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EDITORS:
EMILIO MARIANELLI
ROBERT J. PUDERBAUGH
JOHN EYSTER MYERS

BUSINESS MANAGERS:
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JOHN H. MCKINNEY
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RULE IN SHELLY'S CASE IN THE LAST DUODECENNIUM.

[LAST PART.]

EXCLUDING SOME WHO MIGHT BE HEIRS.

If some only who might be heirs, are intended to take the remainder the rule in Shelley's case is not applicable. We have seen that a limitation to children, although they are a class of heirs, is not consistent with the application of the rule. Grandchildren, great grandchildren could not take, but, to make possible the operation of the rule, anybody who would under the circumstances that may exist at the death of the taker for life be his heir must be intended to succeed him in the possession. The exclusion of a mother[46] or of a husband from those who are to take the remainder, prevents the operation of the rule. There was a gift over to the issue of the life tenant, a daughter, except that if the daughter's husband should survive her, he was not to have the curtesy, but only one third of the rents and profits of the estate for life. This provision prevented the daughter's taking a fee.[47] In Serfass v. Serfass[48] there was a devise to a daughter for life; the land was then to descend to her heirs or next of kin, in the same manner as if she had been seized in fee, sole and unmarried, and had died intestate. This would seem to exclude a husband. The court escaped the difficulty by interpreting it to mean simply that the daughter took the land to her sole and separate use during coverture. Her devise of the property was held valid.[49] After

[46]Kuntzlemann's Estate, 136 Pa. 152.

[47]Shalters v. Ladd, 141 Pa. 349.

[48]190 Pa. 484.

[49]It does not appear whether the separate use terminated before her death.

a gift for life to a son, the land was given to his "next nearest blood relations." Says McCollum, J., "While 'next nearest blood relations' may be heirs, they are not necessarily all of the heirs. It is only in the event of their being all equally remote from their ancestor, that the qualifying words 'next nearest' would apply." The Rule therefore had no application.[50]

THE USE ON DISTRIBUTIVE WORDS.

Sometimes words are used in a will directing that among the issue or heirs of the taker for life the land shall be divided equally[51] that they shall take as tenants in common,[52] that they shall take "share and share alike."[53] In England, these words have been understood to refute the intention that the so called heirs should take as would heirs, since, if the heir be male, one only inherits "*in solido* and in severalty" as says Strong, J.,[54] and if the heirs be female, they take as one heir, by coparcenary. In Pennsylvania, however, the principal reason for the English rule is wanting, since heirs when there are several take as tenants in common. A direction that the remainder shall be divided among right heirs is not repugnant to an intent that they shall take by descent. But, suppose the direction is that the heirs shall take equal shares? In some cases, heirs do not take equal shares in Pennsylvania. If A, having had two sons, B and C, is survived by B, and by the four children of C, previously dead, B and these four grandchildren, do not share equally. Nevertheless, a direction that the land, after the first devisee's death, shall be "equally divided" among the heirs, is said by Strong, J., to afford "no indication of an intent that they shall take as purchasers, for if there be heirs in different degrees they take equally per stirpes(!) and that is the rule of descent."[55] A direction that the heirs or issue shall take share and share alike, does not negative the application of the Rule,[56] but in Hill v. Giles,[57]

[50]McCann v. McCann, 197 Pa. 452. Children and grandchildren may be simultaneous heirs; so may brothers and nephews. Yet being unequally distant, the grandchildren or nephews could not, under the terms of the will take.

[51]Physick's Appeal, 50 Pa. 128.

[52]Grimes v. Shirk, 169 Pa. 74; Xander v. Easton Trust Co. 217 Pa. 485; Bright v. Esterly, 199 Pa. 88.

[53]Breinig v. Oldt, 45 Super, 629.

[54]Physick's Appeal, 50 Pa. 128.

[55]Physick's Appeal, 50 Pa. 128.

[56]Cases in note 52.

where the gift after the life estate, was to the "surviving issue" share and share alike, it was held that this direction was, in conjunction with the word "surviving," enough to exclude the Rule. This case is founded in part on Robins v. Quinliven.[58] The gift was to M "for and during her natural life, and after her death to her issue and their heirs forever, in the proportion to which they would be entitled under the intestate laws of Pennsylvania, respectively, and free and discharged from any or any future husband." The court held that M took but a life estate, because (a) there was no devise over, in case of the failure of issue; an indecisive consideration; (b) the gift was not to issue alone, but to issue and their heirs, equally indecisive, and (c) the gift was to issue in the proportions of the intestate law, "that is to say, in equal shares, as tenants in common." This superadded word of "destributive modification," *plus* the limitation to the heirs of the issue, "clearly shows" says the court, that "issue" means children!

USE OF SUPERADDED WORDS OF LIMITATION.

In Physick's Appeal[59] where the gift was to A, during his life, and, at his death, the same to be equally divided among the right heirs of A, "to them, *their* heirs, executors, administrators and assigns forever," it was said that these "superadded words of limitation" "have always been held insufficient to show that the words "right heirs" were not used in their proper sense; insufficient, then, to repel the application of the Rule in Shelley's Case. The same result was reached when the gift was to the "lawful issue" of the life tenant, "to have and to hold the same in common to them, their heirs and assigns forever."[60] A provision after the gift of the remainder to the heirs of the body of the first taker, that "in case of the death of any one or more

[58]201 Pa. 215.

[59]79 Pa. 333.

[59]50 Pa. 128.

[60]Grimes v. Shirk, 169 Pa. 74. In George v. Morgan, 16 Pa. 95, superadded words did not prevent the application of the Rule unless they denoted a different species of heir from that described by the first words thus showing an intent to break the ordinary line of descent from the first taker. In Powell v. Board of Domestic Missions, 49 Pa. 46, a devise to A for life and to issue, if one, to him or her, his or her heirs or assigns forever, but if more then equally to be divided amongst them, their heirs and assigns forever, was held not within the rule in Shelley's Case.

of said heirs of the body of my son, prior to said son's death, such ones' share or shares shall vest in their respective issue or heirs of their respective bodies", is consistent with the first taker's taking a fee under the Rule.[61] A gift to a daughter for her life, followed by a direction that at her death, the land shall pass and descend to her heirs, or *next of kin*, is a gift in fee. The words "next of kin" in a majority of cases mean the same as heirs.[62]

CHILDREN EQUIVALENT TO ISSUE.

It is possible for the testator to use the word child or children, for issue of any generation, and when the will indicates that it is so used, a gift over to children, like one over to issue, will under the Rule in Shelley's Case, enlarge into a fee the estate of the ancestor. Devise to a daughter "for life only; remainder after her death to her child or children in fee" but if at her death there is no husband or child, she may dispose of the land as she sees proper. In a later clause, it is said that if any of the devisees refuse to take, the land shall revert back and be divided among the other "said heirs equally." The daughter was unmarried at the date of the will. The court convinced itself that "children" and "heirs" were used interchangeably, in the sense of heirs of the body; Since the daughter had no children when the will was written, the testator's intent is inferred, that the "issue should take in lineal descent."[63] If the gift over, is to the first taker's "children or heirs"[64] or "children or issue,"[65] the former word is understood as meaning the latter. The fact that when the will was made or went into effect, the life devisee had no children, does not justify treating child or children as equivalent to issue or heirs of the body.[66] Yet the absence of such child assisted the court to find such equivalence,

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[61]Breinig v. Oldt, 45 Super. 629.

[62]Serfass v. Serfass, 190 Pa. 484.

[63]Simpson v. Reed, 205 Pa. 53.

[64]Shapley v. Diehl, 203 Pa. 566. Devise to A for life and to the heirs of her body at her decease, and in case of her or her children dying without leaving issue, over to the Board of Missions. The word children is to be interpreted by the word heirs. Hastings v. Engle, 217 Pa. 419.

[65]Pifer v. Locke, 205 Pa. 616.

