NOTES AND COMMENTS ON RECENT DECISIONS.

EXECUTORS AND ADMINISTRATORS.

Title of executor to notes against testator.

A somewhat remarkable decision was arrived at in Hoffer's Estate, etc.. 156 Pa. 473, which we overlooked at the time but which deserves notice. This was an appeal by the guardian of Thomas Minors from the decree of the Orphans' Court sustaining exceptions to the report of the auditor of the account of the executor of Hoffer, deceased.

The auditor had refused to allow credit for two notes made by decedent and payable to accountant. Both notes were overdue at the date of the decedent's death. There was evidence that the notes were in possession of accountant's wife immediately after decedent's death, and were handed over by her to accountant.

Exceptions to the auditor's report were sustained by the court (McPHERSON, J., delivering the opinion) on the ground that an executor, who is the payee of the note of his decedent, which is overdue at the time of the decedent's death, must show clearly that he held the note by a title hostile to that of decedent, which he may do by showing that the note was in the custody of his wife immediately after the decedent's death.

This decision, which was accepted without comment by the Supreme Court, practically amounts to this, that, although fraud is never assumed but must be proved, an executor holding notes of a testator *is presumed to have stolen them unless he can prove that he was the holder at the time of the death.* That he was once the holder the paper proves, but payment and subsequent theft are presumed though liable to be disproved.

When we turn to the authority on which this remarkable

deduction is founded we find it was the case of a note signed by a marksman, not witnessed and, therefore, without any outward sign of inward validity, moreover its existence was wholly inconsistent with proof of the holder's admissions that he was not a creditor. (McMahon's Est., 132 Pa. 179.)

We have quite enough instances of inverted reasoning without adding more to the list, even though it may be but a single dictum. That it could have entered into the mind of the most suspicious to suggest such an argument is bad enough; to have it accepted by a court is serious and deserves notice.

RECENT CORPORATION CASES.

In 150 U. S. 371, there is reported a most interesting decision upon the limits of the doctrine that the capital stock of a corporation is a trust fund for the payment of debts. Our readers will remember that in the AMERICAN LAW REGISTER AND REVIEW for February, 1893 (32 Am. L. R. & Rev. 175), we published an editorial review of some of the more important decisions of the Federal Courts which bear upon this question. In view of such considerations as must suggest themselves to every careful reader of these judicial utterances, we ventured to give our adherence to the opinion that the attributes of a trust fund are in many respects wanting in the case of capital stock, and that the use of the term is not only not helpful, but actually misleading. *A propos* of these comments (which included a resumé of an article on this subject from the pen of R. C. MCMURTRIE, Esq.), it is interesting to examine the decision above referred to, Hollins *v.* Brierfield Coal & Iron Co. In this case a trustee of a corporate mortgage had instituted proceedings thereunder which resulted in a decree for the foreclosure of the mortgage deed and a sale of the property. Sometime after the commencement of this suit, but before the decree, Hollins and others filed a bill in the same court, making the corporation, the trustee, and sundry stock and bond-holders, parties defendant. The plaintiffs were unsecured creditors of the company, whose claims had accrued several

years after the issue of the mortgage bonds; and, after stating their claims, they alleged that the mortgage conveyance was absolutely void, and that a large amount was still due on the stock. They prayed for the appointment of a receiver and for the sale of the property in satisfaction of their claims, and they asked that the receiver be given authority to collect the unpaid stock subscriptions for their benefit. They alleged the pendency of the trustee's suit, but did not ask to intervene. The bill was dismissed upon the merits. Upon appeal, the Supreme Court, in an interesting opinion by Mr. Justice BREWER, sustained the decision of the court below in dismissing the bill, but decided that it should have been dismissed, not upon the merits, but for want of jurisdiction. Mr. Justice BROWN and Mr. Justice JACKSON dissented, but gave no reasons for their dissent. Mr. ALEXANDER T. LONDON, for the appellants, strenuously contended that unsecured creditors of a corporation have a right to proceed in equity, without first reducing their claims to judgment at law. He relied upon the general principle recognized in Case *v.* Beauregard (101 U. S. 688), that whenever a creditor has a trust in his favor or a lien upon property for a debt due him, he may go into equity without exhausting his legal remedies. He then claimed the benefit of the many decisions to the effect that the capital stock of a corporation is a trust fund for the benefit of creditors and insisted that it is a necessary conclusion from these premises that a corporate creditor, without judgment, may come into a court of equity upon the insolvency of the corporation to protect the trust fund and to enforce his lien. He also cited expressions of judicial opinion that such a course is in strict accordance with principle and quoted the language of Mr. Chief Justice WAITE in Terry *v.* Anderson (95 U. S. 628).

