On April 21st, a memorial meeting was held in the Law School Building under the auspices of the Trustees of the University, the Law Faculty and the student body. Addresses were made by persons representing these three bodies and by members of the Philadelphia Bar. A pamphlet containing an account of Mr. Flander's life and services and the proceedings at this meeting will be published by the University and distributed as a supplement to the June number of THE REVIEW.

NOTES.

RECOVERY OF MONEY PAID ON AN ILLEGAL TAX ASSESSMENT.—In the case of Shenango Furnace Co. v. Fairfield Twp.[1] there was an assessment of taxes for road purposes on an illegal valuation of the complainant's mining property. Part of these excessive taxes the complainant paid without duress, without protest, without fraud on the part of the respondent, and with full knowledge of the law and facts. The respondent threatened to begin judicial proceedings to collect the unpaid balance. By bill in equity the complainant sought three things: (1) An injunction restraining collection of the unpaid, excessive balance; (2) an accounting; (3) a decree ordering the respondent township to repay the complainant the amount paid in excess of what was legally due. An injunction was granted restraining the collection of the balance not legally due, but the second and third prayers of the bill were denied. Since the items were all on one side of the account there was no necessity for an accounting; and since the prayer for an accounting was merely incidental the court refused to allow it to confer jurisdiction in equity to order the repayment of the excessive amount—a relief which, standing alone, equity does not have jurisdiction to give, the remedy at law being adequate. It is the purpose of this note to review briefly the principles which govern the legal remedy, and the circumstances under which money paid on an illegal tax assessment can be recovered at common law.

Where the right of recovery is conferred by statute, whether or not it is a necessary pre-requisite that the illegal tax be paid involuntarily seems to be a question of construction of the particular statute; a majority of statutes allow recovery though the tax was paid voluntarily.[2]

At common law illegal taxes voluntarily paid cannot be re-

[1] 78 Atl. 937 (1911 Pa.).

[2] People v. Board of Education, 126 App. Div. (N. Y.) 414.
Van Hise v. Board of Sup'rs, 48 N. Y. S. 874 (1897).
Du Bois v. Com'rs of Lake Co., 37 N. E. 1056 (Ind. 1894).
Indianapolis v. Morris, 58 N. E. 510 (Ind. App. 1900).
Stewart Co. v. Alameda Co., 142 Cal. 660 (1904).
Eureka Co. v. Juab Co., 22 Utah 395 (1900).

covered.[4] The reason is that a payment voluntarily made is "an asset to pay more in support of the government of the town than the town had a right to demand, and the law does not imply the duty of refunding." [5]

The word "involuntarily" in this connection means more than an unwilling payment accompanied by protest and a declaration of intention to endeavor to recover it.[6] It means that the payment was made with protest under circumstances which in law amount to compulsion.[7] The generally accepted rule appears to be that when the process which issues to enforce payment of an illegal tax is against real estate and is such as will put a cloud on the title, the person paying the illegal tax under protest is not held to have paid it voluntarily,[8] and can therefore recover the money in an action at law under the common counts. And where the process is illegal on its face; *i. e.*, where the irregularity appears on the record, it is not deemed such as will put a cloud on title, and money thus paid cannot be recovered. Such a case is made out where: (1) the land against which the process actually issued was not that of the plaintiff;[9] (2) the officer issuing the warrant had no authority to do so;[10] (3) the assessment was unconstitutional.[11] (4) Unequal increase of assessed valuation of one class of real estate without making the same increase on another class.[12]

Pennsylvania seems to follow a different rule. When process issues against land for the collection of taxes, whether the illegality of the tax is apparent on the record or whether it is collateral thereto, it is deemed to put a cloud on title. But that fact is held not to be sufficient compulsion to render the payment involuntary; the plaintiff

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[4] McKibben v. Oneida Co., 49 N. Y. S. 553 (1898).
Moller v. Galveston, 57 S. W. 1116 (Tex. 1900).
Bank v. Memphis, 64 S. W. 13 Tenn. (1901).
Lackey v. Mercer Co., 9 Pa. 318.
Taylor v. Board of Health, 31 Pa. 73.