[66]Lancaster v Flowers, 198 Pa. 619; Cote v. Von Bonnhorst, 41 Pa. 243; Curtis v. Longstreth, 44 Pa. 297; Keim's Appeal, 125 Pa. 480.

in the case just cited.[67] The will may direct that children shall include the issue of any deceased child or children, so that the issue shall take the part which the deceased child or children would have taken had he been living, at the cessation of the particular estate. This being so. a devise to testator's brother for life, after his death to his the brother's four daughters, A, B, C, and D, and immediately after the death of any of these four daughters, a devise of the share given to her to her "children and their heirs and assigns forever," gives to each of the daughters a fee.[68] The absence of a residuary provision for the case in which there will be no children and hence an intestacy does not prove that children is used as equivalent to issue.[69] The annexation of a word of limitation to the word children, does not require that it be understood in the sense of heirs. Devise of a house to a grandson Albert for life. "After the death of my said grand-son, Albert Hoover, I give and devise * * * the house unto his children, their heirs and assigns forever." These words "heirs and assigns" simply show that the children are to take a fee. They do not change the sense of the word children. Albert takes only a life estate.[70] Devise to two daughters during their natural lives, share and share alike; after the death of either, devise of her share to her child or children, but, should neither leave heirs, their share to be divided, among other grand children, share and share alike. The court thought children should be interpreted by "heirs" and not heirs by "children." If the latter mode were adopted, then, if the daughter died leaving no children, but grand-children, they could not take, and would be disinherited. In doubtful cases the interpretation should be adopted which would distribute the estate as nearly as possible according to the intestate laws. Another reason assigned is, that if the limitation is to grand-children as such, then there would be an intestacy if

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[67]205 Pa. 53. And in Sechler v. Eshelman, 222 Pa. 35; Pifer v. Locke, 205 Pa. 616; Simpson v. Reed, 205 Pa. 53.

[68]Sechler v. Eshleman, 222 Pa. 35. The ground of the decision is vaguely and obscurely presented.

[69]Lancaster v. Flower, 298 Pa. 614. Yet in Vilsack's Estate, 207 Pa. 611, the fact that if children was used in the strict sense and there were no such children, there would be an intestacy, was a reason for thinking children equivalent to heirs of the body.

[70]Hoover v. Strauss, 217 Pa. 130.

there were no grandchildren, "which is to be avoided if possible."[71]

CHILDREN.

When after a life estate to A, a remainder is given to his children the word is *prima facie* to be understood in its literal sense,[72] as meaning the direct issue of A, and not embracing grandchildren[73] and great grandchildren, or remoter issue. Unless shown to be used in a broader sense, so as to embrace all issue, a gift to A for life, with remainder to his child, will give him only a life estate. They will take as remaindermen. Devise to a son Charles for his sole use for and during his natural life, and at his death, the remainder to his children, share and share alike forever, gives Charles a life estate only[74] as does a gift in these words: "I give my farm to my two sons H and G in trust to make their living, and to their children after them."[75] A gift by will to the children of the testator, if any, at the time of his death; if not, to A and B for their joint lives, and to the survivor for the residue of his life. On the death of the survivor, "the whole to go to my brother Charles, and upon his death to his children absolutely and in fee." Charles took a life-estate only.[76]

TRUSTS.

The rule in Shelley's Case "does not apply if the particular estate, and that in remainder are not both legal or both equitable estates."[77] When the particular estate is equitable, and the remainder legal, the two do not merge. A trust was created, the trustee to pay the rents etc., over to S during his natural life, the rents not being liable to be taken for the debts or

[71]Vileack's Estate, 207 Pa. 611. The court adverts also to the fact that heirs must be understood as heirs of the body since if the daughter leave no "heirs," the land is to go over to others who are collateral heirs.

[72]Shapley v. Diehl, 203 Pa. 566; Lancaster v. Flowers, 198 Pa. 614; Hoover v. Strauss, 215 Pa. 130; Pifer v. Locke, 205 Pa. 616; Simpson v. Reed. 205 Pa. 53.

[73]Haldeman v. Haldeman, 40 Pa. 36; Shabley v. Diehl, 203 Pa. 566; Vilsack's Estate, 207 Pa. 611.

[74]Lancaster v. Flowers, 198 Pa. 614.

[75]Emerick v' Emerich, 219 Pa. 187.

[76]King v. Savage Brick Co. 30 Super. 582.

[77]1 Tiffany Real Prop. p. 312.

engagements of S. At his death, his children were to take the property absolutely and without restriction. The rule in Shelley's case did not apply (a) because the gift over was to children and not to issue or heirs; (b) because the life estate was equitable, and the remainder legal.[78] The trust may be to pay the rents and profits to A during his life, and after his death the principal to go to A's heirs and assigns. A takes only a life-estate.[79] That which is in form a trust, may be "dry." The estate of the formal *cestui que trust* will be treated as legal. A deed created a so-called trust for B, a married woman, during her life. It did not profess to make the trust for her sole and separate use. No active duties were imposed on the trustee. The deed directed that at B's death, the estate should go "then to her heirs in fee," share and share alike. The rule in Shelley's case gave B a fee.[80] The trust, though originally active, may become passive, before the death of the first taker. His estate then becomes legal, and the gift over to his issue or heirs will become in him a fee. Thus a trust for the sole and separate use of a married woman ceases with the death before her, of her husband. It may then coalesce with the remainder to heirs.[81]

IMPLIED GIFT OF REMAINDER.

The rule in Shelley's case presupposes a gift of a freehold to A, and of a remainder to the heirs or issue of A. But, the gift of the remainder does not need to be express. It may be implied. Thus, a devise of the income from property to a daughter, as long as she lives, but, should she die without leaving a family, then to the brothers and sisters of the testator. Without leaving a family means dying without issue, an indefinite failure of issue. There was an implied gift to the family,

[78]Mannerback's Estate, 133 Pa. 342. No trustee being named the court refused in Breinig v. Oldt, 45 Super 629 to find a spendthrift trust for A, to whom a life estate was given, with remainder to "heirs of his body." A took a fee.

[79]Eshbach's Estate, 197 Pa. 153; Little v. Wilcox, 119 Pa. 439; Hemphill's Estate, 180 Pa. 95; Xander v. Easton Trust Co., 217 Pa. 485; West's Estate, 214 Pa. 35.

[80]Carson v. Fuhs, 131 Pa. 256.

[81]Shalter v. Ladd, 141 Pa. 349. Cecil v. Smith, 44 Super. 274. A trust for the benefit of a widow ceases with her death. The estate of the life tenant then becomes legal and may merge in the remainder; Marsh v. Platt, 221 Pa. 431.

to the heirs of the body and the daughter took a fee.[82] Devise of a farm to Robert and John, children of the testator. In case Robert shall not get married and shall die, without any heirs, then his part of the farm shall go to John. Robert never marrying, had a heritable estate, Those claiming under him were entitled, as against John, who survived.[83] Devise to S of a house for her use and profit during her natural life, and provided she leaves no heirs, in that case the house shall be sold and the proceeds divided, etc. There was here a gift to the heirs by implication, and the Rule in Shelley's case gave S a fee.[84] Gift of a lot to a daughter M, but in the event of the said M dying without heirs, then said lot is to vest in S. A gift in fee in remainder to the heirs of M being implied, M took a fee.[85]

ALTERNATE DEVISE.

At the expiration of the life estate, there may be alternate devises; the first to the life tenant's oldest son if he shall have any living at his death; if he shall have no son living at his death, then to his legal heirs and representatives. If there is a son living at the life tenant's death, that son takes a fee. If there is no such son, the first taker has a fee under the rule in Shelley's case; that is, he takes a fee, in any case, which is liable to be defeated on the survival of a son. The Supreme Court remarks that "the will must be read as if the devise to the oldest son were never written in it, because the immediately following devise to the heirs and legal representatives of the devisee for life is the only alternative provided by the will itself. That this alternative brings the case within the rule in Shelley's case is too plain for argument."[86]

RULE APPLICABLE TO DEEDS AND WILLS.

The rule in Shelley's case is applicable when life estates with remainders to the heirs or issue of the life grantee are created by deed.[87] In the vast majority of cases however, they are created by will.

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[82]Beilstein v. Beilstein, 194 Pa. 152.

[83]McCafferty v. Duerr, 207 Pa. 261. The judgment below was affirmed by an equally divided supreme court.

[84]Reimer v. Reimer, 192 Pa. 571.

[85]Corvin v. Elliott, 23 Super. 449.

[86]Eby v. Shank, 196 Pa. 426.

[87]Hileman v. Bouslaugh, 13 Pa. 344; Shapley v. Diehl, 203 Pa. 566; Carson v. Fuhs. 130 Pa. 256; Schrecongost v. West, 210 Pa. 7.

CONCLUSIVEMESS OF DECISION OF COURT.

If the Supreme Court has decided that under a certain deed or will, the rule in Shelley's case has produced a fee, persons who buy the land in reliance upon its decision, will be protected by the court which will adhere to its decision, without further consideration whether it was correct or not.[88]

FEE TAIL SPECIAL.

