counsel might be allowed him, and cited the preamble of the statute as declaring that such a demand was reasonable and just. Lord Holt, one of the greatest of English judges, and of the best of men, replied: "God forbid that we should anticipate the operation of an Act of Parliament even by a single day." The prisoner then asked that the trial be postponed, but his application was refused, and the unlucky man was actually convicted and executed six hours before the bill went into effect.[1]

It was a long time, however, before counsel were bold enough to defend their clients with spirit, and it remained for Dunning and the never-to-be-daunted Erskine to establish the rights of the Bar; while it was not until 1836 —though we in this country had enjoyed the right from early colonial days—that prisoners in England, indicted for felony, could command the assistance of counsel. In cases of misdemeanor and in civil actions the right to counsel had always existed without dispute.

THE PENNSYLVANIA DEFEASANCE ACT OF JUNE 8, 1881, AND THE CASE OF SANKEY *v.* HAWLEY.

By C. Stuart Patterson, Esq.

Prior to the enactment of the Act of June 8, 1881, it was the law of Pennsylvania that, as the essence of a mortgage is a conveyance of land as security for the payment of a debt, a deed absolute in terms accompanied by a collateral agreement for a loan of money by the grantee to the grantor constituted in equity a mortgage;[2] and that it could be shown by parol that a deed, though in terms absolute, was, in fact, a mortgage.[3]

[1] 13 State Trials, 72.

[2] Friedley *v.* Hamilton, 17 S. & R., 70; Harper's Appeal, 64 Pa., 315.

[3] Heister *v.* Madeira, 3 W. & S., 384; Umbenhower *v.* Miller, 101 Pa., 71.

It was also, and it is yet, the law of Pennsylvania, that although the recording statutes declare that no mortgage shall be sufficient to pass any estate unless recorded in accordance with the statutes, nevertheless an unrecorded mortgage is valid and enforceable as against the mortgagor and his heirs and assigns, for the reasons as stated by Judge SERGEANT,[1] that, while there is plausibility in the argument that the strict terms of the statute ought to be enforced, and that nothing should be allowed to dispense with the actual recording of the instrument, yet when this doctrine comes to be applied in practice it is found to be too strict to be insisted upon as between the mortgagee and mortgagor, for *summum jus* then proves to be *summa injuria*, and the result of the strict construction would be to sanction injustice and to reward the most palpable fraud and iniquity; and the courts, therefore, in the exercise of equity, look to the object and design of the recording acts rather than to their dry letter, and, therefore, hold that the recording of a mortgage is unnecessary as between the mortgagor and the mortgagee.[2]

It was also, and it is yet, the law that although the Statute of Frauds requires conveyances of land to be in writing and signed by the parties, nevertheless a parol contract for the sale of lands is enforceable as between the parties where a court of equity finds the parties unequivocally in a position different from that in which, according to their legal rights, they would be if there were no contract;[3] and in such cases the defendant is charged, not upon the contract, but upon the equities resulting from the acts done in execution of the contract; for if those equities were excluded, injustice not contemplated by the statute would be done.[4]

It is, of course, unnecessary that I should quote any authorities to establish the recognition by the Supreme Court of Pennsylvania of the doctrine of part performance.

[1] Jaques *v.* Weeks, 7 Watts, 269.

[2] See also Tryon *v.* Munson, 72 Pa., 250; McLaughlin *v.* Ihmsen, 85 *id.*, 364.

[3] Dale *v.* Hamilton, 5 Hare, 381.

[4] Maddison *v.* Alderson, 8 Appeal Cases, 467; per Selborne, L. C.

Such being the state of the law, the Act of June 8, 1881,[1] was passed. That act is as follows:

"That no defeasance to any deed for real estate regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated, within sixty days from the execution thereof; and such defeasances shall be recorded and indexed as mortgages by the recorder."

The Act of 1881 seems to require the defeasance (1) to be made at the time the deed is made; (2) to be in writing; (3) to be signed by the grantee or mortgagee; (4) to be sealed; (5) to be acknowledged; (6) to be delivered by the grantee or mortgagee to the grantor or mortgagor; (7) to be recorded within sixty days from its execution, and (8) to be indexed as a mortgage. Of these requirements the second, third, fourth, and sixth would seem to be the only ones which can be of any possible efficacy as between the mortgagor and the mortgagee. The first, the contemporaneous execution, would seem to be immaterial, if there be a subsequent written admission by the mortgagee. The fifth, the acknowledgment, is nothing more than a prerequisite to the recording; and the seventh, the recording, and the eighth, the indexing, being only means of obtaining actual notice, and, therefore, constituting in themselves constructive notice, of the fact that the transaction is a mortgage and not a sale, could be of no practical use to the mortgagor, nor to a mortgagee, who having made a contract intended honestly to perform it; while, on the other hand, these requisites, if held to be essential to the legal validity of the paper *inter partes*, might be used as a means of fraud and as a trap to catch the unwary. The fourth requisite, sealing, is worse than useless, for under Hacker's Appeal[2] a judge is permitted to recognize as a seal anything which he

