UNCONSTITUTIONAL LEGISLATION UPON THE EXTINGUISHMENT OF GROUND RENTS.

An Act relating to the Extinguishment of Ground Rents, and providing a means where Ground Rent has been extinguished by payment or presumption of law, for recording such extinguishment, and making the same binding and effectual. P. L. 1897, page 149.

In the September number of the LAW REGISTER for 1896, in discussing the case of *Biddle* v. *Hooven*, 120 Pa. 221, as to the constitutionality of the Act of 1855, declaring that a claim for arrears of rent by a ground rent landlord after twenty-one years, was barred by limitation, we asserted on the authority of *Haines' Case*, 73 Pa. 169, that the Supreme Court could not enforce its own decree, because it professed only to take away the remedy and not to impair the contract. Sharswood, J., delivering the opinion of the court, said, that in such a case a court of equity could not interfere to decree an extinguishment, as it would usurp the position of a court of law and deprive the ground rent landlord of his property without a trial by jury. If his property is thus taken under the guise of public use, the Constitution of the United States, the Constitution of his State, guarantee him a trial by jury. If it is a question between the parties themselves, no court of equity can interfere to decree that the interest of the landlord in the rent has been extinguished, still less can it do so without his constitutional trial by jury. On June 14th, 1897, the Legislature passed the Act entitled, "An Act relating to the Extinguishment of Ground Rents, &c.," as follows:

SECTION 1. *Be it enacted, &c.*, That in all cases in which a ground rent has been or may be extinguished by payment or by presumption of law, but no deed of extinguishment or release thereof appears of record, it shall and may be lawful for the owner or owners of the land out of which the said rent issues, or any person interested, to apply by petition, under oath or affirmation, to the Court of Common Pleas of

the county, in which the land out of which the rent was reserved is situate, setting forth the reservation of the rent and the name of the present holder or holders, owner or owners of said rent, if known, and if not known, then stating the name of the last recorded owner, and also the fact that said ground rent has been extinguished, and the method or means whereby it became extinguished, and asking for an issue to determine the question of its extinguishment by a jury. Whereupon the court shall direct an issue to be framed, to try the question whether said ground rent has been extinguished, and shall make such order for giving notice to all parties to said issue and all other parties interested therein, if any such exist, as the court shall see fit, either by personal service, publication or otherwise.

SEC. 2. The issue to be framed, as provided by the first section of this Act, shall be a real issue in the usual form, to determine whether the said ground rent has been extinguished by payment or by presumption of law, in which issue the last known owner or owners of said rent shall be the plaintiff, and the covenantor in the deed under which the ground rent was reserved and the petitioner shall be the defendants; and in case of a rent reserved by deed dated and recorded more than twenty-one years before the filing of said petition, the burden of proof shall be on the plaintiff to show that said rent is not extinguished by payment or presumption of law.

SEC. 3. If upon the trial of the said issue, the verdict of the jury shall be for the defendants, thereby establishing the fact that said rent has been extinguished, by payment or presumption of law, the court shall, after entering final judgment on said verdict, enter a decree declaring that said ground rent is released, merged and forever extinguished, and a certified copy of said decree, when duly entered, shall be recorded in the office of the recorder of deeds of the proper county, shall be indexed in said office in the name of the last recorded owner or owners of said rent as grantors, and shall have the same force and effect as a deed of extinguishment duly executed by the real owner of said rent and duly recorded in said office.

SEC. 4. At any time before final judgment, any person or persons claiming by petition, under oath or affirmation, to be interested in said rent, shall be admitted as parties plaintiff in the issue, with the same effect as if made plaintiff therein on the order of the court awarding the issue.

SEC. 5. Any party aggrieved by the judgment of the court may appeal thereupon to the Supreme Court or Superior Court as in other cases.

Approved June 14, 1897.

Whether this Act comes within the demand of the Supreme Court in *Haines's Appeal*, is a very serious question.

First of all, let it be remembered, that when the Commonwealth of Pennsylvania determined to sever the allegiance between the Proprietary Government of the Penns and itself, and by the Act of 1779, known as the Divesting Act, proclaiming the Sovereignty in the Commonwealth of Pennsylvania, sequestrated certain estates of the Penn family, it, at the same time, by sections 8 and 9 of the same Act, assured to them and their heirs forever the rents reserved from their private estates: 1 Smith's Laws, 479.

No such Act, therefore, as the Act of 1897, could by implication repeal the Act of 1779, or effect the rents of the private estates of the proprietary family, which rents really form a large portion of the estates against which these statutes of limitation have been directed. These ground rent landlords not being American citizens could invoke the aid of the United States courts. As the Supreme Court of the United States finally decided in *Butler* v. *Horwitz*, 7 Wallace, 258, that it was unlawful even to change the kind of money called for in a contract, it is hardly possible to conceive that any peculiar doctrine of the Pennsylvania courts will have force or weight in attempting to dispose of the entire estate in the rent.