The gift over to the issue or the heirs of the body of the donee for life, creates at common law a fee tail. The act of April 27th, 1855, however, makes what would have produced a fee tail produce a fee simple. "Whenever, hereafter by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this state, it shall be taken and construed to be an estate in fee simple and as such shall be inheritable and freely alienable." It converts a fee tail special into a fee simple. A conveyance to X in trust for the sole and separate use of a married woman for her life; then in trust for the heirs of her body by her present husband; on the death of the husband before the wife, gives her under the rule in Shelley's case, what would have been a fee tail special, before the act of 1855, but what in consequence of that act, becomes a fee simple.[89]

THE RULE NOT A RULE OF CONSTRUCTION.

The supreme court has often said that the rule in Shelley's case is not one of construction, but of law,[90] a badly chosen expression for the thought which is intended to be conveyed by it. It is necessary to find a certain meaning in the deed or will, before the rule can be applied to it. The rule then, does not assist in the discovery of that meaning. As we have seen, we must first find that the grantor or testator has intended to give to A a freehold estate less than of inheritance. If we find that he has intended to give a heritable estate, then the rule is unnecessary. The intention plus its fit expression, creates the estate. We must then find (not as often said, that he intends an estate to be inherited from the first taker, for he does not intend the first taker to have, nor therefore,

[88]Bright v. Esterly, 199 Pa. 88; Devine's Estate, 199 Pa. 250 Pa. 7.

[89]Cecil v. Smith, 44 Super. 274. Cf. Schrecongost v. West, 210 Pa. 7.

[90]Hastings v Engle, 217 Pa. 419.

to transmit, a heritable estate, but) that he intends precisely the same persons to take the remainder as would inherit it, if the life tenant had a fee and died seised of it, and intestate. When these two intentions are found to exist, the Rule in Shelley's case annuls the latter of them altogether. The intended remaindermen under it take nothing. The rule annuls partially the former intention. Instead of the first taker receiving a life estate, without power over the residual estate, he acquires under the Rule a fee, with the power to prevent altogether the succession of the remainderman.

EXECUTORY DEVISE.

The syllabus of Lewis v. Link Belt Company[91] suggests that that case was decided under the Rule in Shelley's Case. There was a devise of a house to J., a step-son "for and during the term of his natural life, but in the event of his death leaving issue, said real estate shall go to and vest in said issue absolutely and in fee; but in the event of the death of J without issue, then said real estate shall go and vest in" H absolutely and in fee. J contracting to convey the land in fee, it was held by the lower court that he had a fee, and could therefore pass a good title to his vendee. The supreme court, not deciding whether J had taken a fee, decided that if he did, it was defeasible on his dying without issue then surviving him; under the act of July 9th, 1897 P. L. 213 which requires a definite failure of issue to be understood by the words of the devise;[92] and the vendee, therefore was not required to accept the imperfect title.

[91]222 Pa. 139.

[92]Cf. Kemp v. Reinhard, 128 Pa. 143.

MOOT COURT

AMOS HONALD v. ADMINISTRATOR OF JOHN SMITH

Evidence—Witness—Competency of Witness—Party Dead.

STATEMENT OF FACTS.

This is assumpsit for a debt of Smith to the plaintiff of $600. Honald became a witness and was allowed to testify to the formation of the debt, although he was objected to because of the death of Smith. The defendant's counsel, however, cross-examined him upon all the points of his testimony in chief. On a motion for a new trial, the trial court held that the incompetency of Honald had been waived by the cross-examination.

Durkin for Plaintiff.

Narcowich for Defendant.

OPINION OF THE COURT.

GRIM, J.—Tne plaintiff Honald became a witness and was allowed to testify to the formation of the debt, under the object of the defendant. Smith, the other party to the debt, was dead and he is represented in this action by his administrator, the defendant.

Honald was an incompetent witness and the court erred in allowing him to testify to the formation of the debt. The act of May 23, 1887, sec. 5, cl. (e) P. L. 161, in effect provides that "no surviving or remaining party," nor any person with adverse interests, shall be "a competent witness to any matter occurring before the death of the decedent," the other party to the thing or contract. The statute intends to prevent the advantage of a plaintiff's claim against the dead man's estate. (But see Trickett's criticism of Act of 1887, D. L. R. Vol. 19 page 25.)

The competency of Honald was a primary question and it should not have been passed upon by the court before the witness was permitted to express any opinion. 159 Pa. 99. The defendant objected at the proper time—before the examination in chief. Patterson vs. Wallace, 44 Pa. 88.

The important question in this case concerns the effect of the defendant's cross-examination upon the incompetency of Honald. Had the incompetency of Honald been waived by the defendant's cross-examination?

We have found a number of cases in which a party was called to testify to facts occurring after a decedent's death, and was cross examined on behalf of the decedents estate as to matters occurring before the death, as to which he was incompetent in chief, and it was held that he thereby became competent for all purposes, and on re-direct examination could testify as to matters occurring in the defendant's lifetime. Clad's Estete, 214 Pa. 161. Watkins v. Hughes 206 Pa. 526. Carson's Estate, 136 Pa. 160; Hambleton's Estate, 165 Pa. 500; Blecher's Estate, 51 Pitts., L. J. 174; Fox Estate, 10 York 109.

These cases differ from the case at bar. The cross-examination in every instance was not upon "the testimony in chief," while in our case the "testimony in chief" was adhered to.

In this case two essential facts present themselves upon the motion for a new trial: (a) Honald's testimony was allowed under the objection of the defendant; (b) defendant cross-examined the witness only upon his "testimony in chief," the formation of the debt.

We now contend that a cross-examination on the testimony in chief, after objection, will not waive the objection, and cite as authority the case of Johnson v. Johnson, 173 Mo. 91, L. R. A. vol. 61, 166; in which it was held that an objection to the testimony of the surviving party to a cause of action in his own behalf, which is forbidden by statute, is not waived by cross-examining him only as to matters covered by his examination in chief.

Two Pennsylvania cases clearly set forth the law in the case at bar. The one case affirms the decision of the other case. DeSilver's Estate, 15 D. R. 205, (1906). 32 Super. 174. In 15 D. R. 205, the court held that "the things testified to prior to the death of the decedent were incompetent, and cross-examination with regard to it did not make it or anything that she said, either in chief or on cross-examination as to what took place in the lifetime of the persons against whose estate she was claiming, admissible as evidence; more especially as it appears by the adjudication and stenographer's transcript that the entire examination was under a general objection to the competency of the witness."

In 32 Super 174, in commenting upon the case just cited and quoted it was said that when the witness was called to testify in support of her claim that the jewelry in question was given to her by the decedent, objection was made to her competency, whereupon her counsel stated that he did not propose to ask her as to anything that took place with the decedent. Her testimony was then taken subject, however, to the objection to her competency, and this appears affirmatively in the record of the proceedings. But her counsel did go into matters occurring before decedent's death and the auditing judge examined her still more fully as to such matters. This led to cross-examination upon the same matters. The court concluding held that under the circumstances the cause of the adverse party in thus cross-examining her cannot, with fairness, be regarded as a waiver of the objection subject to which her entire testimony was taken; nor does it bring the case within the principle of the common law rule (which is embodied in the Act of May 23, 1887, supra) that a party calling and examining generally an incompetent witness, and having the benefit of his testimony cannot object to his competency when called by the other side as to other relevant matters.

In the case at bar, had the adverse party, the defendant, under the guise of cross-examination gone beyond the legitimate scope thereof, and required the witness to testify as to matters occurring before the decedent's death, concerning which he had not been examined in chief, the authorities before referred to show that ordinarily this would render him competent to testify in his own behalf as to any relevant matter. But this is not the case at issue.

It would be an injustice to the defendant if, after objection to the witnesses' competency, taken before his testimony in chief, he should be estopped to cross-examine him upon anything that he might be allowed to offer in substantiation of his claim. Cross-examination is a weapon of defense, and the defendant had a right to use it to thwart the claim of Honald whose claim might have been false. It was the defendant's means of ascertaining the validity of the plaintiff's claim.

The witness, Honald, testified under objection, and since the court allowed him to testify to a matter which made him incompetent, the defendant is thereby permitted to cross-examine him, and we conclude in light of the authorities cited and quoted that under these conditions the defendant did not waive his objection, and Honald's incompetency was not waived.

A new trial should have been granted.

