sons convicted of adultery, is given and declared to be to the use of the Governor, and the other moiety to the use of the poor; but inasmuch as it is not ascertained, by the said act, to the use of what particular poor the same moiety is intended to be applied, doubts have arisen, and the Sheriffs of several counties within this province have detained in their hands, and still detain the said moiety, for want of proper persons to discharge them, upon payment thereof: For the removal of which doubts, *Be it enacted*, That one moiety of all fines, imposed on persons convicted of adultery in and by virtue of the said act, and received by any Sheriff within this province, before the publication hereof, shall be paid to the Overseers of the poor of the city, district or township, where the offender did reside at the time of committing the fact, to the use of the poor thereof; and that one moiety of all fines, which shall hereafter be imposed on any person convicted of the said offence, by virtue of the said act, shall be to and for the use of the Governor of this province, for the time being, * and the other moiety to the Overseers of the poor of the city, district or township, where the offender shall reside at the time of committing the fact, to the use of the poor thereof, any thing in the said act to the contrary notwithstanding. 1772.

Manner of appropriating fines for adultery.

* Now for the use of the commonwealth.

Passed 21st March, 1772.—Recorded A. vol. V. page 521.

CHAPTER DCLXV.

An ACT *to enable the owners of the lands, called The Pigeon Swamp, in the township of Bristol, in the county of Bucks, to dig, maintain, and keep open, a ditch through the said swamp, and to raise money to defray the expense thereof.*

Passed 21st March, 1772.—Private Act.—Recorded A. vol. V. page 512.

CHAPTER DCLXIX.

An ACT *for prevention of frauds and perjuries.*

FOR prevention of fraudulent practices, perjuries, and subornation of perjuries, *Be it enacted*, That from and after the tenth day of April, one thousand seven hundred and seventy-two, all leases, estates, interests of freehold, or term of years, or any uncertain interest, of, in, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary, notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the

Parol leases, &c. not put in writing, and signed by the parties to have the effect of leases at will only, &c.

1772. making thereof: And moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said tenth day of April, one thousand seven hundred and seventy-two, be assigned, granted or surrendered, unless it be by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law.

Officer signing judgments to set down the day of the month, &c.

II. *And be it further enacted*, That from and after the said tenth day of April, any Judge or officer of any of the Courts of Record within this province, that shall sign any judgments, shall, at the signing the same, without fee for doing the same, set down the day of the month and year of his so doing upon the paper, book, docket or record, which he shall sign, which day of the month and year shall be also entered upon the margin of the record where the said judgment shall be entered.

Time of judgments taking place.

III. *And be it further enacted*, That such judgments, as against purchasers *bona fide* for valuable consideration of lands, tenements or hereditaments, to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of the term whereof they are entered, or the day of return of the original, or filing of the bail, bail, any law, usage, or course of any court, to the contrary notwithstanding.

Writs of *fieri facias*, &c. not binding, till delivered to the Sheriff, &c.

IV. *And be it further enacted*, That from and after the said tenth day of April, no writ of *fieri facias*, or other writ of execution, shall bind the property of the goods of the person against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the Sheriff, Under-Sheriff or Coroners, to be executed; and for the better manifestation of the said time, the Sheriff, Under-Sheriff and Coroners, their deputies and agents, shall, upon the receipt of any such writ, (without fee for doing the same) endorse on the back thereof the day of the month and year, whereon he or they received the same.

Act of the 4th of Queen Anne, relating to intestates estates, not to extend to the estates of *feme coverts*, &c.

V. *And be it further enacted*, That the act, entitled *An Act for better settling of intestates' estates*, passed in the fourth year of the reign of the late Queen Anne, or any thing therein contained, shall not be construed to extend to the estates of *feme coverts* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.

Passed 21st March, 1772.—Recorded A. vol. V. page 524. *(i)*

(i) Before the passing the act in the text, it had been adjudged, that the English Statute of frauds and perjuries, 29 *Charles* 2d, chap. 3, did not extend to *Pennsylvania*. 1 Dallas, 1.

The first section of this act, is copied from the three first sections of the Statute of *Charles* 2d. The second, third, fourth and fifth sections of the act in the text, are copied from the 14th, 15th, 16th and 25th sections of the Statute of *Charles*.

Devises of lands, &c. which are regulated in a certain manner, by another part of the statute, are provided for by our own act of Assembly.