[1] P. L., 84. [2] 121 Pa., 192.

chooses to regard as such. The second requisite, the writing, and the third, the signature of the party to be bound thereby, are, of course, justifiable upon the reason which supports the Statute of Frauds, and that is, that a written admission is preferable to oral evidence, because the latter may by mistake, or by fraud, misrepresent the transaction.

The Act of 1881, therefore, so far as regards its requirements of acknowledgment, recording, and indexing, would seem to be nothing more than a recording statute, and as such requiring the construction which has been uniformly given to recording statutes ever since Levinz *v.* Will[1] was decided; and so far as regards its requirements of reduction to writing, and contemporaneous execution by signing, sealing, and delivery by the mortgagee, it would seem to be nothing more than a statute of frauds and as such requiring a construction in accordance with the principles of equity.

It would seem also that the Legislature never could have intended by the Act of 1881 to make acknowledgment, recording, or indexing an essential requisite to the legal validity of the defeasance, as between the mortgagor and mortgagee; for the object of indexing is to afford an easy means of finding a record; the object of recording is to give notice to parties who otherwise would not know of the existence of the instrument; and the object of acknowledgment is to sufficiently attest a paper to permit it to be recorded; and of what possible use could either the indexing, or the recording, or the acknowledgment, be to a mortgagee who had executed the written defeasance, or to a mortgagor who had received the paper from the mortgagee?

In 1888, the case of Sankey *v.* Hawley[2] came before the Supreme Court of Pennsylvania. The facts were these: Samuel K. Sankey, being the owner of a lot of ground and a planing-mill thereon erected, on December 17, 1883, borrowed from Hawley four thousand dollars, and as security for the loan executed and delivered to Hawley a deed in fee. Hawley contemporaneously executed and delivered to Sankey the following written defeasance:

[1] 1 Dall., 430. [2] 118 Pa., 30.

"DUNCANNON, Pa., December 17, 1883.

"This is to certify that S. K. Sankey and wife have this day deeded me their property (see Deed Book Q., Vol. 2, page 634, etc., New Bloomfield, Pa.), for the purpose of securing the loan of four thousand dollars, and I hereby agree to deed the above property back to S. K. Sankey, in fee simple, with all the improvements thereon erected, upon the payment of the four thousand dollars above referred to. Redeemable within two years.

Witness, JOSEPH M. HAWLEY.
WILLIAM BOTHWELL."

Subsequently Samuel K. Sankey paid Hawley one thousand dollars on account of the loan, and afterwards conveyed the land to his father, Jacob Sankey, against whom Hawley brought ejectment.

At the trial, the admission of the defeasance in evidence was objected to because, although in writing, it had not been acknowledged and recorded in accordance with the Act of 1881, and the judge sustained the objection. The signatures of Hawley and the subscribing witness were proved, and no objection was made as to the absence of a seal. After the facts as above stated had been proved by parol, a verdict was directed for the plaintiff, and judgment on that verdict was affirmed in the Supreme Court, Chief-Justice GORDON delivering the opinion.

That judgment in favor of the plaintiff allowed one who had loaned four thousand dollars, and to whom one thousand dollars had subsequently been repaid, to retain without possibility of redemption the land which he had admitted over his own signature to have been conveyed to him only as security for his loan of four thousand dollars, although one-fourth of the loan had been repaid, and although his admission was as a defeasance so far in strict accordance with the requirements of the Act of 1881, that it was contemporaneous with the deed, that it was in writing, and that it was delivered by the grantee and mortgagee to the grantor and mortgagor, and that it was under seal; for as no point was made as to its not being under seal, and as the report of the case is silent as to that, it must be taken to

have been under seal. It, therefore, only fell short of a full compliance with the Act of 1881 in that it was not acknowledged, recorded, nor indexed as a mortgage.

I venture to think, that the judge at the trial should have directed, not a verdict for the plaintiff, but a conditional verdict for the defendant on terms of repayment of the balance of the loan with interest, on the ground that the defendant's title was in strict accordance with the Act of 1881 in so far as that Act could possibly apply as between the mortgagor and the mortgagee.