OPINION OF SUPERIOR COURT.

The question presented by this case is, does a party who cross-examines a witness to whose testimony he has properly objected, on the ground of his incompetency, lose the right by that act, to insist upon his objection in the appellate court, or upon a motion for a new trial?

It is never thought, in Pennsylvania, that by cross-examining a witness the cross-examiner makes him his own. He can impeach his credit. Indeed the object of the cross-examination is in various ways to impeach his credibility. After cross-examination, he can introduce evidence of the bad reputation of the witness in respect to veracity, a thing he could not do, had he made the witness "his own" by the cross-examination.

The cross-examination may go beyond the legitimate range of such an examination. It may extend to matters germane to the issue and not touched upon in the examination in chief. By such an examination the examiner makes the witness "his own"' and is probably precluded afterwards, from alleging his incompetency. In the case before us, the defendant limited the cross examination to the points of the testimony in chief.

The learned court below has correctly concluded that by this cross examination, the objection to the competency of the witness was not waived. DeSilver's Estate, 32 Super: 174.

A learned note upon this subject may be found in 33 L. R. A. N. S. 103. The "majority rule" is there stated to be, that the cross-examination is no waiver. There are authorities which take the opposite view.

When a witness is offered by a party, the opposite party is interested to elicit from him evidence which will render innocuous, the testimony which he has delivered in chief. He is also interested in excluding altogether the testimony of this witness, an object which he can accomplish only if the witness be incompetent. We see no reason for holding that if the objection to competency is made, the opposite party must confide his cause to it, and cannot also cross-examine, except on the condition that he withdraws the objection.

Affirmed.

FARSON v. McLEAN.

Liability of an Owner for the Trespassing of his Cattle—Division Fences.

Orcutt for Plaintiff.

Stevenson for Defendant.

OPINION OF THE COURT.

BEST, J.—The facts in this case are similar to those of Barber v. Mensch, 157 Pa. 390 referred to by the attorney for the plaintiff, and the decision therein seems to cover all points.

Mr. Justice Dean delivered the opinion of the Court as follows: "Since the passage of the Act of April 4, 1889, no man is required to fence against his neighbor's cattle, but every person is legally bound to restrain his own cattle.

By the fence Act of 1700 every land owner was compelled to 'fence out'. It changed the rule of common law which held the owner liable for all damages done to others by his cattle.

Then came Act of 1842 providing for a method of procuring a division fence, but it did not *compel* the land-owner to join with his neighbor in erecting a division fence, he could set one altogether on his own side. Dysert v. Leids, 2 Penna. 488. And when he had paid his proportion of the cost of one fence, he was not *bound* to keep it up, but might build a new one on his side. Rohrer v. Rohrer, 18 Pa. 367.

After this comes the Act of 1889, which repealed the Act of 1700, leaving the common law rights in force, requiring owners of cattle to 'fence in'. But this did not repeal the Act of 1842, providing for a method of building partition fences between adjoining land owners.

It is the defendant now who is confronted with the Act of 1842. The question is under that Act: 'Did you construct a divisiou fence sufficie it to keep your cattle off your neighbor? If you did not you must answer in damages, and that without regard to the liability for the cost of a division fence.' It was his duty to have a sufficient fence, whether his neighbor built one or not."

This decision is in accord with that given in the Dickinson Law Review, Vol. XII, page 177.

Since these decisions the Act of 1905 P. L. 167 has been passed, providing for the erection of division fences between adjoining land-owners, but this act does not affect the liability of owners for damage done by their cattle, as fixed by the Act of 1889.

In Turner v. Richards, 34 Superior 624, a case decided since the passage of the Act of 1905, the common law rule requiring owners of cattle to "fence in" was held to be still in force.

Whatever the intention of the Legislature may have been in passing the Act of 1905, and notwithstanding the fact that an injustice may result from allowing a man to recover for damages the result of his own negligence or carelessness, the Court is of the opinion as a matter of law, the owner of the cattle is liable for damages resulting from their trespass.

Judgment for plaintiff.

OPINION OF SUPERIOR COURT.

The single question presented for our determination is whether the act of 1905 has wrought any change in the rule established by the act of 1889, that every man is bound to keep his domestic animals from trespassing upon the lands of others and is liable for any damage they may do by trespassing, whether or not the owner of the animals exercised care and prudence to keep them from trespassing, and irrespective of the fact that the land upon which the trespass was committed was insecurely fenced or unfenced.

In 1700 the legislature, influenced by the fact that, as agriculture was limited and passage extensive, the common law rule requiring an owner of animals to restrain them was inappropriate to local conditions, provided in substance that every land owner should defend his crops against his neighbors' cattle by constructing a sufficient fence; he must fence them out. In 1842 the legislature provided in substance that the charge of a division fence between adjoining land owners should be equally borne and maintained by both parties and provided a method of determining the sufficiency of the division fence, what proportion of the cost should be borne by each, and in case of a refusal to pay, how the money should be collected. Construing the act of 1842, it was held that it merely provided a method of enforcing an equitable division of the cost of a partition fence, and wrought no change in the rule established by the act of 1700 that the owner of lands could not recover for damages done by trespassing animals unless his lands were enclosed by a sufficient fence. Gregg v. Gregg, 55 Pa. 228.

In 1889 the legislature repealed the act of 1700, and by this repeal the rights of land-owners and owners of cattle were left as they were at common law. In Barber v. Mensh, 151 Pa., 390, it was held that the act of 1889 did not repeal the act of 1842 because there was no inconsistency between the two acts, and that since the passage of the act of 1889 the owner of cattle was bound to keep them in.

There are therefore two decisions arising out of entirely different situations to the effect that the act of 1842 had no effect upon the law regulating the liability of the owner of cattle for their trespasses.

The learned counel for the defendant contends that the act of 1905 goes a step further than the act of 1842 and imposed upon a land-owner the affirmative duty of "erecting and maintainining an equal part of division fence" whereas the act of 1842 imposes no such affirmative duty but merely provided a method of enforcing an equitable division of the cost of a partition fence. He therefore claims that, as the plaintiff did not keep his half of the fence in repair, he cannot recover for the trespasses of the defendant's cattle. "If this were not the effect of the act of 1905," says the learned counsel, "the legislature would not have passed it, because a method of enforcing an equitable division of the cost of the partition fence was provided by the act of 1842."

To these propositions we cannot give our assent. We do not think that the purpose of the act of 1905 was to change the rule regulating the liability of the owner of cattle for the trespasses thereof. A sufficient justification for the passage of this act by the legislature is found in the

fact that it changes in many respects the procedure for enforcing an equitable division of the costs of the division fence which was provided by the act of 1842. See Turner v. Richards, 34 Sup. 624.

From the preamble of the act of 1905 we learn that it was passed because "grave complications and obligations" had arisen "between owners of real estate as to *the line* of partition fences," and may we not assume that it was to obviate the necessity for these "grave complications and litigations as to the line of the partition fence," rather than to change the rules in regard to trespassing cattle, that the act was passed?

The act it is true does stipulate that each owner "shall erect and maintain an equal part of the line fence," but it also provides that "if any owner shall fail or neglect to erect or maintain his share," not that the aggrieved party shall be exempt from liability for the trespasses of his cattle, but that "he shall notify the auditors" whose duty it shall be to examine the fence and determine whether or not it is defective; and, if so, what part of it should be erected or repaired by the party against whom the complaint was lodged, etc.

In construing similar legislation in other states it has been uniformly held that the common law only as to liability for trespassing cattle is not changed thereby, and each adjoining owner remains liable to the other for damage done by his trespassing cattle.

In Michigan, construing a statute which provided that adjoining owners should "keep up and maintain partition fences in equal shares," the court held that until the respective shares of the fence were ascertained either by agreement of according to the provision of the statute, the statute would remain inoperative. Johnson v. Wing, 3 Mich. 168.

In Keenan v. Canavaugh, 44 Vt. 268, it was held that a similar statute did not relieve cattle owners from their common law liability until the fence had been divided pursuant to the statute.

In Indiana a statute provided that partition fences were to be equally maintained by both parties, etc. Construing the statute the court said: "We think there is no statute controlling the common law rule. Either party might have repaired the fence and enforced contribution from the other; but not having done so, they stood upon their common law rights." Myers v. Dodd, 9 Ind. 290.

The same doctrine has been asserted in Maine and Massachusetts. Little v. Lathroy, 3 Me. 356; Rust v. Low, 7 Mass. 100.