The legislature have not, however, thought proper to incorporate into our law the important provisions contained in the *fourth* and *seventh* sections of the *English* Statute. This departure from the English law, forms a striking difference in the system of the two countries; and it must be kept constantly in view by the student, that he may be enabled to distinguish how far the English decisions, previous to the revolution, on the different branches of the statute, can apply, in their principles to the law and practice of Pennsylvania.

That the decisions in Pennsylvania which follow, may be the more readily comprehended, without a reference to the Statute itself, which is in the hands of but a few, and to which the people at large, for whose benefit this edition of our Laws is more immediately intended by the legislature, cannot have access; it is deemed necessary to insert here, the two great sections of the English Statute, which are not incorporated in the law of this commonwealth.

"Sect. 4.—1. No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate;—2. Or whereby to charge the defendant, upon any special promise, to answer for the debt, default, or miscarriages of another person;—3. Or, to charge any person upon any agreement made upon consideration of marriage;—4. Or, upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them;—5. Or, upon any agreement that is not to be performed within the space of one year from the making thereof;—6. Unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Sect. 7. "All declarations or creations of trust or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

The first case we find reported in this state, in which this important act came into the full view of the court, is *Thomson's Lessee* v. *White*. 1 Dallas, 424.

Ejectment for a house and lot in *Philadelphia*. Verdict for the plaintiff; and a motion for a new trial; upon the following case:

Dorothy Gordon, being seized in fee of the moiety of the premises in question, intermarried with *Lawrence Saltar*, and having lived long with him, and no prospect of children, she was desirous of making provision for an only sister of the whole blood, viz. *Mary*, one of the lessors of the plaintiff, whose husband, *John Thompson*, the other lessor, was considerably reduced in his circumstances. It then appeared, that *Mrs. Saltar*, while upon a visit, with her husband, to his brother, *John Saltar*, who resided at some distance, was taken sick; and, after a conversation relative to her estate, it was agreed by her husband and herself, that it should be settled on them for their lives, and for the life of the survivor of them, and, afterwards, that it should go to her sister, the said *Mary Thompson*, for her life, and the heirs of her body, lawfully begotten, and for want of such heirs to the children of her three sisters of the half blood. *Mr. Saltar*, accordingly, procured a deed of the above effect, to be drawn; but the second remainder being expressed to be "*for the issue of the bodies* of the three half sisters," one of whom was unmarried, *Mrs. Saltar*, when the instrument was read to her, thought the expression indelicate with respect to her three half sisters, and, for that reason, persisted in refusing to execute it, notwithstanding all the persuasion of her friends. Upon this refusal, her husband proposed to her, that a deed should be drawn from them to his brother *John*, who, with his wife, should reconvey the premises to him (the said Lawrence) and herself, as joint-tenants in fee; and he promised that, as soon as he got home, he would make his will, or by some other means, settle the estate in the manner they had before projected. *Mrs. Saltar* hesitated at this proposition; but, on her sister, *Elizabeth Saltar*, telling her that "*she might rely upon him; for, if there was a man in the world, who could be trusted in such a case, it was him;*" and, on her husband's requesting her to comply, declaring, that "*if there was faith or truth in man, he would honestly perform what he again promised;*" she executed the deed to *John Saltar*, who, with his wife, reconveyed the estate according to the previous stipulation. *Mrs. Saltar* died in the year 1781, about six months after the deeds were signed; and her husband died, intestate, and without issue, about eighteen months after her decease. *Mr. Lawrence Saltar* always, during his life, managed the estate that had been his wife's, as if it belonged to the lessors of the plaintiff. In his last sickness, indeed, when near expiring, he told his

1772.

1772. brother, that he was very uneasy on account of his leaving no will; and soon after this declaration he lost his reason.

The preceding facts were proved by *John Saltar*, and *Elizabeth* his wife, together with the confession of the defendant, that the lessors of the plaintiff had the title in equity, although he had it in law. There was, indeed, a contradiction, in some respect, in the case of the lessors of the plaintiff, in the testimony of *Abel James*, who related a conversation which he had with *Lawrence* and *Dorothy Saltar*, a few days before the deeds were executed, at which time, the witness said, that they had agreed to settle the estate in a different manner.

The motion for a new trial was made on two grounds; 1st, because the *parol* evidence ought not to have been admitted to go to the jury; and 2dly, because the jury gave a verdict against evidence.

