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 M'KEE'S Lessee *versus* PFOUT.

THIS was an ejectment tried at the *Nisi Prius* for *Dauphin* county in *October* 1795, when a verdict was given for the Lessor of the Plaintiff, subject to the opinion of the Court, on a case, stating the following facts.

On the third of *January* 1794, a warrant had issued for the lands described in the declaration in favor of *James Chambers*; who, on the 6th of *January* 1758, made his will, and, *inter alia*, devised, "that all his estate, after payment of his debts, be equally divided between his wife *Sarah*, and his children *Rowland*, *Ann*, *Sarah*, *James*, *Elizabeth*, *Benjamin*, and *Joseph*, each "one eighth part." The Lessor of the Plaintiff claimed one eighth part of the premises under the testator's daughter *Ann*, who had intermarried, twenty years ago, with *Oliver Ramsay*, by whom she had issue, and died. Before her death, however, on the 22nd of *October* 1779, she had joined with some of the other devisees, in conveying their respective shares in the estate, for a valuable consideration, to *Andrew Strout*, the real Defendant; but, at the time of executing the conveyance (touching which, she was separately examined by a Judge of *Dauphin* county) she had been driven away by her husband, and lived separate from him;—a fact with which the Lessor of the Plaintiff was well acquainted. On the 1st of *October* 1785, *Oliver Ramsay* (who is still living) executed an indenture between him and the Lessor of the Plaintiff, wherein it is set forth, "that the said *Oliver* hath granted, bargained, sold, aliened, released, "enfeoffed and confirmed, and doth grant, bargain, sell, alien, "release, enfeoff and confirm, unto *Robert M'Kee*, in his actual possession now being, by virtue of a bargain and sale to "him made, by the said *Oliver*, as these presents, and by virtue of the statute, for transferring uses into possession; and to "his heirs and assigns, *my* undivided part and respective share "and purparts of him the said *Oliver Ramsay*, of, in and to "that certain piece or tract of land, before described, with all "and singular ways &c. and reversions and remainders,

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“ and also all the estate, right, title, interest, claim and de-
 “ mand, *whether* at law or in equity, of him the said *Oliver*,
 “ of, in and to the same, to have and to hold the said respective
 “ share and purpart, of in and to the said plantation, and tract
 “ of land, hereditaments, and premises, hereby granted, men-
 “ tioned or intended to be, with the appurtenances, unto
 “ the said *Robert M'Kee*, *To the only proper use, benefit and be-*
 “ *hoof of them the said Robert M'Kee, his heirs, and assigns*
 “ *forever*. And the said *Oliver Ramsay* for himself, his heirs,
 “ executors and administrators, not jointly, do covenant, prom-
 “ ise, and grant to and with the said *Robert M'Kee*, his heirs
 “ and assigns. That he the said *Oliver Ramsay*, hath not done
 “ or committed any act, matter, deed, or thing whatsoever,
 “ whereby or wherewith his said and respective share and
 “ purpart of, in, and to the said piece or tract of land, heredi-
 “ taments, and premises, are or shall or may be impeached,
 “ charged or incumbered, in title, charge, estate, or otherwise
 “ howsoever. And the said *Oliver*, for himself, his heirs, ex-
 “ cutors, and administrators, not jointly, do covenant, promise,
 “ and grant, to and with the said *Robert M'Kee*, his heirs and
 “ assigns, that the said *Oliver*, his heirs, executors and adminis-
 “ trators, his share and purpart, of him the said *Oliver Ram-*
 “ *say*, of, in, and to, the piece or tract of land aforesaid, heredi-
 “ taments and premises, against them, their, and each and every
 “ of his heirs and assigns, and all and every person and persons
 “ whatsoever, *lawfully claiming, or to claim by from or under*
 “ *him, or either of them, his or any of his heirs, or assigns shall,*
 “ and will warrant, and forever defend by these presents. And
 “ that said *Oliver*, and his heirs, not jointly, do further
 “ covenant, promise, and grant, to and with the said *Robert*,
 “ that they, him, her, or any of them, shall and will, at any time
 “ or times hereafter, at and upon the reasonable request, proper
 “ costs and charges, in law, of the said *Robert M'Kee*, his heirs
 “ or assigns, make, execute and acknowledge, or cause so to be,
 “ all, and every such further and other reasonable act or acts,
 “ deed or deeds, device or devices, in the law whatsoever, either
 “ by fine or recovery, or otherwise howsoever, for the further
 “ and better conveyance, assurance and confirmation of his
 “ respective share and purpart of him the said *Oliver*, of in and
 “ to the said piece or tract of land aforesaid, hereditaments, and
 “ premises, unto the said *Robert*, his heirs, and assigns, as by
 “ him or them, or his or their counsel learned in the law, shall
 “ be reasonably advised, devised, or required.”