[5] Allentown Borough v. Saeger, 20 Pa. 421. Laurie, J.

[6] Union Ins. Co. v. Allegheny, 101 Pa. 250.
Town of Phœbus v. Manhattan Club, 105 Va. 144 (1906).

[7] Johnson v. Cook Co. (Or.), 100 P. 294.
Chicago v. Klinkert, 94 Ill. App. 524 (1901).
Oakland Cemetery Ass'n v. Ramsey Co., 108 N. W. 857 (Minn. 1906).
De Baker v. Carello, 52 Cal. 473 (1877).

[8] *In re* Edison Electric Co. v. Brooklyn, 48 N. Y. S. 99 (1897).
Peyser v. N. Y., 70 N. Y. 497 (1877).
City of Detroit v. Martin, 34 Mich. 170 (1876).
Toger v. Skagit Co., 34 Wash. 147 (1904).
Miles v. Austin, 53 Cal. 152 (1878).

[9] Dubuque v. Webster Co., 40 Iowa 16 (1874).

[10] Mason v. Johnson, 51 Cal. 612.

[11] Baltimore v. Lefferman, 4 Gill. 425 (1846).
Detroit v. Martin, 34 Mich. 170 (1876).
San Francisco v. Dinwittle, 13 Fed. 789 (1882).
Yates v. Royal Ins. Co., 65 N. E. 726 (Ill. 1902).

[12] Gould v. Hennepin Co., 76 Minn. 379 (1899).

must first exhaust his legal and equitable remedies.[13] If he then makes payment and the tax turns out to be illegal, he can recover the money thus paid, in assumpsit.

It seems that a different rule rightly obtains where personal property is liable to seizure for non-payment of the illegal tax. In such case the owner will be deprived immediately of his possession, while in the case of real estate the sheriff merely makes the sale and then leaves the parties to fight out their right to possession in an action of ejectment. For this reason where personalty is levied on, or about to be levied on, and is answerable for the illegal tax under such circumstances as will deprive the owner of his possession, payment then made is held to be involuntary, and recovery can be had, even though payment was made without protest.[14]

In view of the necessity that public funds, which are intended for immediate expenditure for the common good, should be reasonably free from claims by the individuals who have contributed thereto, and in order to secure the most beneficial use for the public, it seems that the difficulties imposed upon the individual in recovering from that fund are wise and reasonable. And this is especially true in view of the fact that the rights of the individual are amply protected by the avenues of escape from the payment of an illegal tax which are open to him, such as review, appeal, or defense to proceedings to enforce the tax.[15]

J. F. S.

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[13] Ins. Co. v. Allegheny, 101 Pa. 250 (1882).
Wharton v. Birmingham, 37 Pa. 371 (1861).
De La Cuesta v. Insurance Co., 136 Pa. 62.

[14] Elevator Co. v. Louice, 83 N. W. 212 (N. D. 1900).
Cox v. Welcher, 16 Mich. 263 (1888).
Lyon v. Receiver of Taxes, 17 N. W. 839 (1883).

[15] I. Bill in equity to enjoin collection will lie in following cases:
1. Exempt property.
University of South v. Jetton, 155 F. 182.
Bates v. Parker, 227 Ill. 120 (1907).
2. Where taxing bodies have or are about to act fraudulently or illegally.
(a) Not having jurisdiction.
Lumber Co. v. Lattimore, 105 S. W. 1028.
Hemple v. City of Hastings, 113 N. W. 187.
Caldwell Co. v. Smith, 59 S. E. 653 (1907).
Gas Co. v. Ratliff, 31 Ky. L. R. 1229 (1907).
3. Where it will cause irreparable injury, *i. e.*, no remedy at law.
Hallet v. Arapahoe Co. Com'rs (Colo.), 90 P. 678.
4. Assessment under unconstitutional law.
Green v. Hutchinson, 57 S. E. 353 (1907).
5. Property is not owned by plaintiff.
Weber v. Baird, 208 Ill. 209.
6. Where taxes have been paid.
Hamberg v. Western Storage Co., 231 Ill. 32.
Nyce v. Schmoll, 40 Ind. App. 555 (1907).
II. By suit to remove cloud on title.
Regan Land Co. v. Carthage, 108 S. W. 589.
College v. Berryman, 156 F. 112 (1907).
III. By appeal.
Wharton v. Borough of Birmingham, 37 Pa. (1 Wright) 371 (1861).