M'Kean, C. J. delivered the unanimous opinion of the court in favour of the plaintiff, as follows:

In support of the first ground assigned for a new trial, it has been urged, that the *parol* proof *contradicted* the deed given by the witnesses themselves; that in *Pennsylvania*, lands must pass by *deed*, *will*, or some *writing* signed by the parties, or by the act and operation of law; that a declaration of uses must be by *deed*; that no *parol* evidence should be admitted respecting an agreement, or deed, which may *add to*, *diminish*, *vary*, or *contradict*, the agreement, or deed, but only to *explain* it; and that *John Saltar* and his wife were estopped from saying any thing against their own deed.

Since the statute of frauds and perjuries in *England*, and our act of assembly, it has, indeed, been a general rule, that no estate or interest in lands shall pass but by deed, or some instrument in writing, signed by the parties; and that no parol proof shall be admitted to contradict, add to, diminish, or vary from a deed or writing. But it is certain that there are several exceptions to this rule, and many cases may be found in which parol proof has been admitted, notwithstanding writings have been signed between the parties. For instance, where a declaration is made *before* a deed is executed, *shewing the design with which it was executed*, the decisions in the court of chancery have been grounded upon parol proof; and in the case of *Harvey* v. *Harvey*, 2 Chan. Ca. 180, three successive Chancellors decreed, on the parol proof of a single witness, against a deed of settlement. See Fitzg. 213-14.

In cases of *fraud* and of *trusts*, though no trust was declared in writing, exceptions have likewise taken place: 1 Vern. 296, *Thynn* v. *Thynn*. As, where an *absolute* deed was given, but intended to be in trust; on parol proof of the party's intention, the trust was decreed. 2 Vern. 288, *Hampton* v. *Spencer*, *et e contra*. And the same decision was pronounced, in the case of an agreement, or trust, being *confessed* by an answer, although such trust had only been declared by *parol*, ib. 294, *Bellasis* v. *Compton*.—Prec. Chan. 208, *Croyston* v. *Banes*. So, where a party is drawn in, by *assurances* and *promises*, to execute a deed, to enter into a marriage, or to do any other act, and it is stipulated that the treaty or agreement should be reduced into writing; although this should not be done, the Court, *if the agreement is executed in part*, will give relief. A man treating for a loan of money on a mortgage, it was agreed, that an absolute deed should be given by the mortgagor, and a deed of defeazance executed by the mortgagee; the absolute deed being given, the mortgagee refused to execute the defeazance, but the court of Chancery interposed to inforce justice agreeably to the agreement of the parties, Prec. Chan. 103-4, Skinn. 143, 9 Mod. 88.—In another instance, where an absolute conveyance is made for a certain sum of money, and the person to whom it is made receives interest for the money, the receipt of the interest will be admitted to explain the nature of the conveyance, Prec. Chan. 526, 1 Wils. 620. S. C. 2 Freem. 268, 285.

There are other authorities which bear a strict analogy to the case before us. A copy holder, intending to give the greatest part of his estate to his godson, and the residue to his wife, was persuaded by the latter to nominate her to the whole, declaring that she would give the godson the part designed for him: After her husband's death she refused to perform this promise, and pleaded the statute of frauds and perjuries, but the decree was against her. Again; a father, being about to make a will to provide for his younger children, is prevented by his son and heir apparent's promising him that he would make the provision for his brothers and sisters; the son and heir afterwards refused to fulfil this engagement; but, on an application to the Chancellor, the decree was also against him. So, where the issue in tail persuades the tenant in tail, not to suffer a recovery, in order to provide for younger children, upon an assurance, that he would provide for them himself, which he afterwards refuses, equity will compel him to do it. Prec. Chan. 4, 5, *Deve-*

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lish v. *Baines*. 2 Freem. 34, *Chamberlaine* v. *Chamberlaine*.

A voluntary settlement is made by *A.* to *B.* who afterwards, without any consideration, agrees to deliver it up: This agreement shall bind in equity; for a *voluntary* settlement may be surrendered *voluntarily*. Prec. Chan. 69, *Wentworth* v. *Devergeny*.

The statute and act of assembly were made to prevent *frauds*, as well as *perjuries*: They should be construed liberally, and beneficially expounded for the suppression of cheats and wrongs. Thus, where there has been a fraud in gaining a conveyance from another, the grantee may be considered as a mere trustee. *Barnardist. Chan. Ca.* 388, *Lloyd* v. *Spillet*.