In New Hampshire a statute provided that adjoining owners should contribute equally in building partition fences and, as in Pennsylvania, provision was made for a division of the fence on the application of either party, and, after this was done, that either party might build the delinquent's part at his expense. It was held that where no such division had been made the common law rule prevailed. Tewsbury v. Bucklen, 7 N. H. 518.

As a result of these decisions and many others it may be announced as the settled rule that until a division of the partition fence has been made by an agreement of the other parties or under the statute, no particular part thereof belongs to either owner to be built and kept in repair. Their rights are regulated by the common law and each is bound

at his peril to keep his cattle on his own land. 12 A. & E. En. Cyc. 1050.

The decision in Rangler v. McCreight, 21 Pa. 95 is not in conflict with this principle. At the time of the decision of that case a man was bound to fence against cattle; and, of course, if he built no part of the division fence, he could not recover for damages done to his land by trespassing cattle.

Judgment affirmed.

COMMONWEALTH v. SHUSTER.

STATEMENT OF FACTS.

William Shuster tried for murder was proved to have shot a rifle, deliberately pointing it at the head of John Salter who was only five feet away and thus blew off the upper part of his head, killing Salter instantly. The court told the jury that the use of a deadly weapon directed to a vital part of the body, required the inference of an intention to kill, Verdict; Guilty of murder in first degree.

Ferio for Plantiff.

O'Rorke for Defendant.

OPINION OF THE COURT.

PRICE, J.—The appellant stands convicted of murder in the first degree. If the verdict which so condemned him was the free expression of a conclusion reached by the jury upon review of the evidence in case, upon proper instructions as to the law, the verdict ought to stand, for they could have found from the evidence every ingredient necessary to conviction for the highest degree of guilt. If, on the other hand, the verdict was reached by the jury, under instructions from the court as to their duty which prevented consideration of those things which necessarily enter into the determination of the degree of guilt, namely—premeditation, intent, etc; then it ought not to be allowed to stand.

The appellant killed Salter by shooting a rifle "deliberately pointing it at the head of Salter who was only five feet away and thus blew off the upper part of his head." Let us suppose that the evidence was sufficient to establish the crime of murder and that the jury was so convinced, it still remains for the jury to determine the degree.

"The conviction of murder in the first degree can be justified only as the commonwealth establishes by evidence a specific intent to take life; and while the law regards the circumstance that a deadly weapon was used as evidence that a specific intent to kill existed, it is never so far conclusive as to such fact that the trial court may pronounce the intent to take life established as a matter of law. It is always for the jury to determine the intent by their own consideration of the evidence."

Com. v. Chapler, 228 Pa. 630; People v. Webster, 50 N. Y. 398; People v. Jones, 3 N. Y. Cr. 252; State v. Allen. 22 Mo. 818.

In the charge of the court to the jury that, "the use of a deadly weapon directed to a vital part of the body required the inference of an intention

to kill" we think he means "carried with it an intention to kill" which is contrary to law. Trickett Crim. Law, Vol II. Page 809, "There is no rule of law that if a deadly weapon is used upon a vital part and death occurs, the intention of the user to produce the death shall be inferred," "The weapon, the mode of its use, are simple evidential circumstances, the interpretation of which, the drawing of inference from which, is the function of the jury" Abernethy v. Com. 101 Pa. 322.

"It is reversible error for the court to instruct the Jury that they are bound to find a verdict of murder in the first degree, and a judge takes away the statutory sights of the accused when he undertakes to ascertain it himself." Com. v. Chapler. 228 Pa. 630.

"Under no circumstances does the presumption rise higher than murder in the second degree from the use of a deadly weapon and the duty of fixing the degree of murder in such cases belongs exclusively to the jury" Rhodes, v. Com. 48 Pa. 396; Pannell, v. Com. 86 Pa. 260; Com. v. Onofri, 18 Phila. 436; Com. v. Drum, 58 Pa. 9; Com. v. Green. 227 Pa. 86; Com. v. Chapler, 228 Pa. 630.

The presumption against the accused is no higher than murder in the second degree and it lies on the commonwealth to established the facts and circumstances which constitute murder in the first degree.

Therefore it follows that the charge of the judge to the jury was erroneous and a new trial must be granted.

OPINION OF SUPERIOR COURT.

An essential element of the crime of murder in the first degree, save where the killing results from the perpetration of or an attempt to perpetrate arson, rape, robbery or burglary, is the specific intent to kill.

It is a fundamental principle of the law of crimes that where a crime involves a specific intent as distinguished from a general criminal intent this specific intent must be proved to have existed as a matter of fact and well never be presumed to have existed as a matter of law. Clark's Crimnal Law, 51. 8 A. & E. Encyc. 287. "The specific intent has no resemblance to the criminal intent except that both are mental conditions. The criminal intent is not an actual but a presumed intent concurrent with but not contained in the crimnal act. The specific intent is an actual purpose or design existing in the mind of the actor, and is an essential element of the criminal act, which is never presumed as a matter of law but must be proved as a matter of fact equally with the physical portion of the criminal act" Robinson's Elementary Law, 535.

Applying this general principle to the crime of murder in the first degree it is held that the specific intent to kill must be found by the jury to have existed as a matter of fact and that altho the jury may infer the existence of this intent from the circumstances of the case the court may not. 21 Cyc. 877. 27 A & E, Encyc. 167. Any instruction which requires the jury to infer the specific intent from existence of certain other facts is therefore erroneous. It is the prerogative of the jury to draw their own conclusions as to the existence of this specific intent.

In Com. v. Chapler 228 Pa. 630. an instruction by which the jury was told that it was their duty to infer that the intent to take life existed from

the fact that a deadly weapon was used etc. was held to be erroneous. In the present case the jury were told that the use of a deadly weapon "required the inference of an intention to kill." This instruction might reasonably have been construed by the jury to mean that the law required them to infer an intention to kill from the use of a deadly weapon. Used in such connection "to require" means "to impose a command or compulsion on one to do something"—Webster's Dictionary. The jury had sworn to render judgment in accordance with the law. Judgment affirmed.

JOHN THOMAS v. MARY JONES.

STATEMENT OF FACTS.

Mary Jones on the day before her marriage with Wm. Smith and in contemplation thereof, conveyed with Smith's consent, her farm to Thos. Williams for her "sole and separate use." After her marriage, and during the life of her husband, she borrowed $500 from John Thomas. Thomas now seeks to subject her interest in the farm to the payment of his debt. Smith is still living.

Corbin for Plaintiff.

Rorer for Defendant.

OPINION OF THE COURT.

REESE, J.—We have examined the case with a scrutiny not confined to the briefs of the counsel and are forced to decide for the plaintiff.

Let us first understand what the conveyance of defendant to Williams was. By the words of the conveyance "for her sole and separate use," it is clear that a Separate Use Trust was formed, the legal title being in Thomas Williams to be held for the "sole and separate use" of defendant. Mary Jones, after her marriage, borrowed $500 from plaintiff who now seeks to subject her interest in the farm to the payment of this debt. By the Married Woman's Act of 1893, a married woman has the same powers as though unmarried, and may make contracts as if unmarried. (P. &. L. 3, 4849 and 4855). Thus the debt against defendant is valid. In Wallace v. Coston, 149 Pa. Supreme Court 137 it was held that where a married woman has an equitable estate settled on her, for her sole and separate use she has power only to the extent clearly given by the instrument, by which such estate is created and has no right beyond it· Lancaster vs. Dolan, 1 Rawle 247; Thomas v. Folwell, 2 Wharton 11.) There is no doubt in the case at bar, that an estate for her own sole and separate use was created, but it was not created by another person in her favor, but by herself (defendant) for her "sole and separate use." In Brown v. McGill, (39 L. R. A. 806,) the court held that a trust to place one's own property beyond the reach of creditors, while retaining full enjoyment of the income and revenues therefrom, through the instrumentality of a trustee, cannot be created, even by a married woman or

a woman in contemplation of marriage. In Pennsylvania the policy of the law forbids the creation of a trust by a person, *sui juris*, under which an income is to be paid to him without liability for his debts either present or future. In such case the income from the trust may be attached by judgment creditors, and property so settled is assets in the hands of the trustee for payment of debts, whether contracted before or after the execution of the deed of trust. If the law were otherwise, it would be to affirm a most startling proposition. It would revolutionize the credit system entirely, destroy all faith in apparent ownership of land or property and repeal all our statutes against frauds. Mackason's Appeal, 42 Pa. 330; Ghormley v. Smith, 139 Pa. 584, Stewart vs. Madden, 153 Pa. 445; Hollbrook's Estate, 213 Pa. 94; Nolan v. Nolan, 218 Pa. 135.

