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THE PITTSBURG-ALLEGHENY CONSOLIDATION CASES

On April 20th, 1905,[1] an act was passed whose object was expressed in its first few lines. "Be it enacted, etc., that where two cities, situate in the same county, are or may be contiguous to each other, the city having the smaller population, as shown by the last preceding United States census, may be annexed to the city having the larger population as shown by said census in the following manner," etc. On Feb. 7th, 1906,[2] in an extraordinary session of the legislature, another act was passed which enacted "that whenever in this commonwealth now or hereafter, two cities shall be contiguous or in close proximity to each other, the two, with any intervening land other than boroughs may be united and become one by annexing and consolidating the lesser city, and the intervening land other than boroughs, if any, with the greater city, and thus making one consolidated city, if at an election, to be held as hereinafter provided, there shall be a majority of all the votes cast in favor of such union."

[1] P. L. 221.
[2] P. L. 7

Within a few weeks after the passage of the first of these acts, citizens and taxpayers of the territory to be affected by it, filed a bill[3] in the Supreme Court to restrain the city of Pittsburg, its mayor, the president of its select, and the president of its common council from taking any proceedings under the act. The ground upon which the injunction was asked was that the act was unconstitutional as being a local and special law regulating the affairs of cities, and violating Art. 3, Sect. 7 of the constitution.

Did it regulate the affairs of cities? Mestrezat, J. replies "There can be no doubt that the Act of 1905 regulates the 'affairs of cities' in contemplation of the constitution."[4]

The next and more difficult question is, is the act local and special?

Cities form only a small part of the area of the state. Legislation then affecting alike even all the cities, would in a sense be local. If an act, said Mercur, C. J. "apply to the whole state it is general. If to a part only, it is local. As a legal principle it is as effectually local when it applies to 65 counties out of the 67, as if it applied to one county only."[5] But, since the constitution recognizes cities, boroughs, counties, etc., it has not been understood to forbid legislation applicable to cities, because not applicable to boroughs or townships. Only that legislation concerning the affairs of cities is local, which is made applicable to some; but not to all cities.

But is all legislation applicable to cities local or special unless it is applicable to all cities? It plainly is in the only definable sense of the word "local" or "special." A statute intended to operate and hence operating only on Harrisburg, but not on Reading, or Altoona, or Lancaster, is plainly local and special. It cannot matter how its operativeness is thus restrained, whether by the use in defining the subject, of the name Reading, or of a description by its

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[3]Sample vs. Pittsburg, 212 Pa. 533.

[4]Brown, J. tacitly assumes the same in Pittsburg's Petition; 217 Pa. 227.

[5]Davis vs. Clark, 106 Pa. 377.

geographical position, its topography, the county in which it is, conspicuous facts in its history. If an act is intended to operate on two, three, six cities, and not on all, it is possible to find some common quality or qualities of these cities, to give them a class name on account of their possession of these common qualities, and to legislate for cities of the class so defined. That legislation would be as truly local or special as if the names of the existing cities having those qualities were used.

That the same legislation would not be appropriate to all cities was early perceived by the legislature, and by the courts. The legislature thought, in 1874, that one kind of legislation would be suitable for Philadelphia, another for Pittsburg, and still another for the other cities. Believing that it could not pass a law frankly applicable to Philadelphia alone, at any time during the life of the law, as would be the case, did the law name Philadelphia as its subject, it invented the plan of classification. It adopted population as the principle of classification. Cities having more than 300,000 people, were termed by it, cities of the first class; those between 100,000 and 300,000, were termed cities of the second class; those between 10,000 and 100,000, were termed cities of the third class. This classification, as we have said was adopted as a cloak to conceal the localness of legislation designed for Philadelphia, the sole city falling within the first class, and Pittsburg, the only one within the second class.

The suggested justification for this evasion of the constitution was the necessity of having different laws for Philadelphia, Pittsburg, and the other cities, and the necessity of feigning respect, at the same time, for the prohibition of the constitution.