In the case now under consideration, *Mrs. Saltar* was seized in fee of the premises stated in the ejectment; and, had she made no conveyance, her sister, *Mary Thompson*, would have been her heir at law; but her husband, whom she loved, wished to enjoy the estate during his life, and she designed that her sister, and her sister's children should have the estate uncontrolled by her husband; with this view the deeds were executed; and, if the solemn promise and agreement of *Lawrence Saltar* is not to be enforced, his heir at law will have the estate, contrary to the intention of all parties.

The question then is, whether the engagement of *Saltar*, not being in writing, although it concerns lands of inheritance, is void by the act of assembly, for preventing frauds and perjuries?

We are of opinion, that it is not; and the parol evidence was proper to be admitted upon the trial of the cause. Here was a breach of trust in *Lawrence Saltar*, a fraud in law, which is not within the act. This is the reason of our judgment; a reason warranted by a due construction of the act, and an attentive consideration of its frame and design; which was, not only to guard against perjuries, but also against frauds. It is to be remembered, that there is no purchaser, *bona fide*, for a valuable consideration, without notice, in the present case: The defendant claims under the heir at law of *Lawrence Saltar*; he ought, therefore, to perform what *Lawrence* should have performed; and equity will consider that as done, which ought to have been done; *Grounds, &c. of Law* and *Eq.* 75. Every man's contract, (wherever it is possible) should, indeed, be performed as it was intended.

The numerous cases cited, as well as some determined in this court, both before, and since the revolution (several of which are in point) all turn upon the same principle, and are uniformly in favour of the plaintiff; and so many uniform, solemn decisions, ought to be always of great weight and consideration, that the law may be certain. I am glad, indeed, that the present motion has been made, because it has afforded an opportunity of full deliberation on the subject, and of settling it upon a satisfactory and permanent foundation.

With respect to the *second* objection, we are clearly of opinion, that the verdict was given agreeably to the weight of the evidence; and, upon the whole, direct, that judgment be entered for the plaintiff.

It will be evident that the principle that runs through this case, is this, that an act which is intended to prevent fraud, shall not itself be made the instrument of fraud; the cases therefore are numerous, that where the medium of fraud has been interposed, to prevent an agreement from being put into writing, the court will relieve notwithstanding the act of frauds and perjuries.

This class of cases, however, requires great nicety of discrimination. The court cannot, by construction, repeal the statute of frauds. And if there be no fraud interposed, it is presumed a parol contract for the sale of lands could not be enforced. And where there are general instructions for an agreement, consisting of material circumstances, to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus penitentiæ*; it has been said by an able chancellor, he shall not be compelled to perform such an agreement, when he insists upon the statute of frauds. And although, in the foregoing case of *Thompson* and *White*, a case is cited by the Chief Justice, that an agreement *confessed* by answer, though only by *parol*, was decreed, which went upon this ground, that where the agreement was confessed, there could be no danger of perjury, which takes the case out of the mischief intended to be prevented by the act; yet it may reasonably be doubted if this be now law, unless in a case where the agreement has been *in part* performed.

The case of *confession*, by answer to a bill, cannot occur in *Pennsylvania*, where there is no Court of Chancery; and it has never been held that any other kind of confession or acknowledgment was sufficient. For if it were allowed to prove it by witnesses, it might introduce all the evils of perjury, which the

1772. act was intended to prevent. But unequivocal acts, consequential to such parol agreement, which would be a fraud upon either of the parties, and a hardship and injury to him, and more especially, where he cannot be placed in *statu quo*, if the parol agreement were not enforced, will be sufficient, through the medium of a Court and Jury, in Pennsylvania, to carry the contract into effect.

Thus, either in the cases of parol, or written contracts, *under circumstances* which would induce a Court of Chancery to decree the specific execution, the remedy here is by ejectment, or action of covenant or cases. In an ejectment against the vendor, if the contract ought to be decreed, upon the plaintiffs complying faithfully with the terms of the contract on his part, the Jury will give him a verdict and he will be put into possession as in *Thompson* and *White*. But the remedy is still imperfect, because they could not compel the execution of the proper title deeds, unless they were also to go further, and give conditional damages, to be released on the conveyance being made, or, if the whole purchase money be not paid, allowing it to be retained by the plaintiff until the contract be fully completed. So, where the vendee is in fault, on an action of covenant, and due tender of the title deeds, by the vendor, the Jury may give the whole purchase money in damages, with such additional damages as the case may justify.

So, in other kinds of contracts, where neither ejectment or covenant would be the proper remedy, the Jury, by giving exemplary damages, may compel the delinquent party to do Justice.