In both the cases of *Korn* v. *Brown*, 64 Pa. 55, and *Biddle* v. *Hooven*, 120 Pa. 221, the court said, that the Act of 1855, providing that where there has been no claim or demand for twenty-one years, an extinguishment will be presumed, was constitutional, and that it did not impair the obligation of the contract as between landlord and tenant, because it did not

affect the estate in the rent or interfere with the contract, but merely took away the remedy.

Therefore the estate in the rent was still in the owner or landlord, and as no court has yet been induced directly to impair the contract between the parties to that extent, the owner of the land was left with a stain upon his title, and the court was powerless to enforce the judgment.

In the case of *Haines's Appeal*, we have seen, it was attempted to complete the work started by the Act of 1855, and take the estate in the rent from the owner and decree an extinguishment in favor of the owner of the land, on the authority of the Act of 1868, declaring that in all cases in which ground rents have been or may be extinguished by payment or by presumption of law, but no deed of extinguishment or release thereof shall have been executed, it shall and may be lawful for the owner or owners of land out of which the rent issues, or any person interested, to apply by petition to the Court of Common Pleas; whereupon the court shall make such order for giving notice, etc., *and on due proof being made* of the truth of said petition, the said courts are authorized and required to make a decree declaring that said ground rent is released, merged and extinguished.

In *Longstreet's Executors*, 7 Phila. Rep. 460, the Court of Common Pleas sustained this Act of 1868, holding that it did not usurp the powers of the courts by compelling them to decide a cause in a particular way; that it did not impair the obligation of a contract, and that it did not deprive the parties of their right of trial by jury. In its opinion the court admitted that it was an open question whether the Act did not deprive the parties of a trial by jury, but finally decided that "due proof" being made, the court could make a decree or send such a case to a jury.

Afterwards, however, in the case of *Haines's Appeal*, 73 Pa. 169, this case was reviewed and the Supreme Court held that the Act of 1868 was unconstitutional and that it did violate the right of trial by jury. The court, Chief Justice Sharswood delivering the opinion, added "No case has been produced, and we think none can be, which goes the length

which must be maintained here, that wherever there is an outstanding claim which is barred by reason of lapse of time, and, therefore, cannot be enforced at law, but which, nevertheless, is a cloud upon the title and prevents it from being marketable, the possessor can invoke the aid of a court of equity to remove the cloud and forever bar such claim or encumbrance by a perpetual injunction." "We cannot strike from the Act the words 'on due proof being made of the truth of the said petition' and insert other words which would confine the jurisdiction to the case, where no evidence should be produced which would save the act from its unconstitutional operation."

It was intimated by the court, that if there had been a provision giving the respondent a right to demand an issue the argument against depriving the parties of a trial by jury might be answered.

In hopes of relieving the situation, on the 14th day of June last the Act of 1897 was passed, providing, *inter alia*, that the petitioner may ask for an issue to determine the question by a jury; "whereupon the court shall direct an issue to be framed to try the question whether said ground rent has been extinguished, and shall make such order for giving notice to all parties to said issue, and all other parties interested therein, if any such exist, as the court shall see fit, either by personal service, publication or otherwise."

This and the succeeding section, providing that the issue shall be a real issue in the usual form, may be intended to supply the trial by jury guaranteed to every citizen by the Constitution of the State and the Constitution of the United States; though, whether the provision that the owner of the rent shall prove that the rent has not been paid, instead of the usual custom that he who makes a claim should support and prove it, virtually reversing the ordinary rules of law held for all time in all free governments, will be in accordance with the Bill of Rights, "that trial by jury shall be as heretofore and inviolate," shall be considered a fair trial, will be questioned.

We wish particularly to call attention to the point that this

Act of 1897 aims directly at the estate. It proposes to take away the estate in the ground rent and give it to another, and this without compensation, which deprives it of any consideration on the ground of public policy. As said in *Palairet's Appeal*, 63 Pa. 485, where it was attempted to extinguish irredeemable ground rents by payment under the Act of April 15, 1869, P. L. 47, taking the property of one person and giving it to another is in no sense constitutional. It might also be added that leaving to the discretion of the court whether the notice to the owner of the ground rent should be personal or otherwise, would bring it under the condemnation in *Gault's Appeal*, 33 Pa. 94, "to divest ownership without personal notice and without direct compensation is the instance in which a constitutional government approaches most near to an unrestrained tyranny."

Recalling that in the case of the Act of 1855, both in the case of *Korn* v. *Browne*, and *Biddle* v. *Hooven*, the court expressly disclaimed any intention to impair the contract between the parties to the ground rent deed, but only to take away the remedy, the case now under discussion is entirely different. We are brought face to face with the question of impairing the obligation of the contract, declaring that the owner of the land will continue to pay the rent as it falls due or produce a deed of extinguishment between his landlord and himself. Not only that, but the Act directly authorizes the court to take the property of one man and give it to another by ordering a decree that the rent has been extinguished by lapse of time, in spite of all safeguards mentioned in the ground rent contract to the contrary. Is the real issue "in the usual form," when the owner of the rent is denied the privilege accorded to the lowest criminal in a court of justice to hear the charge against him and go free unless it be proved?