In the case at issue, the defendant conveyed the property for her own sole and separate use, and later borrowed $500 from plaintiff and defendant cannot defend herself on the ground that it was not conveyed to Williams for the purpose of defrauding creditors, as the law presumes that it was made with that intent wherever a conveyance has the effect of hindering or delaying creditors in collecting by ordinary legal poocess, what the grantor owes them. McDowell v. Steele, 87 Ala. 493; Fleischman v. Bowser, 62 Fed. 259.

As defendant had power to contract and has contracted with plaintiff to the sum of $500, and the law will not allow a trust to be formed in defraud of creditors, judgment must be given for the plaintiff.

OPINION OF SUPREME COURT.

The courts of Pennsylvania are not so far averse to the possession by a man of an assured income, which he may enjoy despite his creditors as to declare such exemption impossible. A man who has a vicious, drunken, in all respects contemptible and pernicious son, may settle an estate so that he may indulge his laziness, and his other worse vices, and at the same time enjoy a comfortable, an abundant revenue. The so-called spendthrift trust is of this description, for whose toleration, in the majority of cases, no plausible apology can be uttered.

But the courts which allow one man to settle an estate in favor of another man, so as to shelter that man from the legitimate effects of his vices, are singularly fastidious with respect to the settlement by an honest, industrious and worthy man, if his property so as to yield to himself an income, should he when his faculties have failed, prove unsuccessful in business, and contract debts in excess of his power, independent of the property thus settled, to pay them.

A man, who is advanced in years, who has lost the alertness and strength of mind and body of his earlier period, but who nevertheless endeavors to carry on a business in which he contracts debts, is not allowed to enjoy, exempt from the attachment or lien of his creditors, the property which he settled on himself in better times, in order to provide against the miseries and failures of advancing years.

Why so? It is indeed hard to see. In Mackason's Appeal, 42 Pa. 330 Bartram made the settlement of his property in 1849. He died in 1857. Debts contracted before his death but after 1849, possibly, five,

six, seven or eight years afterwards, were allowed to obtain payment from it. Was there any fraud? There is not the slightest intimation of fraud. If the making of the trust was known to those who became his creditors before they gave their credits, how were they defrauded? If the trust was valid, they knew that, whatever else they might trust, however much they could trust his earning and saving power, they could not trust the settled estate.

This principle of Mackason's Appeal has been reiterated by the courts In order to show that they are no respecter of sex, they have extended it to women, who are very frequently without business experience, or sagacity, and who if any body, ought to be allowed to be supplied, whether by their parents or other relatives, or by themselves, (while free from debt) an assured living income. Ghormley v. Smith, 139 Pa. 584, forbids a single woman's settling her property so, as to be exempt from appropriation by future creditors, however notorious the settlement is; however inexplicable the expectation of those who, with knowledge of it became creditors, of being able to seize the property or its proceeds, in payment. Cf. also, Patrick v. Bingaman, 2 Super. 113.

An abhorrent case is that of Nolan v. Nolan, 218 Pa. 135. A widow with six children, settled her property in trust to secure an income for life. Six years afterwards, apparently, she confessed a judgment to Nolan. Did Nolan know of the settlement? Very probably, for the deed was "duly recorded." He was, apparently, a relative. Without bothering itself about such trifles as the creditors' knowledge of the presence or absence of fraud, of the right of a creditor to try to break down a defense against destitution, which was erected, for the very purpose of being valid as against debts rashly or unwisely contracted, the court decides that the creditor may take the settled property or its income. If a widow with six children to support cannot secure to herself, as against those who with full knowledge of her precaution become her creditors, with intention to defeat it, a living income, the law, that is the judges, who have created this impossibility, have assumed a serious responsibility. But they have assumed it.

But the case before us, is not precisely that which we have been considering. The trust created by Mary Jones is not a so-called "spendthrift trust," but a sole and separate use. It was made on the day before her marriage to Smith. It was made with the consent of Smith. The question then is, does the doctrine that a man or woman cannot so settle his or her property, as to secure it or its rents and income, from future creditors, extend to the creation by a woman of a sole and separate use?

In Ghormley v. Smith, 139 Pa. 584, the court adverted to a possible distinction between spendthrift trusts and sole and separate uses, created by the settler for herself. A trust in contemplation of marriage has been upheld against the settler herself, seeking to have it declared void, Ash's Appeal, 80 Pa. 497, unless particular facts warrant the annulment of it, Bristor v. Tasker, 135 Pa. 110, but the trust might be indefeasible by the settler herself, while defeasible by her creditors. In Stewart v. Madden, 153 Pa. 445, the court refrained from discussing the question "whether a feme covert can by voluntary conveyance, exempt her separate estate from her debts thereafter created," The

court found what was virtually a power in the trustee to alienate any part of the principal, if necessary for the benefit of the *cestui que trust.* It also found that when debts for necessaries were contracted, the trustee could be compelled to pay them, if necessary, from the corpus, or, the *cestui que trust* dying, that those who had become creditors for necessaries could cause an orphans' court sale, for their payment, and that the purchaser at such sale acquired a good title.

Wallace v. Coston, 9 W. 137, is a case in which a woman, before marriage settled her estate to her sole and separate use. It was therein held that one who became a creditor, the power to subject the estate to debts not having been reserved, could not compel payment from the trust property. In Lancaster v. Dolan, 1 R. 230. A settled her property to her sole and separate use during life; then to such persons as by deed or will she should appoint. She married, and with her husband, executed a mortgage for $3000 upon the land. Upon this mortgage, the land was sold in her lifetime. It was held that the mortgage was good, only as an exercise of the power to appoint; and that, as that power operated not so as to withdraw the land from A during her life, but only after her death, the purchaser was not entitled to recover the possession from her during her life, although he might recover it, after her death, from her husband or heirs. This decision, like the last, is a tacit affirmation that a settlement by a woman, to her sole and separate use, is valid against her subsequent creditors.

The object of the sole and separate use, was to protect property primarily from the direct control of the husband. It was also intended to protect it from his indirect control, exercised by means of cajolery, coercion, marital influence, upon the wife, and therefore from her own alienations or contracts resulting in debts, superinduced by this influence. From the unwillingness of the courts to protect a woman's property from debts due to her business inexperience, heedlessness, and incapacity, we cannot safely infer that they will be unwilling to protect that property from debts resulting from the influence of her husband. There is no precedent for the inquiry, when she has contracted debts, into the existence or non-existence or the marital persuasion, and for holding debts contracted without that persuasion binding, but not so contracted, not binding.

It is a pity that courts which have allowed the "spendthrift" trust, with its crying evils, if created by a friend of the "spendthrift," have not allowed sober, discreet persons when entirely free from debt, to make honest and open provision against the calamities and vicissitudes of their own future. We shall not be the first to extend, still further, this unaccommodating, unchivalrous and inhumane policy to the sole and separate use. There are some things better than payment of debts, and when a trust has been made to guard property for the *cestui que trust* against his or her own improvidence, in the formation of debts, the reason is not apparent for saying that one who becomes a creditor knowing of the trust, shall by collusion with the *cestui que trust's* frailty, in advertence, improvidence, be allowed to smash the bulwarks which, in a wiser and happier state and time, he endeavored to erect against his own possible future weakness.

Judgment reversed.

CHARLES PATTERSON v. ISAAC COLES.

Master and Servant.—Negligence—Liability of Master to Third Persons for Torts of Servant.

STATEMENT OF FACTS.

Coles owning an automobile, asked one Hendricks, to drive it to a garage and repair shop, half mile away in the city of Harrisburg, to have some repairs made. Hendricks undertook to do so, but instead of going directly to the garage, went to a point two miles away from it in order to deposit a package of his own. Hendricks then steered the autocar as directly as he could to the garage, and when within 120 yards of it, and on the route he would have taken had he not made the unwarranted detour, he negligently ran over Patterson, breaking his right leg. This is an action by Patterson, the injured person against Coles, the owner of the automobile.

Singerman for Plaintiff.

Watson for Defendant.

OPINION OF THE COURT.