There is no consideration mentioned in this deed; but there
 was a separate receipt for £.60, given by *Oliver Ramsay* to
Robert

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Robert McKee; and the deed was acknowledged, and recorded, on the day of its date.

The general question submitted to the Court, was—whether a conveyance *in fee*, by a tenant by the curtesy, is not a forfeiture of his estate? And it was argued by *Ingersoll*, for the Lessor of the Plaintiff, and by *Duncan* and *C. Smith*, for the Defendant.

For the Lessor of the Plaintiff. The special warranty shews the intention of the party; it secures the grantee against any previous incumbrances by the grantor, and against persons claiming under him, his heirs, or assigns; but there is no covenant, not even a declaration, that he is seized in fee; and, in effect, he simply conveys his own right, whatever that may be. A freehold, though not a fee, may be made descendible to heirs; and the nature of the conveyance under the statutes, and with the clause of warranty under the act of Assembly (1 Vol. 111. *Dall. edit.*) conveys only such estate as the vendor might lawfully part with. If a tenant for his own life aliens by feoffment, or fine, for the life of another, or in tail, or in fee, it is a forfeiture; 2 *Black. Com.* 274. *Co. Litt.* 251. *Litt. f.* 415. but the reason is, that such an alienation tends to defeat and divest the remainder. In a feoffment, by the word *Dedi*, since the statute *Quia Emptores*, the feoff only is bound to the implied warranty; and in other forms of alienation, no warrant whatsoever is implied. 2 *Bl. C.* 300. i. *Co. Litt.* 384. *Co. Litt.* 102. *Litt. f.* 733. The present deed is a bargain and sale;—a contract to convey for a valuable consideration; 2 *Bl. Com.* 338. and it has its force and operation by the statute of uses. 2 *Bl. Com.* 327. 337. The force and operation of the words “grant, bargain, and sell,” under the act of Assembly, (1 Vol. 111. *Dall. edit.*) do not apply where a special warranty is introduced into the deed; and the previous section of the act only gives to deeds acknowledged and recorded the effect of a feoffment, or a deed inrolled in *England*, to perfect the title and seisen of the grantee; a mere bargain and sale not being before so strong a conveyance, as livery. *Shep. T.* 219. n. (1.)

For the Defendant. The act of Assembly declares, that deeds recorded shall be of the same force and effect here, for the giving possession and seisen, and making good the title and assurance of lands, tenements and hereditaments; as deeds of *Feoffment with livery of seisen*, or deeds enrolled in any of the Courts of record at *Westminster*, are or shall be in the kingdom of *Great Britain*. 1 Vol. p. 111. *Dall. edit.* The present deed is, therefore, an absolute and efficient conveyance in fee, whereas the grantor had only an estate for life, as tenant by the curtesy, in the premises. But if tenant for life, or years, conveys a greater