The argument upon these grounds is conceived to be formally valid, and the conclusion follows from the premises as a matter of logical necessity. As the conclusion, however, was too preposterous to be accepted, and since the major premise contained a statement of law which was indisputable, the court was compelled either to deny the validity of the syllogism as a mode of inference or else to deny a distinctive attribute of a

trust fund to the capital stock of a corporation. Fortunately the court adopted the latter alternative, as appears from the following quotation:—"While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund, held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in 2 Pomeroy's Equity Jurisprudence, § 1046, they 'are not in any true and complete sense trusts, and can only be called so by way of analogy or metaphor.'"

In other words, this decision denies the necessary validity of deductive arguments based upon the postulate of the trust fund. In a science where analogy is out of place and metaphor is misleading, such a decision is in effect a judicial declaration that the so called trust fund is not a trust fund at all.

LANDLORD AND TENANT LAW.

In the case of Shermer *v.* Paciello, 34 W. N. C. p. 252, the Supreme Court of Pennsylvania passed upon the important question of the right of a sub-tenant to resist proceedings in ejectment instituted by virtue of an authority contained in the lease—the lease containing a prohibition against sub-letting. It appeared that the plaintiff let certain premises to the defendant in August, 1893. In October, 1893, the defendant called at the office of the plaintiff's agent, handed him the keys, and said that he had moved. When the agent went upon the premises, he found Banner Herman in possession of a part of the building and conducting a dry goods business for himself. The lessor's agent, for the purpose of obtaining possession, left on the premises a notice to the defendant, the original lessor, to give security within five days for three months' rent or deliver possession. The notice fell into the hands of Herman, who tendered the security, which was refused, and judgment in ejectment was entered. Herman had been a sub-tenant for some months, but of this neither the plaintiff or his agent had any knowledge.

The question presented was to (1) the right of the sub-tenant

to resist the proceedings in ejectment instituted by virtue of the lease, and (2) the right to enter security under the Act of March 25, 1825, where the lessee has waived his rights under that act. In the lower court, on the authority of the case of Grider *v.* McIntyre, 6 Phila. 112, judgment was given in favor of the sub-tenant, who had obtained a rule to open the judgment in ejectment entered upon the authority of the lease. In the Supreme Court, in the opinion of Mr. Justice Fell, it was declared that the sub-tenant had no standing as against the landlord under the circumstances of the case, unless he had acquired some right, and judgment was given accordingly for the plaintiff.

As early as the case of Row *v.* Riggs, Bos. & Pul. 330, Mansfield, C. J., declared: "I never understood that it was necessary for a landlord to give notice to anyone but his own tenant. If possession be not delivered up after said notice, the landlord may take a verdict against his own tenant and sue at execution, upon which the sheriff will turn the under-tenants out of possession." In Pennsylvania, however, the courts have occasionally looked with a kindly eye upon the rights of sub-tenants in possession, as is very fully brought out in the interesting note of Judge Arnold to the principal case.

In Grider *v.* McIntyre, *supra*, upon which the lower court relied in reaching a decision in the principal case, it appeared that upon a demand for security for the payment of the rent the original tenant surrendered the premises before the expiration of the lease, having previously sub-let them to the plaintiff for a period which had not yet expired. The sub-tenant tendered security, as required by the act, which was refused by the landlord. It was held that the original tenant could not waive any legal right to the prejudice of the sub-tenant; citing the case of Pleasant *v.* Benson, 14 E. 234, and Brown *v.* Butler, 17 Leg. Int. 148, a sub-tenant was held to have the right to protection in the exercise of his privilege under the Act of 1825, and the landlord could not complain, because his rent is secured, and the object for which the act was passed was attained, even by the act of a party who, although a stranger to the landlord, had contracted with his tenant and thus

entitled himself to legal protection as against the unauthorized acts of the original lessee. Grider *v.* McIntyre is certainly overruled by the decision of Shermer *v.* Paciello, and the profession and public should be very thankful that such an important question of landlord and tenant law has been decided in such a satisfactory manner. It had always been popularly supposed that the sub-tenant, when unrecognized, had absolutely no status as against the landlord, and real estate agents had constantly proceeded upon the basis of the doctrine enunciated in Shermer *v.* Paciello.