The mistaken conclusion reached by the Court will clearly appear, if it be observed that if Sankey's deed of conveyance to Hawley had, like Hawley's written defeasance, remained unrecorded, Hawley could have recovered in ejectment against Sankey upon the unrecorded deed as an absolute conveyance, while he prevented the admission in evidence of his own unrecorded contemporaneous defeasance, which solemnly admitted over his own signature that the transaction was a mortgage and not a sale.

In so deciding Sankey *v.* Hawley, a court of equity permitted an act of the Legislature to be used as a means of effecting a fraud. I venture to think that in so doing the Court violated established equitable principles.

The grounds of decision stated in the opinion are (1) that the Act of 1881 is plain and positive in its terms; (2) that it is not a recording statute, and as such efficacious only in favor of purchasers and encumbrancers, but that it prescribes a rule of evidence which prevents a court of justice from permitting an absolute deed to be converted into a mortgage otherwise than by all the evidence prescribed in the Act; and (3) that the Act of 1881 would, unless effect be given *inter partes* to each and every of its requirements, be nugatory and merely declaratory of the existing law.

In reply to these reasons, it may be said: (1) the Act of 1881 is no more "plain and positive in its terms" than are the recording statutes and the Statute of Frauds, and yet the courts have consistently refused to enforce those statutes *inter partes*, whenever their enforcement would work injustice.

(2) The Act of 1881 does not prescribe a rule of evidence of a more binding and stringent character than that which the Statute of Frauds prescribes, and yet, as Lord WESTBURY said in McCormick *v.* Grogan,[1] "the Court of Equity has from a very early period decided that even an act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the Court of Equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act and imposes upon him a personal obligation because he applies the act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills."

Even if it were held that, by force of the Act of 1881, the legal estate in fee vested in Hawley by Sankey's deed could not be reduced to a mortgage, yet a court of equity ought to have seen in Hawley's written defeasance, in Sankey's retention of possession after his conveyance, and in his subsequent payment of one thousand dollars to Hawley, circumstance sufficient, notwithstanding the Act of 1881, to constitute Hawley a trustee for Sankey as to the surplus in value of the property over and above the balance of principal and interest due to Hawley on his loan. A court which enforces the doctrine of part performance, and which, in the exercise of equitable principles, reforms deeds, ought not to have stopped short of that conclusion.

If the rule of evidence prescribed by the Act could be regarded as of the stringent and binding character which the Court attributes to it, it must follow that each one of the eight requisites is of equally indispensable efficacy, and it must also follow that a written and sealed contemporaneous defeasance, acknowledged, delivered and recorded in accordance with the Act, will be unavailing *inter partes* if the Recorder's Clerk shall fail to index the mortgage; yet Luch's Appeal,[2] which held fatal as against subsequent purchasers a failure by the Recorder to record a mortgage

[1] L. R. 4, H. L., 97. [2] 44 Pa., 519.

in the proper book has been overruled by Glading *v.* Frick,[1] and Paige *v.* Wheeler.[2]

(3) It is not an accurate statement to say that the Act of 1881 would be merely declaratory of the existing law, if its requirements as to acknowledgment, recording, and indexing are not held to be applicable *inter partes;* for, as has been pointed out, that statute is also a statute of frauds in that it requires the defeasance to be in writing, and signed by the mortagee, whereas prior to its enactment no written defeasance was necessary *inter partes.*

It is also to be noted that the Act of 1881 changes the law in another, and an important, respect. Prior to that Act it was the law, that while a deed absolute in terms but accompanied by a collateral agreement for a loan of money by the grantee to the grantor constituted in equity a mortgage, yet a purchaser for value and without notice, taking a deed from the original grantee, at any time subsequent to the recording of the deed to that original grantee, took a good title as against the original grantor.[3] Under the Act of 1881, as the grantor and mortgagor has sixty days within which to record the defeasance, it follows that until sixty days from the date of any deed of conveyance shall have passed, no one can purchase from the grantee therein without encountering the risk of having his title defeated by the recording of a defeasance and by its conversion of his vendor's apparently absolute deed into a mortgage. If the Act were, in any respect, judicious legislation, the clause giving sixty days in which to record the defeasance would yet be objectionable because it is inconsistent with the policy of recent legislation, as evidenced by the Act of May 25th, 1878,[4] which, probably, gives to purchase-money mortgages in Philadelphia a lien only from the date of their record, and because it opens the door to fraud.

[1] 88 Pa.,.460. [2] 92 Pa., 282.

[3] Manufacturers' Bank *v.* the Bank of Pennsylvania, 7 W. & S., 355; Jaques *v.* Weeks, 7 Watts, 261.

[4] P.L., 151.