Thus in the case of *Clyde* v. *Clyde, Northampton* county, Oct. 1791, before *M'Kean, C. J.* and *Yeates, J.* (MSS. reports.) In a special *assumpsit* for the privilege of a water course through the lands of defendant, the case was, *A. A.* being seized of 500 acres of land in *Allen* township, in 1772, contracted with the plaintiff to convey him one moiety thereof, and agreed that he should have the preemption of the remaining moiety within a limited time. The defendant, his brother, and one *Hugh Horne*, afterwards agreed to join with him in the purchase of the whole tract, and they stipulated with each other previously, respecting the particular parts each should have; and that as a stream of water run through the lands, those who possessed the lower places on the stream, should have the privilege of a water course through the upper places, to convey the water to their respective lands. The purchase was at length completed from *A. A. Horner* took the upper place, the defendant the middle tract, and the plaintiff the lower, on the stream. The plaintiff, to suit his brother's convenience, and throw his lands into one compact body, exchanged with him 50 acres of land on the east side of the creek, for the same quantity on the west side. In the event, the defendant would not comply with his contract in suffering his brother to have a drain through the middle tract, though of little, or no injury to himself, but carried the water above his division line into the creek, and thereby prevented the plaintiff from watering eighteen acres of valuable meadow, which he possessed below. Repeated references were had between the brothers, to neighbours, and the defendant always promised to give his brother a right to the water, but when the matter appeared to be concluded between them, he uniformly broke his engagements. There appearing to be much vexation, and highly improper conduct on the part of the defendant, and the plaintiff's counsel agreeing to release the damages which might be found for him, in case a proper grant of the water right should be made to him by his brother, agreeably to the original contract, the jury, under the direction of the court, found a verdict for the plaintiff for £.500 damages, to compel his brother to do him justice; and see the same principle, 4 Dallas, 147-8, *anonymous*, (*John Walker* v. *Peter Butz*, MSS. reports.)

What shall be a *part performance* of a parol contract, so as to take it out of the act, is a subject of no little difficulty. Upon a view of the English cases on this important branch of Chancery Jurisdiction, and which form the ground work of the decisions in Pennsylvania, in similar cases, the elementary writers seem to deduce the following principles

Where agreements have been carried partly into execution, although a controversy might be afterwards between the parties as to the terms, yet if made out satisfactorily to the court, it would be decreed, though variety of evidence might be in the case; in order that one side might not take advantage of the statute to be guilty of fraud, the Court would hold his conscience bound thereby.

But an agreement will not be considered as partly executed, unless the acts done are such as could be done with no other view or design than to perform the agreement, or, perhaps, to speak more correctly, with the view of the agreement being performed; and if it do not appear, but that the acts done,

might be done with other views, the agreement will not be taken out of the statute. Neither will acts merely introductory, or ancillary to an agreement, be considered as a part performance, although attended with expense; as, delivering an abstract, going to view the estate, fixing upon appraisers to make valuations, &c.

But if possession be delivered to the purchaser, the agreement will be considered as in part executed, especially if he expend money in building or improving, for the statute should never be so turned, construed, or used, as to protect, and be a mean of fraud But it is said, possession must be *delivered in part performance*, for if the purchaser obtain it *wrongfully*, it will not avail him. And a possession which can be referred to a title distinct from the agreement, will not take a case out of the statute. Therefore, possession by a tenant can not be deemed a part performance. The delivery of possession by a person having possession to the person claiming under the agreement, is a strong and marked circumstance; but a tenant, of course, continues in possession, unless he has notice to quit; and the mere fact of his continuing in possession, (which is all that can be admitted, for *quo animo* he continued in possession, is not a subject of admission) cannot weigh with the court.

Whether the mere payment of part of the purchase money can be considered as a part performance, is much controverted and is deserving of great consideration. For it has been held, that nothing is a part performance, that does not put the party into a situation, that it is a *fraud* upon him if the agreement be not performed; and it is said, that payment of money cannot therefore be a part performance, for it may be repaid, and then the parties will be just as they were before, especially if it be repaid with interest. See 4 Dallas, 152.

Notwithstanding the act in the text, it has been adjudged, that a parol partition between tenants in common, made by marking a division line on the ground, and followed by a corresponding separate possession, is good. The parol evidence had been overruled by the Court of Common Pleas in *Fayette County*; and upon error, it was urged, that the evidence ought to have been received. A parol agreement concerning lands, partly executed, is good in equity, 1 Fonbl. 164, for this is not within the statute of frauds, as the evidence of the bargain does not lie merely upon the words, but upon the fact performed. 1 Pow. Cont. 360.