BANKRUPTCY—RESTORATION OF EMBEZZLED TRUST-FUND AS A VOIDABLE PREFERENCE.—In Clarke v. Rogers, 183 Fed. 518, the Circuit Court of Appeals of the First Circuit recently held that the restitution to the trust fund of substituted securities by the defaulting trustee may constitute a preference voidable upon his subsequent bankruptcy, that a bankrupt may in his individual capacity have preferred himself in his trustee capacity, and, inferentially, that a defaulting trustee is debtor to the trust.[1] The same facts had never concurred in an American case. A long line of English decisions reach an opposite conclusion from this case. This variance is partly accounted for in the difference in construction under the bankrupt acts. In England a transfer in order to be a voidable preference must be clearly voluntary and with the intent to prefer as the dominant motive on the part of the transferror.[2] So English courts have refused to avoid a preference where they have found it was made not with intent to prefer but primarily to rectify the wrong done,[3] or to shield the wrongdoer from the consequences of his default,[4] or through fear of suit or exposure on account of a threat real or imagined [5] by one of the parties interested.[6] The first of the English decisions [7] however went on the broader ground that such a transaction as this was not within the general purpose of statutes in bankruptcy.

At first we may be inclined to sympathize with the result reached in the English cases if we feel that *cestuis que trustent* deserve greater protection in the hands of the law than ordinary creditors. Nevertheless under the decisions construing our bankrupt law the conclusion in the American case is at least logical, if not inevitable.

From section 60a, such a transfer as will enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class is a preference. It is a voidable preference if the creditor shall have had reasonable cause to believe

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[1] In this case the bankrupt, a testatmentary trustee had disposed of some of the securities which should have been in his possession. The surety in his bond discovered this fact and persuaded him to replace these with securities of his own. At the time he was to his own knowledge insolvent and within four months was adjudicated a bankrupt. The trustee in bankruptcy recovered these securities from the trustees on the ground of unlawful preference.

[2] Under the American Act the preference must be voluntary, but although intent to prefer is requisite to constitute a preference an act of bankruptcy, it is doubtful at least in the case of preferences which may be avoided by the trustee. See Remington on Bankruptcy § 1405.

[3] *Ex parte* Stubbins [1881], 17 Ch. D. 58.
Ex parte Dyer [1901], 1 K. B. 710.

[4] Sharp v. Jackson [1899], A. C. 419.

[5] Thompson v. Freeman [1786], 1 T. R. 155.

[6] *Ex parte* Taylor [1886], 18 Q. B. D. 295.

[7] *Ex parte* Stubbins, *supra*.

that it was intended thereby to give a preference.[8] The intent, if indeed it is necessary under the American rule, is found in that entertained by the bankrupt, Shaw, "in his individual capacity, while the reasonable cause to assume the intent, on the part of the preferred creditor, appertained to Shaw as testamentary trustee in that capacity." As to other creditors of the same class, that element is present in the fact that the bankrupt here was testamentary trustee over several other estates in which there were shortages. The court by dictum admits that these various estates may share in the distribution of the bankrupt's estate.[9] It is unnecessary to say whether they are creditors of the same class with his other obligees.

The real difficulty of the case lies in conceiving the bankrupt in his trustee capacity as a creditor. Authority has not agreed upon a definition of the word "creditor."[10] Some have limited its application to those to whom there is an obligation in debt or in contract. Others would extend it to those to whom there is an obligation *ex delicto,* even where not reduced to judgment and where the tort is such as cannot be waived and sued upon in assumpsit, as *e. g.,* seduction or slander. A more troublesome question would be whether it includes obligations enforceable only in equity.

