of such provisions to be null and void, does not apply to mortgages on real or leasehold property. *Chipman v. Far. and Mer. Natl. Bk.* p.356

2. This Act does not apply to a mortgage covering both chattels and leasehold property.

Chipman v. Far. and Mer. Natl. Bk. p. 356

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USURY LAWS—*Continued.*

3. Effect of usury laws.

The usury laws of this State do not render the contract void; but only permit the borrower to recover, in law or in equity, the amount paid by him in excess of the interest allowed by law; or he may, when sued on a usury contract, be allowed such excess. *Chipman v. Far. and Mer. Natl. Bk.* p. 355

4. Protect borrower only.

But usury laws are enacted for the protection of the *borrower* only from the oppressive demand of the lender; and only from excessive burdens imposed on the *borrower* is relief afforded. *Chipman v. Far. and Mer. Natl. Bk.* p. 355

5. Recovery only of sums actually paid.

While relief may be had from usurious demands, regardless of the device resorted to by the lender, a borrower can not recover what he has not actually paid, in the absence of some statute authorizing him to do so.

Chipman v. Far. and Mer. Natl. Bk. p. 356

6. National banks.

Under sections 5197 and 5198 of the Revised Statutes of the United States, recovery may be had for interest charged by national banks in excess of that which is allowed by law; but such actions must be commenced "within two years from the time the usurious transaction occurred."

Chipman v. Far. and Mer. Natl. Bk. p. 358

VENDOR AND VENDEE.

Refusal to accept goods.

A tomato grower had a contract with a canner for taking his crop at a certain price; at a time when the canner was receiving more tomatoes than he could handle he refused to receive those of the grower; in an action by the grower against the canner, it was *held*, that the plaintiff and the jury would have been amply justified in inferring that such refusal was temporary only, one which might be terminated at any time, and there was no obligation upon the plaintiff to show that he had sought any other purchaser for the tomatoes so rejected.

Dolby v. Laramore. p. 624

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WAGES. See ATTACHMENT.

WASTE. See DECEDENTS' ESTATES, 9. EXECUTORS, 4.

WILLS: CONSTRUCTION OF—.

1. In construing wills, it is to be presumed that the testator intended to dispose of his whole estate and not to die intestate as to any part of it. *Maddox v. Yoe.* p. 291

2. **Estate to a woman until she marries.**

A devise or bequest to a woman of an estate so long as she remains unmarried, with a limitation over in case of her marriage, is an estate under a special limitation, and the devise or bequest is valid, since it is not in fact a condition in restraint of marriage. *Maddox v. Yoe.* p. 292

3. Such a limitation in a devise to a widow vests in her a life estate only, subject to be defeated by her marriage. *Maddox v. Yoe.* p. 292

4. By his will, a testator devised all his property to M. for life; upon M.'s death to Y., so long as Y. should remain single; in case of Y.'s marriage, then from and after that date to T. and his heirs forever. Y., not having married, predeceased M.; *held,* that upon the death of M., T. took in fee simple. *Maddox v. Yoe.* p. 296

WITNESSES: EXAMINATION OF—.

In propounding a hypothetical question to a witness who is offered as an expert, it is error to omit any of the material facts which might affect the opinion of the witness. *Avery v. State.* p. 236

WRITTEN INSTRUMENTS. See CONTRACTS, ETC. RECTIFICATION OF INSTRUMENTS.

1. **Construction: for the Court.**

The construction of a written instrument is for the Court. *Carrington v. Graves.* p. 575

2. **Presumption.**

The presumption is, that a written instrument embodies the correct terms of the agreement between the parties, and in order to justify a party to ask its reformation in equity, this presumption must be overcome or rebutted by the complainant. *Hesson v. Hesson.* p. 633

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WRITTEN INSTRUMENTS—*Continued.*

3. Parol evidence.

When a contract is reduced to writing, the presumption is that the entire actual agreement of the parties is contained in it, and parol evidence as to any negotiations or covenants prior to its execution is not admissible to vary or explain it.

Fowler v. Pendleton. p. 301

WRITS.