On the other hand, it was contended that the statute of frauds had made a deed necessary in all cases. And it was alleged that the equity decisions in England could not be of any authority here, because we had no Court of Chancery, which was well known to the legislature when the act in the text was passed. But on the court's intimating that it had been the settled practice of the Supreme Court to proceed upon equity principles, this point was relinquished. 1772.

It was further said not to be clearly settled what part performance was sufficient in equity; but it must certainly be such as necessarily prevented fraud, which was not the case here, because a separate possession of different moieties might be had in point of fact, by tenants in common, without a complete severance of their title.

Tilghman, C. J. delivered the opinion of the Court, that on the plea of *non tenent insimul*, the evidence ought to have been received,—and the judgment was reversed. After stating the facts of the case, he proceeded as follows: The first objection is founded on the act of assembly, by which a writing is made necessary for the passing of any estate or interest in lands. This act of assembly, so far as it respects the point under consideration, is in substance the same as the *English* statute of frauds and perjuries; in the construction of which it has been determined that specific execution of a parol agreement shall be decreed in equity, where the agreement has been carried into effect in part only. This determination was founded on two principles; 1st, that where the parties have acted upon their agreement, there is no danger of perjury in proving it; and 2d, because it is against equity that a man should refuse to perfect an agreement, from which he had derived benefit by an execution in part. Whether the courts of Chancery have gone further than they ought, in thus indirectly giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty now to enquire; because the principles I have mentioned have been adopted by this court, and long considered as the law of the land; and to question them now would shake many titles acquired under their authority. *Ebert* v. *Wood*, 1 Binney, 216.

So, a parol gift of lands by a father to his son, accompanied with possession, and followed by the son's making improvements on the land, is valid, notwithstanding the act in the text.

Tilghman, C. J. in delivering the opinion of the court, said,—Although the court are not disposed to extend the

1772. principles on which parol agreements concerning lands have been confirmed, farther than they have been already carried, yet they are bound by what has been decided. It has been settled, that where a parol agreement is clearly proved, in consequence of which one of the parties has taken possession, and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift; because it certainly would be fraudulent conduct in a parent to make a gift which he knew to be void, and thus intice his child into a great expenditure of labour and money, of which he meant to reap the benefit himself. *Syler's Lessee* v. *Eckhart*, 1 Binney, 378.

But although, when divested of such circumstances as above stated, no interest in lands can be derived from a parol contract, yet the contract is not void in itself, so as to prevent the recovery of damages for the non-performance of it; inasmuch as the 4th section of the statute of *Charles*, is not incorporated in the system of Pennsylvania laws.

Thus, in the case of *Clyde* v. *Clyde*, before cited, in the course of the trial, the father of the parties was offered as a witness by the plaintiff to prove the original contract, as to the benefit of the water course being reserved to the lower tracts of land; but he was objected to by the defendant's counsel, who cited Gilb. Ev. 108, That a man cannot claim a water course, but by a deed under seal. But to this it was answered, and so ruled by the court, that this suit is for damages on a breach of promise, which surely may be proved by oral testimony.

And, in *Bell* v. *Andrews*, 4 Dallas, 152, which was an action on the case to recover damages for the breach of an agreement to sell and convey to the plaintiff, in fee simple, a tract of land in *Westmoreland* county,—The plaintiff offered parol evidence of the agreement, as stated in the declaration, of a payment of the price of the land; of the defendant's subsequent acknowledgment of the sale and payment, and of the defendant's refusal to execute a conveyance.

The defendant objected to any proof of a parol agreement for the sale of lands in fee simple, as the act in the text required expressly, that all such agreements, to have the full effect, must be put in writing, and be signed by the parties or their agents.

But, *by the Court*, the payment of the consideration money, may, certainly, be proved by parol evidence. The agreement being then executed by one of the parties is not affected by the act of assembly; and it is settled that the *English* statute against frauds and perjuries was never extended to Pennsylvania. The act of assembly does not make a parol agreement for the sale of lands, void; though it restricts the operation of the agreement, as to the acquisition of an interest in the land, and no title in fee simple can be derived under it. But certainly an action will lie to recover damages for the non-performance of such an agreement.

