tion to the milk furnished; Baxter's interest in the cheese, etc., was sold under an execution against him. *Held*, that the sale by the factory converted his interest into a money demand, and this interest was, therefore, not the subject of a levy. The arrangement at the factory did not constitute the farmers partners nor tenants in common in the cheese; nor was there an agency or bailment as to the particular milk delivered. It was a sale of milk to be paid for in a certain time and manner.

On the general subject see and compare *Cushing* v. *Breed*, 14 Allen, 370; *Warren* v. *Milliken*, 57 Maine, 97; *Dale* v. *Olmstead*, 36 Ill. 150; 2 Kent Com., 12th ed., 90, and cases cited in Mr. Holmes' note.

SUPREME COURT OF PENNSYLVANIA.

WOLFORD v. HERRINGTON.

Trust ex maleficio.

[*Pittsburgh Legal Journal*, Oct. 27, 1873.]

Error to Common Pleas of Crawford County.

SHARSWOOD, J.—Upon this writ of error we have nothing to do with the competency of the witness, Mrs. Wolford. Her testimony was admitted, and forms part of the evidence. Had it been rejected, *non constat* that the defendant would not have strengthened his case by other testimony, he might have proved *aliunde* that she had a deed for the property, or he might have produced and offered the deed itself. He had a perfect right, when the evidence was in, to rely upon it. Her testimony alone, if believed by the jury—and there was no contradiction of it—showed a clear case of fraud on the part of Herrington within our late decisions of *Beegle* v. *Wentz*, 5 P. F. Smith, 369, and *Boynton* v. *Housler*, 21 *Pittsburgh Legal Journal*, 17. She had a claim to the land in her own right by an unrecorded deed—whether good or bad—conveying a good title or not, is unimportant; and these cases settle that where one having any interest is induced to confide in the verbal promise of another that he will purchase for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee *ex maleficio*.

But we are of opinion, also, that if the testimony of John Wightman—a clearly competent witness, admitted without objection—is believed, it was sufficient to make Herrington a trustee *ex maleficio*, independent of any interest in the land in Mrs. Wolford. He testified that at the time of the verbal contract Herrington distinctly agreed that he would execute a writing declaring the trust before he bid the property off. At the time of the sale he did not deny but evaded the performance of this promise, by saying he would get his lawyer to write it after the bidding. It was written, and then he refused until the deed was acknowledged. In one of the earliest cases on this subject in Pennsylvania, *Thomson's Lessee* v. *White*, 1 Dall. 447, decided in 1789, where a husband and wife, having no children, conveyed the estate of the wife to a stranger, who reconveyed to them as joint tenants in fee, under a parol agreement between the husband and wife that the husband should settle the fee upon the wife's heirs, and the husband died without making the settlement, it was held that the parol evidence was admissible to establish the agreement. Mr. Chief Justice McKean said: "Where a party is drawn in by assurances and promises to execute a deed, to enter into a marriage, or to do any other act, and it is stipulated that the treaty or agreement should be reduced to writing, although this should not be done, the court, if the agreement is executed in part, will give relief." When this case was cited before the same eminent judge soon after, in *Plankinham* v. *Carr*, 1 Yeates, 370, he said: "The case of *Thomson* v. *White* was that of a fraud and an exception to the general rule." So it has been classed in the numerous subsequent cases in which it has been cited with approbation in the opinions of this court. *Wallace* v. *Baker*, 1 Binn. 616; *Drum* v. *Les see of Simpson*, 6 Binn. 482; *Cozens* v. *Stephenson*, 5 S. & R. 426; *Overton* v. *Tracy*, 14 S. & R. 326; *Oliver* v. *Oliver*, 4 Rawle, 144; *Robertson* v. *Robertson*, 9 Watts, 34; *Pugh* v. *Good*, 3 W. & S. 58; *Miller* v. *Pearce*, 6 W. & S. 100; *Morey* v. *Herrick*, 6 Harris, 128. In short, the principle settled in *Thomson's Lessee* v. *White*, is a landmark of our law, and is well generalized by Mr. Justice Duncan in *Overton* v. *Tracy*, *supra*: "If one of the contracting parties insists on a certain stipulation and desires it to be made a part of the written agreement, and the other by his promise to conform to it, as if it was inserted in the written agreement, prevents its insertion, this is a fraud, and chancery will enforce the agreement as if the stipulation had been inserted. Having no court of chancery, our common law courts have constantly acted upon this principle from *Thomson* v. *White*, 1 Dall. 424, to *Christ* v. *Diffenbach*, 1 S. & R. 464, in a succession of decisions, varying in their circumstances, but all bottomed upon this principle." The case before us is much stronger than *Thomson* v. *White*, for there was no evidence to show then that wher