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greater estate, than he can lawfully do, whereby the reversion, or remainder is *divested*, it will be a forfeiture of his estate, as if he makes a feoffment. *Co. Litt. 251. a. b.* The law is the same in the case of an alienation by a tenant by the curtesy. *Ibid. 252. a.* The recording a deed is made, by the act of Assembly, equal in solemnity to *livery of seizen*, as public and notorious, and as operative to pass and vest the estate. So, if tenant *for life* bargains and sells his lands by deed enrolled, although no fees pass, yet it is a forfeiture, and that by reason of the enrollment, which is *matter of record*. *2 Leon. 64. 5.* In *Pennsylvania*, the deed on record is itself a record, and a copy of it is evidence. So, if a tenant *for years* make a feoffment, it is a forfeiture of his estate; *3 Mod. 151.* and, when it is said, in the case cited, that if he makes a lease and release, though it is of the same operation, it will not amount to a forfeiture; the reason is assigned in *1 T. Rep. 744.* that a lease and release is a lawful conveyance, and passes no more than a man may lawfully part with. *2 Bl. Com. 274. 5.* The particular tenant, by granting a larger estate than his own, has, *by his own act*, determined and put an end to his original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder, or reversion. The criterion of the forfeiture is the *actual passing* an estate, which the grantor has no right to pass, to the prejudice of him in remainder;—it amounts to a disseisin. Feoffment without livery, is said to pass no interest, which is the reason why such a feoffment is not a forfeiture; but by the act of Assembly, a deed recorded is equal to a feoffment with livery; and it is the matter of record, that makes the forfeiture. *Harg. Co. Litt. 59. a. n. (3.)*

The Court stopped *Ingersoll*, when he was about to reply, and delivered their opinion as follows.

M'KEAN, Chief Justice. We entertain no doubt on the present question. The Legislature has, at various periods, and on a variety of subjects, departed from feudal ceremonies and principles, in relation to the transfer and descent of property: but, in the present instance, the act of Assembly meant only to give to a grant of lands, a greater effect upon the estate, on recording the deed, than could previously have been enjoyed, without livery of seizen: It never contemplated that circumstance, as an instrument to work a forfeiture, on the common law doctrine of alienation by tenant for life, or years.

SHIPPEN, Justice. From the words of the act of Assembly, it is plain, I think, that the Legislature did not mean to work the forfeiture of a particular estate, by the provision for recording deeds. In allowing to deeds recorded the same force and effect, as feoffments with livery, the intention is expressly re-

1799: restricted to "giving possession and seisen, and making good the title and assurance of lands, tenements, and hereditaments." It is, therefore, merely a facility and benefit extended to the grantee.

YEATES and SMITH, *Justices*, concurred.

JUDGMENT for the *Plaintiff*.

March Term, 1799.

RESPUBLICA *versus* WRAY.

THE Defendant on the 1st of *June*, 1778, had been appointed treasurer for the County of *Cumberland*, "for three years, to commence on the 5th of *June* following;" but upon a suggestion of improper practices in procuring the appointment, the Attorney General obtained a rule to shew cause, why an information in the nature of a writ of *quo warranto* should not be filed against him.

In support of the rule, affidavits and office papers were produced, with a view to shew, that the Defendant was in embarrassed circumstances; and that he had procured the vote of one of the County Commissioners, under an assurance, that he would soon resign the office of treasurer, as he only wished to be appointed to it, in order to promote his election as Sheriff of the county. There was, likewise, an ineffectual attempt to prove that the commissioner, who had thus voted, and the Defendant, were not citizens of the *United States*: And, in point of law, it was objected, that the appointment was void *ab initio*, being made to commence *in futuro*.

The rule was opposed by *Dallas* and *M^r Kean*; and the opinion of the court in the absence of the CHIEF JUSTICE, was delivered by

SHIPPEN, *Justice*: The present is the first instance, that we recollect, of an application of this kind in *Pennsylvania*; and on opening the case, it struck us to be within the 10th section of the 9th Article of the Constitution, which declares, "that no person shall for any indictable offence, be proceeded against criminally by information," except in cases that are not involved