ing in possession and charge, as desired by the Holly Company. This testimony of Mr. Bullock is uncontradicted, and there is no reason to doubt its truthfulness. The bill in this case was filed September 19, 1888, while Lockman was still in control of the pumping-engines, and he has since maintained his charge and custody thereof in the manner stated, as the representative and under the pay of the Holly Company. In November, 1888, Bullock & Co. assigned their entire remaining interest in the bonds and stock of the New Chester Water Company to Wood & Co., and at the same time delivered to them resignations of the officers of the water company. Thereupon new officers were elected, and the water company then took the actual possession of the works, but Lockman's control of the engines continued. Hopper & Co. and Wood & Co. together hold substantially the entire mortgage bond issue of $500,000 of the New Chester Water Company. Sixteen bonds of $1,000 each are, indeed, held by Dyer and Black under a pledge made in July, 1887, but only to indemnify them against a claim which the water company itself may have against them as sureties for Bullock & Co., touching a lien of $15,000 which they were to remove. All the bonds and stock of the New Chester Water Company which Bullock & Co. were to receive under their construction contract had been delivered to them probably before the first pumping-engine reached Chester, and certainly before its erection began. On March 31, 1890, Samuel R. Bullock and wife executed and delivered to the New Chester Water Company a deed of conveyance of the land upon which the engine-house and pumping-engines stand.

Upon this state of facts two questions are presented for our determination: *First*, whether R. D. Wood & Co. are under any personal liability to the Holly Manufacturing Company; and, *second*, whether that company has a valid lien upon or claim to the pumping-engines at Chester enforceable in this suit.

The first question, it seems to us, is not difficult of solution. The Holly Company was not a party to the tripartite agreement of October 26, 1887. That instrument contains no provision expressed to be in its behalf. Neither was any money thereby specifically set apart to pay for pumping-engines either at Chester or Mobile. The agreement was for the mutual benefit of the three parties who executed it, and to promote a purpose in which they had a common interest. To secure the faithful application to that object of the fund which Hopper & Co. proposed then to advance it was stipulated that it should pass through the hands of Wood & Co., but the paper provided that ultimately the money should be distributed by Bullock & Co. It was then believed that $200,000 would complete the water-works at Chester, Greencastle, and Mobile. So Bullock & Co. had represented. Confiding in the correctness of that estimate, the paper provided for the apportionment of the fund between the three places. But this did not give third persons any right to control the application of the fund, or any vested interest therein. The parties to the agreement did not relinquish their joint dominion over the fund. As between themselves, the agreed apportion-

ment in the first instance was binding, but it was not irrevocable by them. Therefore when they discovered that the fund was insufficient to accomplish all that was intended it was competent for them to change the apportionment. This was done by their mutual consent, and no third person had any right to complain. In point of fact, every dollar of the money so advanced by Hopper & Co. was used in the completion of the water-works at the three places, although not in the proportions originally contemplated.

We note the recital in the tripartite agreement that "Samuel R. Bullock & Co. and R. D. Wood & Co. have entered into certain contracts by which the said R. D. Wood & Co. have agreed to complete the water-works at Chester, Greencastle, and Mobile." But those contracts are not in evidence. We do not know their contents, and they are not here available to the Holly Company. The stipulation that Wood & Co. would procure the completion of the water-works "clear of all liens ahead of the securities held by Wm. G. Hopper & Co.," was for the special benefit of that firm, and the Holly Company is a stranger to the consideration upon which it was based. Moreover, Wood & Co. have made advances out of their own pockets to the amount of $105,000 not contemplated by the parties. Notwithstanding this unexpected result, they may still be legally answerable to Hopper & Co., but we do not perceive that the Holly Company has any right to equitable relief by virtue of anything contained in the tripartite agreement. Nor does the fact that Bullock & Co. assigned all their remaining interest in the bonds and stock of the New Chester Water Company to Wood & Co. affect the case. The good faith of that transfer is not impeached. Neither, under the proofs, can it be maintained that the stock of the water company in the hands of Wood & Co. is unpaid capital stock, and hence a trust fund for the payment of the debts incurred on behalf of the company. We are, then, of the opinion that no equitable ground to charge R. D. Wood & Co. personally is shown.

We pass now to a consideration of the rights of the Holly Manufacturing Company under the clause already quoted of the contract of August 3, 1887. The language there used is plain, and the purpose unmistakable. The contract not only created a lien upon the engines for the purchase price, but it also provided that the Holly Company "may remain in and have full possession" thereof until the price is paid. The privilege thus conferred upon the Holly Company to maintain possession evidently was for the better security of the purchase-money. This right, it is to be assumed, was to be exercised in such a manner as was consistent with the nature of the property and the use to which it was designed. But certainly the parties did not contemplate any such unqualified delivery of the pumping-engines as would wholly defeat the exercise by the Holly Company of its right to possession. Manifestly the engines were not to become inseparably incorporated with the real estate until they should be subjected to the prescribed "trial of their capacity and efficiency" and were accepted. Had they failed to meet the required test, the vendor would have been compelled to take them away.

Neither was it intended that the engines should be converted from personalty into realty until they were paid for. The Holly Company's right to "remain in and have full possession" of the engines plainly was inconsistent with such a conversion. All this, we think, is very clear. And we here observe that at the date of the contract Bullock & Co. were in possession of the real estate, and the legal title was in Bullock, for the transaction between him and H. S. Hopper—the deed to the latter, and his written acknowledgment—constituted only a mortgage. Bullock & Co., then, were in a position to stipulate as they did with respect to the Holly Company's lien for the purchase money and its right to maintain possession of the engines as additional security.