Habere facias possessionem. *Hawkins v. Bouic.* p. 162

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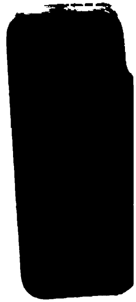

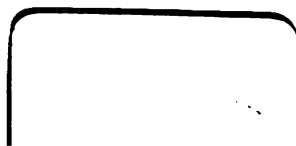

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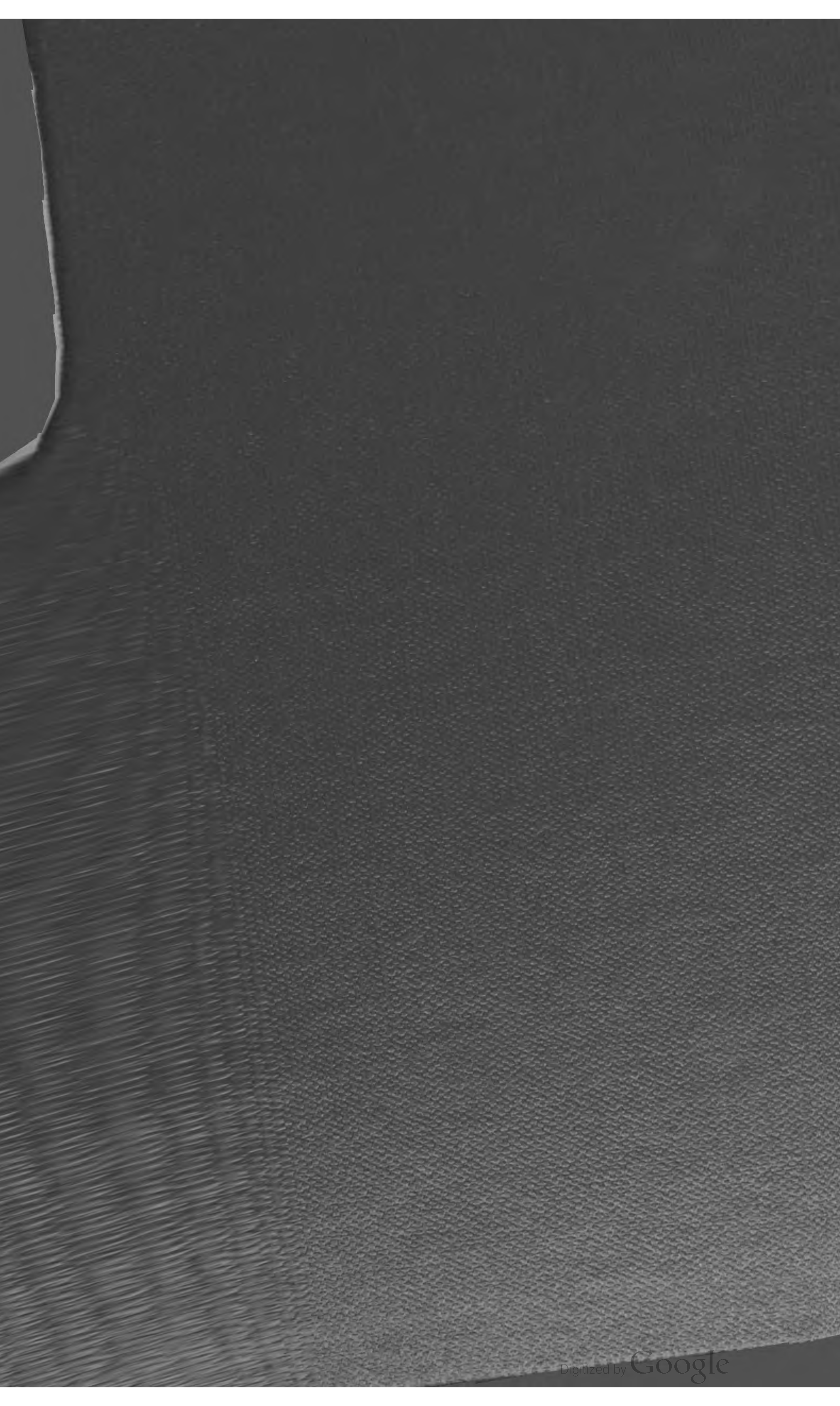
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