The Act of 1855 makes it a presumption of law, but the court, in *Biddle* v. *Hooven*, said it meant a presumption of fact, and if it meant more it would be void for excess; therefore there can be no such thing as presumption of law under the Act of 1897. To that extent *Biddle* v. *Hooven* overruled *Korn* v. *Browne*.

In conclusion, then, admitting the danger of such legislation, that in the United States courts and nearly every State in the Union, such Acts would be held unconstitutional as impairing the obligation of a contract expressly provided in the deed, that payment must be by deed executed between the parties, also in spite of the objections against unusual interference with methods of procedure to aid the owner of the land to avoid the claims of a too indulgent landlord, and notwithstanding the owner of the rent is obliged to explain to the jury that unsolved problem of mathematics, "proving a negative," the Act of 1897 may be made to settle these vexed questions.

Why it is better public policy to encourage the tenant who may have a late receipt for rent in his pocket barring a statute of limitation, yet who, by perjury against his landlord who has nothing to show, can get the estate of another by a doctrine of law at variance with former established principles, than to insist that the tenant should get rid of the claim by paying as in other transactions of life, is one of the mysteries of the law of real estate in Pennsylvania.

This Act of 1897 can still be saved and rendered serviceable, provided it is admitted that there can be no payment by presumption of law. To that extent the court in *Biddle* v. *Hooven*, we have shown, has practically declared the Act of 1855 unconstitutional and would apply against the Act of 1897, therefore there can be no binding instructions to the jury to find for the owner of the land on that ground. This reduces the case entirely to a question of fact between the parties.

Finally, then, if the trial of the real issue be a trial before a jury, in fairness and honor, the Act of 1897 may thus settle questions so far eluding the various statutes and all the courts to this day. Let the owner of the rent be served, and after statement of his claim, with the evidence of both sides fairly submitted to the jury, await the result. This will, at least, bring a verdict as to the fact of the assertion of payment, and either save the owner of the land from his negligence in losing his deed or not recording it, or force him to pay his honest

debt. Whether right or wrong, the owner of the estate in the rent, will, at least, have the judgment of his peers.

Unless this Act of June 1897 shall be thus limited and such legislation be restrained, as Chief Justice Sharswood insisted, we can only mournfully repeat the language of the late Judge Black in his dissenting opinion in *Hole* v. *Rittenhouse*, 2 Phila. Rep 417. "This case is important in its principle, so curious in its history, and so alarming in its result, that I feel bound to put on record a brief statement of my own views."

"The judgment now about to be given is one of 'death's doings.' No one can doubt that if Judge Gibson and Judge Coulter had lived, the plaintiff could not have been thus deprived of his property; and thousands of other men would have been saved from the imminent danger to which they are now exposed of losing the homes they have labored and paid for. But they are dead; and the law which should have protected those sacred rights has died with them. It is a melancholy reflection that the property of a citizen should be held by a tenure so frail. But 'new lords, new laws' is the order of the day. Hereafter if any man be offered a title which the Supreme Court has decided to be good, let him not buy if the judges who made the decision are dead; and if they are living let him get an insurance on their lives; for ye know not what a day or an hour may bring forth."

"The majority of this court changes on the average every nine years, without counting the chances of death and resignation. If each new set of judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it can be called) would be the most fickle, uncertain and vicious that the civilized world ever saw. A French Constitution, or a South American Republic, or a Mexican Administration, would be an immortal thing in comparison to the short lived principles of Pennsylvania law. The rules of property which ought to be as steadfast as the hills, will become as unstable as the waves. To avoid this great calamity, I know of no resource but that of *stare decisis*. I claim nothing for the great men who have gone before us on the score of their marked and manifest

superiority. But I would stand by their decisions, because they have passed into the law and become a part of it—have been relied and acted on—and rights have grown up under them which it is unjust and cruel to take away."

Richard M. Cadwalader.

NOTE.—The inconsistency of the Legislature is singularly illustrated in this class legislation against the owner of an estate in a ground rent, by reference to the Acts of May 20, 1864, P. L. 914, and May 26, 1897, P. L. 101.

These Acts insist upon the collection of the purchase money with interest due the Commonwealth on unpatented lands. The statute of limitations cannot be pleaded against the Sovereign; the Act of 1897 directs that the Surveyor-General shall make a descriptive list of all unpatented lands, and transmit to the Prothonotaries of the different Counties, who shall enter the amounts as liens against the lands and enforce the collection of the same.

Some of these claims date back to the Divesting Act of 1779. All are very old, and it is probable that the legal proceedings will ruin many, without convincing them that their debts have not in some way been paid.

The only difference between the claims due the Commonwealth and the owner of an estate in a ground rent, is that the ground rent landlord has a covenant of the tenant under seal and duly recorded, while the Commonwealth of Pennsylvania has only an implied promise to pay. The Legislature of the State has prescribed exactly the opposite course of legal prccedure, which makes it difficult to understand the justice, or the question of public policy.