RENARD, J.—The facts as presented to the court show the relation of master and servant to have existed between the plaintiff and the tort-feasor, Hendricks, at the time of injury to Patterson. To constitute such relation there must exist the right to select the person claimed to be servant and also the power and duty to control his acts in regard to the transaction out of which the injury arose. Sproul v. Hemminway, 14 Pickering, (Mass.) 1; Kelly v. New York, 11 N. Y. 436; Pack v. New York, 8 N. Y. 222; Geer v. Darrow, 61 Conn. 220. So it was here. Coles had the right to employ whom he pleased and also had the right to discharge such employee at his pleasure. He also had the power to control and direct the acts of his employee, even if it had to be done by his riding with his servant in the autocar.

In view of the fact that the relation of master and servant had existed the question is as to the liability of the master for the torts of his servant to third persons. It has repeatedly been held that a master is not liable for torts of his servant if such torts were committed outside the scope of his employment: Central Ry. C. v. Peacock, 69 Md. 257; Quigley v. Thompson, 211 Pa. State 107; Lotz v. Honlon, 217 Pa. State 339; while on the other hand a master is responsible for torts of his servant done with a view to the furtherance of the master's business, whether the same be done negligently, wantonly or even willfully, but within the scope of his employment; Quinn v. Shamokin & Mt. Carmel Electric Ry. Co., 7 Pa. Superior 19; Howe v. Newmarch, 12 Allen (Mass.) 49; Hays v. Miller, 77 Pa. 238.

It has been further held in Guile v. Campbell, 200 Pa. 119, that where an injury is caused by a servant, in the use of means fairly adapted to accomplish the purpose of his employment, the master is responsible. This is true, even though the act of the servant is wrongful or unauthorized; but where the act of the servant does not fairly tend to effectuate the discharge of the duty for which he is employed the master is not li-

able. Consequently where the act of the servant does falrly tend to effectuate the discharge of the duty for which he is employed the master i liable.

The question as to whether or not the act was done in the execution of the master's business within the scope of the servant's employment was clearly settled in Ritchie v. Waller, 53 Conn. 155. In case the deviation is slight and not unusual the court may and often will, as matter of law, determine that the servant was still executing his master's business. In the case at the bar Hendricks was doing what he was authorized to do and at the place specified. It is true, or at least it seems to be, that if Hendricks had not made the unwarranted detour he would have reached the spot where the accident occurred at a different time. Yet it has been held that if the particular act is within the general scope of the servant's authority, the fact that it is done at a time and manner contrary to the master's orders is immaterial, since third persons cannot be expected to be familiar with such orders and are unaffected by them: Phila., W. & B. R. Co. v. Brannan, 17 W. N. C. 227. Furthermore, a master's liability to third persons for the negligent act of his servant is in no way dependent upon the presence of the master at the time the act was done: Shaw v. Reed, 9 Pa. 72.

In Richie v. Waller, 63 Conn. 155, it has even been held that if the servant, driving his master's conveyance on his master's business, makes a detour from the direct road for some purpose of his own the master will be answerable for any injury to third persons caused by his careless driving while so out of his proper route. However, the deviation from the line of the servant's duty was not in the present case sufficiently marked to justify the court in determining as matter of law that the servant was not doing the business of the master in the performance of the act causing the injury. Therefore, since the injury was sustained by Patterson while Hendricks was on his master's business within the scope of his employment a judgment should be entered on the verdict for the plaintiff.

OPINION OF SUPERIOR COURT.

The negligence which caused the injury to the plaintiff was that of Hendricks. Upon what principle can Coles be made responsible for it? Not, clearly, because the instrument, through which he inflicted the injury, belonged to Coles. A may use B's pistol in shooting C, but C is not for that reason either criminally or civilly liable for the shooting. If A uses the weapon without B's consent to his possession of it the irresponsibility of B will be doubted by nobody. Equally free from doubt, ought his exemption from liability to be, although he had consented to A's use of it, if that use is for A's advantage and to promote A's purposes.

If however, B puts an implement in A's hands in order that he may do something with it for B, and in negligently doing this thing A injures another, B will be liable. Hendricks was asked by Coles to drive the autocar to a repair shop. The accident to Patterson occurred while he was thus driving the car to the shop. We see no reason for exempting Coles from responsibility.

Hendricks had, instead of going directly to the shop, gone to a point two miles away, to accomplish an object of his own. While so doing, had the accident happened, Coles would not have been answerable for it; Fleishner v. Durgin, 207 Mass. 435. But Hendricks had returned to the route which he would have taken had he not gone to the distant point, and was on his way to the shop when the injury to Patterson was inflicted. His past misuse of the car, for his own ends. did not make his then use of it, any the less a use for Coles, a use in the execution of Coles' order. We think therefore that the learned court below has properly decided that Coles is liable.

Affirmed.

SAMUEL SLOAN v PASSENGER R. R. O.

SRATEMENT OF FACTS.

The track of the Railway Co. extended for a mile along and upon a highway, which was not wider outside of the track than 10 feet. On the further side extended a wide and deep ditch. A car was running at the usual rate of 12 miles per hour, when Sloan going in the opposite direction on the highway, finding his horse becoming terrified, signaled to the motorman to slow or to stop, until he could get by. The motorman saw and understood the signal and saw that the horse was probably becoming unmanageable from terror but did nothing. The horse became wildly terrified, rushed to the side of the road and into the ditch killing itself destroying the vehicle and gravely injuring the plaintiff. The court told the jury that if the situation as realized by the motorman would have induced a man of ordinary humanity to stop the car, the company was liable for the damage arising from his failure thus to stop or slow the car. Verdict for $5000 damages.

Stafford for Plantiff.

Mendelsohn for Defendant.

OPINION OF THE COURT.

WATKINS, J.—The only question raised by the assignment of error is, that the trial judge erred in its charge to the jury. The charge being as follows: The court told the jury that if the situation as realized by the motorman would have induced a man of ordinary humanity to stop the car, tne company was liable for the damage arising from his failure thus to stop or slow the car.

Verdict for $5000 damages.

The first question which presents itself is, what care is due to the public from a street railway.

From our observation of the cases we find that the degree of care varies with the circumstances of each particular case, for as said in Gilmore v. Pass. Ry. Co, 153 Pa. 21; Holt, v. Penna. Railroad Co., 206 Pa. 356, so long as the common user of the streets exists in the public, it is the duty of a street railway company to exercise such watchful care as will prevent accidents or injury to persons who without negligence on their

own part may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances of each case. We therefore think that the care demanded of a street railway company is ordinary care but this care may be increased or lessened as the circumstance of each case appears.

Held in McMahem v. White 30 Sup. 169 that the duty is to exercise ordinary and reasonable care, or, as otherwise expressed, the care of an ordinarily prudent man and this varies with the circumstances.

It is the province of the court to instruct the jury that the omission to exercise such care is negligence, and the province of the jury to determine whether the conduct of the party established by the weight of the testimony, involved the omission of such care. When the measure of duty varies, when a higher degree of care is demanded under some circumstances than under others; when both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved.

This seems to be confirmed in 191 Pa. 390, 211 Pa. 227, 28 Pa. Sup. 387.

When there is a doubt as to the inference to be drawn from the facts or when the measure of duty is ordinary and reasonable care, and the degree of care required varies with the circumstances, the question of negligence is necessarily for the jury.

Penna. R. R. Co. v. White 88 Pa. 327

Penna. R. R. Co. v. Peters 116 Pa. 206.

And as said by Judge Strong in McCully v. Clark, 40 Pa. 399, the question was not alone what defendant has done or left undone, but in addition what a prudent and reasonable man would ordinarily have done under the circumstances. Construing the words "ordinary humanity" as equivalent to "ordinary care" and in the light of the cases cited, we deny the motion for a new trial.

OPINION OF SUPREME COURT.

In the operation of a train of steam cars, or of a trolley car, the corporations' agents must have in mind, not simply what is conducive to the progress of the train or car, and to its reaching its destination at the preappointed time. Others, on the adjacent highways, whether running parallel with, or transversely to the track, may be affected by the operation of the train. Thus the letting off of steam may frighten horses; the noise and speedy motion of a large body like a car or train of cars, may have a similar effect. It cannot be contended successfully, that the operators of the train are under no obligation to consider these collateral and possibly serious results of the operation of the train. If due heed to the safety of others requires, the train should refrain from blowing the whistle, or from the letting off of steam, or of great volumes of smoke. Its speed should be reduced.