The difficulty of an abstract definition of the word "creditor" should not disturb us in the limited field of bankruptcy for in section 1 of the Act of July 1, 1898, "creditor" is defined to "include anyone who owns any demand or claim provable in bankruptcy." Thus preferences are within the same subject-matter as "claims provable." By section 63a provable debts include those founded upon implied contracts. Section 63b provides too that "unliquidated claims against the bankrupt may be liquidated and proved and allowed against his estate." These sections have been construed to include such torts as may be resolved into an implied contract.[11]

The objection that a breach of trust is an equitable rather than a legal tort, seems never to have been raised.[12] The answer would probably be that bankruptcy proceedings are essentially equitable in their nature and thus could take cognizance of breaches of equitable as well as legal duties. The court here believes that when the trustee committed a breach of his trust there arose an obligation

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[8] Under the Amendment of June 25, 1910, c. 412, 36 Stat. 842, the preference is voidable where there is reasonable cause to believe that the enforcement of the judgment or transfer would effect a preference," apparently doing away with the element of intent. The principal case was pending and thus not affected by this recent amendment.

[9] *Accord:* Keble v. Thompson (1791), 3 B. C. C. 112.
Ex parte Shakeshaft, 3 B. C. C. 197.
Lathrop v. Bampton, 31 Cal. 17.
See also Lewin on Trusts, 11th Ed. 1157.

[10] See Words and Phrases, Tit., "Creditor."

[11] Brown v. United Button Co., 149 Fed. 48.
Tindle v. Birkett, 205 U. S. 183.

[12] Lewin on Trusts at page 1146 and Godefroi on Trusts at page 939.

contractual in nature, to restore the value of the assets embezzled.[13] Trusts involve some of the elements of contract but are of a more transcendent character and include so much more that they may not be reduced to the ordinary elements of contract.

Granted then that the obligation to make good upon a breach of trust is a claim provable in bankruptcy on a par with those of other creditors, it seems to be a logical conclusion that a voluntary transfer to carry out this obligation is within the confines of "voidable preferences," although the transaction does appear at first glance to be outside of the usual contemplation and general purposes of statutes in bankruptcy.

S. L. H.

BOOK ENTRIES.—The case of West Virginia Architects and Builders v. Stewart,[1] held that books of original entry of a contractor and builder kept by a bookkeeper, who, according to an established system or method of transacting the business, records the oral or written reports made to him by one or more persons in the regular course of business, of transactions lying in the personal knowledge of the latter, whether such bookkeeper have personal knowledge of such transaction or not, are admissible in evidence in connection with the testimony of such bookkeeper showing the regularity of the entries therein by him, to prove an account therein, without the evidence of the witnesses having personal knowledge of the transactions, provided the testimony of such witnesses, because of death, interest, incompetency, absence, inconvenience or otherwise be unavailing.

The general rule requires that the entrant must have had personal knowledge of the transaction.[2] Though recognizing its existence, and citing a great many cases which follow it, the Court, relying chiefly on Professor Wigmore's exception, qualifies the rule.

The general principle of testimonial evidence is, that the person whose statement is received as testimony should speak from personal observation or knowledge. This principle does not, however, necessarily exclude all entries made by persons not having personal knowledge of the facts entered. If the element of personal knowledge can somehow be adequately supplied by a third person, it is immaterial that the entrant himself did not have this personal knowledge. Professor Wigmore gives three possible situations:

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[13] Perry on Trusts, 6th Ed. § 843.
Dornford v. Dornford, 12 Vesey 127.
Moons v. De Bernales, 1 Russ. 301.
Smith v. Frost, 70 N. Y. 65.
Snyder v. Parmalee, 80 Vt. 496.
Holderman v. Hood, 70 Kans. 267.

[1] 70 S. E. 113 (1911).

[2] Vinal v. Gilman, 21 W. Va. 301.

(1) If the entrant be deceased, and the actor in the transaction swears to the correctness of his original memorandum or oral report the element of personal knowledge is sufficiently supplied, and the entry is admissible if made in the regular course of business.

(2) If the transactor be deceased, but the entrant swear to the entry as correctly representing the memorandum or oral report, such entry, if based on a memorandum, would be sufficient, as supplying the element of the transactor's personal knowledge, if made in the regular course of business, its production being impossible by destruction, and the transactor being unavailable by decease.

(3) If both entrant and transactor be deceased, the entry is admissible.

A possible fourth case is where the transactor is unavailable. The result need not be different: the rule being, that where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so.