Is there any rule of public policy which will defeat the undeniable intention of the parties as the same appears on the face of the contract? Now while, by the settled law of Pennsylvania, where personal property is delivered under a conditional sale a provision in the contract preserving to the vendor the title until the property is paid for is void as respects execution creditors of the vendee, or an innocent purchaser from him, yet, as against the vendee himself, the seller may reserve the right of property in the goods until payment, and in default he may reclaim them, or resort to legal remedies. *Hank* v. *Linderman*, 64 Pa. St. 499; *Krause* v. *Com.*, 93 Pa. St. 421. All the Pennsylvania cases agree that such a reservation of title to the goods as security for the price is valid as between the parties themselves. *Peek* v. *Heim*, 127 Pa. St. 500, 17 Atl. Rep. 984; *Summerson* v. *Hicks*, 134 Pa. St. 566, 19 Atl. Rep. 808; *Levan* v. *Wilten*, 135 Pa. St. 61, 19 Atl. Rep. 945. In the very latest case on this subject,—*Hineman* v. *Matthews*, 138 Pa. St. 204, 20 Atl. Rep. 843,—where there was a sale of timber on an agreement that the title was not to pass until payment, but the vendee was permitted to remove the timber and convert it into lumber, and then failed to pay, whereupon the vendor took possession of the lumber, it was ruled that he could hold it against a subsequent execution creditor of the vendee. In *Harkness* v. *Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, upon an exhaustive review of the decisions, the conclusion was reached by the supreme court of the United States that by the general rule of law, unaffected by local statutes or local decisions, a conditional sale of personal property, accompanied by delivery, is valid both as against the parties and third persons; and it was further shown that by the almost unanimous opinion of the courts a purchaser buying with notice from the conditional vendee cannot hold the property as against the claim of the original vendor. The case of *Gregory* v. *Morris*, 96 U. S. 619, is instructive. There a contract of sale of cattle gave the vendor a lien thereon for the price, and authorized him to designate a person to go along with and retain possession of the cattle, who, upon non-payment, was to sell the whole or a portion of the cattle. The court sustained the lien as between the parties. Chief Justice WAITE, speaking for the court, said:

"The lien at common law of the vendor of personal property to secure payment of purchase money is lost by the voluntary and unconditional delivery of the property to the purchaser; but this does not prevent the parties from con-

tracting for a lien, which, as between themselves, will be good after delivery. So, ordinarily, when the possession of a pledge is relinquished, the rights of the pledgee are gone. In this case, however, Morris was not willing to rely upon the lien which the law gave him as vendor, or upon a mere pledge of the property, but required a special contract on the part of Gregory, securing his rights. This contract created a charge upon the property, not in the nature of a pledge, but of a mortgage. The lien, as between the parties, was not made to depend upon possession, but upon a contract, which defined the rights both of Morris and Gregory, and the power of Morris for the enforcement of his security."

That it was competent for the parties here to agree that the pumping-engine should remain personalty until paid for, is not to be doubted under the Pennsylvania authorities. *Shell* v. *Haywood*, 16 Pa. St. 523; *Harlan* v. *Harlan*, 20 Pa. St. 303. In *Shell* v. *Haywood*, *supra*, the court declared that the rule of severance and removal is one subject to the control and modification of the parties representing the property, who may vary the same according to their convenience, pleasure, or regard for right; for, (said CHAMBERS, J.,) "whether attached to the realty or not, or in whatever manner attached, is immaterial, when the parties agree to consider it personal property." All the Pennsylvania cases (and they deal with boilers, engines, and machinery generally) concur in the view that it is not the character of the physical connection which constitutes the test of annexation, but intention is the true legal criterion. *Hill* v. *Sewald*, 53 Pa. St. 271; *Benedict* v. *Marsh*, 127 Pa. St. 309, 18 Atl. Rep. 26. It was therefore held in *Vail* v. *Weaver*, 132 Pa. St. 363, 19 Atl. Rep. 138, that the engine, machinery, and appliances of an electric light plant erected upon and firmly attached to real estate do not pass to a purchaser of the real estate at a sale upon a mortgage of the realty, made and recorded before the plant was placed by the mortgagor on the mortgaged premises, unless it was the intention to make the plant a part of the realty when it was erected. This decision seems to us to be a decisive answer to the argument that the pumping-engines, as after-acquired property, come within the grasp of the mortgage of April 1, 1887, to the Farmers' Loan & Trust Company, in such a manner that the Holly Company's lien was displaced.

This case belongs rather to that class of cases of which *U. S.* v. *Railroad Co.*, 12 Wall. 362, is the exponent, than to the class represented by *Porter* v. *Steel Co.*, 122 U. S. 267, 7 Sup. Ct. Rep. 1206. The subject-matter of contest in the former of these two cases was after-acquired rolling stock of a railroad, which by the purchase contract was charged with a lien for the price. To the proposition that a prior general mortgage which in terms covered after-acquired property attached to this rolling stock as soon as acquired, to the displacement of the contractual lien, the court, speaking by Mr. Justice BRADLEY, said:

"That doctrine is intended to subserve the purposes of justice and not injustice. A mortgage intended to recover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time."