The foregoing principle is confirmed by the case of *Ewing* v *Rees*, 1 Binney, 150, and it was also held, that a written contract with an agent who had merely a *parol* authority, was sufficient to support an action for damages. The Chief Justice, after reciting the first section of the act in the text, there says, —It is evident that the provision extends only to the *estate* intended to be passed. No *estate* in lands shall be conveyed by one person to another, unless the agent is authorized by writing. But it is one thing to convey an estate, and another and very different thing, to make an agreement that you will convey it. It might be good policy to establish certain solemnities, without which the title of land could not be transferred; because the peace and happiness of society are promoted by the clearness and facility with which the titles of real estate may be ascertained, and by preventing those frauds and perjuries which would inevitably take place, if after a great length of time it was permitted to establish a title by parol evidence only. Whereas, an action for damages for not performing a contract, is of much less moment. The jury may give such damages as, under the circumstances of each case, appear reasonable, *and these damages will often be very small;* and there is less danger of perjury, because those actions are limited, so that they must be commenced in six years. I should think the case sufficiently clear, if it was taken upon the act of assembly, without any other consideration; but it is still clearer, when we turn to the *English* statute of frauds and perjuries, 29 Car. 2, c. 3. It is plain that our legislature had that statute before them, when they framed the act in question; because that part of our law which I have recited, is copied very nearly *verbatim* from the English law. But there is a total omission of the 4th sect. of the English statute, which enacts, &c. (*See this section before cited.*) It is impossible that this omission should have been accidental. It must have been intended to leave the common law unaltered, as to the redress which it affords for breach of a

parol contract, by recovery of damages. Agreeable to this construction, is the sentiment expressed by this court, in 4 Dallas, 152; although the point now in contest is different from that which was then before them. The same construction has been given in several cases at *Nisi Prius*, in which damages have been recovered on parol contracts for sale of lands—and on this point the court were unanimous.

The distinction, therefore, between the *estate* or *title*, and the *mere contract*, when not in *writing*, is settled. In *Ewing* and *Rees*, it is said, "the jury may give such damages, as, under the circumstances of each case appear reasonable, and these damages will *often be very small!*" But, if in the mere case of a *parol* contract, the jury could, in any case, be induced to give *exemplary* damages, beyond the actual loss or injury, or the difference of price on a second sale, the act in the text might then become a dead letter. If under the pressure of heavy damages, the party could, in such cases, be deprived of what is called the *locus penitentiæ*, and on the one hand be compelled to convey, or on the other, to accept of the purchase, by having damages against him to the amount of the contract, accordingly as the jury may *view the circumstances of the case*, the distinction would then be without a difference, and the absence of the 4th Section of the Statute of *Charles* a serious inconvenience. Hitherto we have not experienced that inconvenience, although the case of *Clyde* and *Clyde*, at first view, would seem to step upon the very line of the distinction; yet, in that case, the agreement about the water course, was dependent upon the principal agreement to purchase and divide the land, which had been *executed so far*, and the fraudulent refusal to carry the residue into effect, was justly punished in that case, so as to compel its execution. The case of *Thompson* and *White* was not merely a common agreement, as between vendor and vendee, but was accompanied with what the law calls a constructive fraud, and was, more particularly, the case of an actual *trust*.

By the 12th section of the act to establish the Judicial Courts of this Commonwealth, &c. passed April 13th, 1791, (post. chap. 1564.) The Prothonotaries of the several Courts of the Common Pleas are empowered to sign judgments. This provision was deemed necessary, in consequence of the change of the judiciary system, by the constitution; the Prothonotaries being no longer judges of the Common Pleas. Previous to this change, in order to enable the Prothonotaries to sign judgments, under the terms of the second section of the act in the text, the commission of Prothonotary was accompanied with a commission of Justice of the Common Pleas. 1772.

The 15th Section of the same act, directs satisfaction to be entered on judgments, when paid off, and prescribes a penalty for the neglect or refusal to enter such satisfaction, within a limited time, on tender of reasonable charges, &c.

Recognizances of bail do not bind the lands of the bail, until they are proceeded on to judgment against the bail.

Shippen, President. I do not find that there have been any legal decisions upon this point in *Pennsylvania;* but a general opinion has taken place, which has been carried into universal practice, that recognizances here do not bind lands, until they are proceeded upon to *judgment* against the bail. Hence it is, that, whenever a purchase or mortgage is made, the examination at the offices, and the certificates which are given by the Prothonotaries, are only of the *judgments* in force against the seller, or mortgagor, and not concerning *recognizances*. The practice has, indeed, been so general, that all the conveyancers and lawyers, for a long course of years, have, on such occasions, confined their inquiries to that circumstance alone; and many titles must, therefore, depend upon it, which would be shaken if a a contrary construction should now be adopted.