The rulings on the subject may be classified:

(a) Cases admitting verified regular entries without requiring the original observer having personal knowledge to be produced or accounted for.

(b) Cases admitting verified regular entries after a showing that the original observer was deceased; possibly absence from the jurisdiction, insanity, or the like, would equally have sufficed.

(c) Cases excluding such entries because the original observer was in no way accounted for, or declaring that he must be produced, without deciding what excuse, if any, for non-production would suffice.

(d) A few rulings inexorably exclude such entries even where the original observer is accounted for as absent from the jurisdiction, or the like.[3]

The following cases seem to require the presence of the original observer:

The Norma,[4] held that a bill of particulars containing numerous items of work and materials may be proved, after destruction of the original memoranda, from which the account was made up, by the evidence of the bookkeeper that he correctly transcribed the memoranda and the testimony of the persons who made and furnished the memoranda to him that the same were correct; but the proof is insufficient where it consists only of the bookkeeper's testimony as to the correctness of his transcription.

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[3] Wigmore: Evidence, §1530.

[4] 68 Fed. 509 (1905).

Stidger v. McPhee,[5] decided that evidence that the custom of a store was not to make an entry of sales until the goods were delivered, and that a salesman brought the witness a slip showing the sale of the goods in question, and the date of their delivery, and that thereon he made an entry in the daybook, and that making the slip and delivery were concurrent acts, is insufficient to sustain the admission of the daybook to show delivery at such time, the salesman not being produced.

Miller v. Shay,[6] held that if goods are delivered by a servant, and his entries or marks are transferred to the master's account book, the servant is a competent and necessary witness to support the charges and to prove the delivery.

Taylor-Woolfender Co. v. Atkinson,[7] laid down the rule that where, in an action to recover for goods sold, the plaintiff showed that the entries in its ledger were made from slips, made out in duplicate by the clerks who made the sales and one of them sent to the bundle counter and the other to the bookkeeper, it was necessary for the plaintiff to prove, to the satisfaction of the jury, that no entry was made except from slips, that no such slips were sent to the bookkeeper except when the goods, accompanied by a duplicate slip, were sent to the bundle counter, and that all goods sent to the bundle counter were delivered, to make the ledger admissible in evidence.

In Mayor of N. Y. v. Second Ave. Ry. Co.[8] it was sought to prove the number of day's labor in making certain repairs by a time book, kept by one Wilt made up from reports of the foreman. It was held that the time book was inadmissible upon the testimony of either the foreman, or of Wilt, separately considered. "But combining the testimony of Wilt and the gang foreman, there was, first, original evidence that laborers were employed, and that their time was correctly reported by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and, second, evidence by the person who received the reports, that he correctly entered them as reported, in the time book, in the usual course of business and duty."

The following cases are in favor of the rule in the case under discussion:

Lawrence v. Stiles,[9] held that the original entries in a book of account are competent evidence if the person making them testifies that the entries therein made are correct even though it appears that

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[5] 15 Colo. App. 252 (1900).
[6] 145 Mass. 162 (1887).
[7] 127 Mich. 633 (1901).
[8] 102 N. Y. 572 (1886).
[9] 16 Ill. App. 489.

he has no recollection of the transaction, independently of the book entries.

Chisholm v. Beaman Machine Co.,[10] stands for the proposition that books of account showing entries for time for workmen are admissible in evidence against a party who was to pay the expense of such work, though such entries were made the day after the work was done, from time slips made by the workmen and marked "approved" by the foremen, who testify to their correctness, while the men who made the entries on the books testify the slips were correctly copied.

Though these and similar cases[11] may possibly be distinguished from West Virginia Architects and Builders v. Stewart, the same principle of necessity and inconvenience amounting to practical impossibility of producing the original observers runs through them all. And it seems that even where, because of the survival of some archaic rule excluding the plaintiffs in the West Virginia case from testifying on the ground of interest, that such subdivision of "inconvenience" should not throw out the books.

T. W. B., 3rd.

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[10] 160 Ill. 101 (1896).

[11] Little Rock Granite Co. v. Dallas County, 66 Fed. 522; Redlich v. Banerlee, 98 Ill. 134.