The motorman saw the fright of the plaintiff's horse. He was asked to slow the car. He did not do so. Would due regard to his duty to the plaintiff, under the circumstances, have caused him to reduce the speed of the car? If it would, and he refused to reduce its speed, why should he not be responsible?

In Phila., Wilmington & Balto. R. R. Co. v. Stinger, 78 Pa. 219, it was said that a jury might find negligence in the use of the whistle a second time, if the engineer saw, or with proper care might have seen the plaintiff's wagon, and that his horse was becoming unmanageable. A satisfactory note in 33 L. R. A. N. S. 123 refers to other authorities having a similar import. Cf. also, Effinger v. Traction Co. 93 N. E. 855.

The learned court below told the jury that if a man of "ordinary humanity" would, under the circumstances' have stopped the car, the defendant would be liable. It is as much the duty of a man to have ordinary humanity as ordinary care. Humanity is the inspiration of care. A man studiously avoids risk to others, when he humanely wishes them exempt from injury. Without this sympathy, why should he have care? We think the instruction unexceptionable, Affirmed.

STAPLES v. SIMPSON.

STATEMENT OF FACTS.

Koller already indebted to Staples to the extent of $500 gave to Staples a mortgage to secure the debt on August 11, 1910. Being also indebted to Jno. Simpson, he gave Simpson a mortgage for $750 on Sept. 3, 1910. This mortgage was recorded on the same day. The Staples mortgage has never been recorded. A sheriff's sale of the mortgaged land has been made on a judgment obtained on a *sci fa* on the Staples mortgage. The land has been sold for $800. Staples insists that his mortgage be paid from the proceeds of the sale before the Simpson mortgage.

Young for Plaintiff.

Dughi for Defendant.

OPINION OF THE COURT.

WALLACE, J.—It is evident from the fact that the proceeds of the sale are $800 that both mortgages cannot be satisfied. The question then to be decided is whether an unrecorded mortgage given for a pre-existing debt, will take priority over a recorded mortgage given also for a pre-existing debt, if the holder of the unrecorded mortgage has foreclosed and the funds are in the hands of the sheriff for distribution.

Under the Act of March 28, 1820 "Mortgages shall have priority according to the date of recording the same, without regard to the time of making or executing thereof. No mortgage shall be a lien until such mortgage has been recorded, provided that no mortgage given for purchase money of the land shall be affected by this act. Mortgages given for the purchase money may be recorded within 60 days after the execution."

As is also held in 15 Sup. 565, under this Act (March 28, 1820) no mortgage except for purchase money, shall be a lien until recorded. This clearly excludes the plaintiff's right of recovery as his mortgage was unrecorded and therefore was not a lien.

But counsel for the plaintiff set up the doctrine of Equitable Estop-

pel, to prevent Simpson from satisfying his mortgage first. He contends that a lien of a mortgage may be waived by implication where the mortgagee has so dealt with the property that he is equitably estopped from asserting his lien to the prejudice of other incumbrances, they having relied upon the implied or apparent purpose of his acts claiming that Staples could justifiably have presumed that he did not intend to push his cause, as he had not been heard from through the proceedings until the sheriff had foreclosed and had the money in his hands.

The doctrine of Equitable Estoppel does not apply. The counsel for plaintiff has not shown any way, wherein the defendant has waived his rights and the Court is of the opinion that he did not, either by acts of omission or commission. He recorded his mortgage and therein complied with the law, relying upon the law to assist him in asserting his rights. But the counsel for plaintiff insists that the recording is only notice to subsequent incumbrances and that Staples could not have notice as his mortgage was executed first.

In 225 Pa. 570 it was held that "the chief object to be attained, by recording an instrument, is to give notice of the incumbrance." In construing the statute properly the Court is of the opinion that a senior mortgagee that has not recorded his mortgage is considered a subsequent mortgagee to the junior mortagee who has recorded. 15 Sup. 565. No mortgage except for purchase money is a lien until it is recorded or is left for record.

In 3 Pa. 79, where the vendee after a judgment is entered against him receives a deed, and at the same time gives a mortgage for a part of the purchase money, it was held "at that moment the equity and the land unite and the judgment attaches to and binds this united interest and *if the mortgage be not placed in the proper office to be recorded the judgment takes precedence.*"

This seems to be analagous to the case at the bar. The judgment is a lien against the property and takes the same position as the recorded mortgage, and the lien takes prior to the unrecorded mortgage.

It was contended that a mortgage otherwise valid, but which has not been recorded is binding and effective as between the original parties. This may be true but it is not a lien as against a second encumbrance (Act Mar. 28, 1820).

The counsel cited a case which held that the statute was not meant to affect mortgages other than for a valid consideration (purchase money) or rather that it did not include those mortgages other than purchase money mortgages, thus contending that the mere recording of defendant's mortgage would not give him priority over the plaintiff.

The Court is of the opinion that the judge in that case erred, if that is what the case held in the construction of the statute, as the statute expressly excludes purchase money mortgages giving them, 60 days from execution to be recorded, and if it did not this court would not be justified in departing from the view in favor of which lies the greater weightof authority.

Let judgment be entered for the defendant.

OPINION OF SUPERIOR COURT.

In spite of the emphatic asseverations of the act of 1820 that "mort-

gages shall have priority according to the date of recording the same" and that "no mortgage shall be a lien until * * * recorded," it has been held that an unrecorded mortgage is good as against (1) the mortgagor; (2) the mortgagor's heirs; (3) a subsequent mortgagee with notice; (4) the mortgagor's assignee for the benefit of creditors; (5) a subsequent purchaser with notice; (6) a judgment creditor who had knowledge of the mortgage when his debt was contracted. (1) Hosie v. Gray, 71 Pa. 198. Trickett on Liens, vol. 1, p. 135. (2) McLaughlin v. Ihmsen, 85 Pa. 364. (3) Bank v. Bank, 7 W. & S. 335. (4) Mellon's Ap., 32 Pa. 121. (5) Murphy v. Nathans, 46 Pa. 508.

It seems therefore that mortgages do not always have priority "according to the date of recording" and that a mortgage may be a lien though not recorded.

It has been uniformly held that an unrecorded mortgage is not valid as against a subsequent mortgagee without notice who parts with value in reliance on the mortgage. Such a mortgagee is a purchaser for value. A mortgagee who takes a mortgage as security for a pre-existing debt is not, however; a purchaser for value. Ashton's Ap. 73 Pa. 162; 27 Cyc. 1191. Adamson v. Souder, 205 Pa. 498. And therefore the authorities which avoid unrecorded mortgages against the former do not require a decision that an unrecorded is void as against the latter.

In other jurisdictions the authorities are quite unanimous in holding that mortgagees who part with no value are not within the protection of the recording acts, 27 Cyc. 1215. 19 L. R. A. 161. And it has been specifically held that a mortgage given to secure an antecedent debt acquires no priorty by earlier recording over a mortgage previously given on the same land. Hamilton v. Perkins (N. Y.) 29 L. R. A. 161. Sipley v. Wass, 49 N. J. E. 463. 14 A. & E. Encyc. 140. Jones on Mortgages 358. 33 L. R. A. N. S. 57. This doctrine has been adopted in Pennsylvania in construing the act of 1893.

The statute of 1820 was designed to furnish protection against fraud. It is in effect a statute of frauds. In construing it the courts have always endeavored to carry out this purpose and have been controlled by the spirit rather than by the letter of the statute. They have not construed it so as to defeat fair and honest transactions which do not injure other persons. Where no one is hurt thereby the courts have felt at liberty to construe the statute according to its spirit and design rather than its letter. Brittons Ap. 45 Pa. 172 Therefore they have upheld unrecorded mortgages against the mortgagor, his heirs, subsequent purchasers or mortgagees with notice etc. Britton's Ap.

Simpson parted with no value or right in reliance upon the mortgage. He gave no new consideration and relinquished no existing right. He is as much of a volunteer as are the mortgagor's heirs and his position is very analogous to an assignee for the benefit of creditors. If because of the absence of injury an unrecorded mortgage is upheld as against the heirs, assignee for the benefit of creditors etc. it should be upheld against Simpson because his injury is not different from that which they would suffer.

In Mitchell on Real Estate, in Pennsylvania p., 202, speaking of the act of 1820, it is said, "It is well settled that an unrecorded mortgage is good as against the mortgagor and all claiming under him with notice; and all volunteers are bound whether they have notice or not."

Simpson was a volunteer. Koller simply gave him a mortgage. The act of 1820 has no application, the common law rule prevails, and the judgment is therefore reversed.