Whether this opinion took its rise from the different situation in which the lands of this country are from those of *England*, and from their being liable to be *sold* for debts; or from the silence of the legislature on the subject; or from what other cause, we can but conjecture. It is remarkable, however, that when our act for the prevention of frauds was made, in the year 1772, although the legislature copied the clause in the *English* Statute relating to judgments, and was minutely exact as to the time from which they should bind lands, yet they totally omitted the clause relating to recognizances. This silence, it is true, is no abrogation of a law; but it looks as if the assembly had taken up the popular idea, that recognizances did not bind till judgments were obtained upon them, and, therefore, they thought that no particular provision was, in that respect, necessary. Upon what principle, indeed, could they else have been so careful of innocent purchasers in the one case, and not in the other?—

We may also properly take into view,

1772 that, long before the passing this act for the prevention of frauds, the relative dignity of judgment debts, and of those upon recognizance, had been settled by a law, directing the order of paying the debts of persons deceased; that is, 1st, Physic and funeral expenses; 2d, Debts and duties to the queen; 3d, Debts due to the proprietor and governor; 4th, *Judgments*; 5th, *Recognizances*; 6th, Rents, &c. If, however, it should be said, that is only a direction in what order debts shall be paid, without any respect to the binding nature of judgments and recognizances, it may be answered, that from the situation of lands in this country, that consideration must necessarily be included. Here lands are chattels for payment of debts; they are chattels too, in the hands of executors; and all writs of *fieri facias* direct the levy accordingly to be made, of the goods and chattels, *lands* and *tenements* of the deceased, in the hands of the executor. If then, in such a case, two writs are executed upon lands, founded, one upon a prior recognizance, and the other on a judgment subsequent to the recognizance, but prior to the judgment upon it, the Court must clearly decree a preference to the judgment creditor. This seems, indeed, to be a legislative direction as to recognizances in similar cases; for, what confusion would arise from supposing lands of *deceased* persons to be bound from *one time*, and the lands of *living* persons from another?

Upon the whole, we think, that great mischiefs and dangers would be imposed upon honest purchasers, if, at this time of day, we should unsettle what has been so long the general opinion and practice on this subject. *Campbell* v. *Rickardson*. 1 Dallas, 131.

Whether the second section of the act in the text is intended merely for the benefit of *bona fide* purchasers of the lands, and not to prevent the technical relation of a judgment to the first day of the term, in a controversy between the judgment creditor and the plaintiff in a domestic attachment. See 1 Dallas, 450.

By the act of April 4th, 1798, (post chap. 1998,) judgments shall not be a lien on lands longer than five years, unless revived by *scire facias* within that time; and the manner of serving such *scire facias* is prescribed. See ante. pa. 9.

Judgments of justices bind lands from the time of entering them on the Prothonotary's docket. Act of March 20th, 1810, sect. 10.—

As between creditors, the priority of their judgments is governed by the times of their entry, and not by relation to the preceding term. *Welsh* v. *Murray*. 4 Dallas, 320.

Leaving a *fieri facias* at the sheriff's office, or at the house where he usually transacts his business, is equivalent to a delivery thereof to him. *Mifflin* v. *Will*, March 1797, Sup. Court, MSS. Reports.

Goods taken in execution permitted to remain in the hands of the defendant—how far a subsequent execution shall prevail—The decisions on this point, in the Pennsylvania Court, and the United States Court seem contrary; but it is said, by *Shippen*, C. J. that there is an obvious and material distinction between a levy on household furniture, and on merchandise, or goods for sale. In the former case, the court has never allowed the plaintiff to lose the lien of a prior execution, because, on principles of humanity, he allowed the furniture to remain on the premises, in the possession of the defendant. But it would be going further than the reason of our decisions, and might introduce collusion and fraud, if we were to authorize, or countenance, such a practice, indiscriminately in every case. *Quere*, see 4 Dallas, 167, 208, 213, 358.

With respect to fraudulent judgments, executions, deeds, alienations, &c. see stat. 13th Eliz. chap. 5, and the act of March 20th, 1810, sect. 14.

Fraudulent assurances of lands or goods, to deceive creditors, shall be void, 50 Edw. 3, c. 6. All deeds of gift made to defraud creditors, shall be void, 3 Hen. 7, c. 4.

See also the first six sections of the stat. 27th Eliz. chap. 4, against covinous and fraudulent conveyances.