The absolute necessity of different laws for different cities was thus forcibly stated by Paxson, J.[6] "If the classification of cities is in violation of the constitution, it follows of necessity, that Philadelphia, as a city of the first

[6]Wheeler vs. Philadelphia, 77 Pa. 338.

class, must be denied the legislation necessary to its present prosperity and future development, or that the small inland cities must be burdened with legislation wholly unsuited to their needs. For, if the constitution means what the complainants aver that it does, Philadelphia can have no legislation that is not common to all other cities of the state. And for this there is absolutely no remedy but a change in the organic law itself." Amendment by the people is a more difficult process than construction by the legislature and the courts; so construction, not amendment is the eligible remedy.

The mere fact that an act is applicable to but one city for the time being, is not decisive that it is unconstitutional. "Classification," says Paxson, J., "does not depend on number. The first man, Adam, was as distinctly a class, when the breath of life was breathed into him, as at any subsequent period."[7] The possibility that another city would enter the first class, is adverted to, as an answer to the complaint that legislation for cities of the first class, containing but one city, is local. "It is true the only city in the state, at the present time containing a population of 300,000 is the city of Philadelphia," said Paxson, J., in 1875. "It is also true that the city of Pittsburg is rapidly approaching that number, if it has not already reached it, by recent enlargement of its territory." The ineptitude of this suggestion is strikingly shown by the subsequent legislation. In order to keep Pittsburg from getting into the same class with Philadelphia, the number necessary to form a city of the first class was, in 1889, raised from 300,000 to 600,000, and in 1895 from 600,000 to one million. All that the legislature needs to do, to furnish legislation that shall always be applicable to Philadelphia alone, is to increase the minimum of inhabitants from time to time, so long as Philadelphia continues to be the most populous city.

Concerning the Pittsburg consolidation act of April

[7]Wheeler vs. Philadelphia, 77 Pa. 338; Cf. Perkins vs. Philadelphia, 156 Pa. 554.

20th, 1905, it may be remarked that it makes no use of the recognized classification of cities. It applies in terms to cities both of the first, both of the second, both of the third, one of the first and the other of the second, one of the first, and the other of the third, one of the second and the other of the third. No reference is made to this circumstance by the writer of the opinion which denounces the act as local and special.[8]

He remarks "The statute is operative 'where two cities are contiguous and in the same county.' Its provisions can be invoked to annex only two cities, and when they are thus situated." Was the act local, because it provided for the union of two, but not of three or four cities? We are not informed. However, the writer approved the act of 1906, although it likewise provided for the union of only two cities.

Is it the fact that the act of 1905 provides for the union of contiguous cities only and not of incontiguous that makes the act improperly local and special? The writer of the opinion does not venture to suggest, that the classification of cities according as they are, or are not contiguous, is an inadmissable classification; when its object is to make provision for fusion. It would be quite too absurd to hold that the legislature may not provide for the union of cities that touch each other, without at the same time providing for the union of cities a mile, 5 miles, 10 miles, 50 miles apart. Moreover, the act of 1906, which has been approved by the writer of the opinion under examination, confines its operation to cities which are "contiguous or in close proximity to each other."

Is it the fact that the act operates only on two cities which are in the same county that condemns it? Apparently. "It therefore," says Mestrezat, J., "excludes from its provisions and denies its privileges to all cities separated by a county line, or which are not wholly within the same county, although occupying contiguous territory. * * * *

[8]Sample vs. Pittsburg, 212 Pa. 533.

This distinction made in the act between the cities of the commonwealth, is not based upon necessity, nor upon any grounds which the law (i. e. we, the judges) recognize as justifying classification." This apparently is the ground of offence.

But, is the distinction between cities in the same county and cities in different counties, with reference to their amalgamation, appreciably any more unreasonable than that between contiguous and incontiguous cities. It is at least unusual that one city or one borough is in part in one and in part in another county; that its territory is wholly within one city or borough, and at the same time partially within one county and partially in another. If the legislature thought fit to promote union of cities in one county, but not, of cities in different counties, would it be irrational? Why is the court not as willing to indulge it in the distinction founded on coexistence or not in the same county, as it is willing to indulge it in the distinction founded on the magnitude of the space intervening between the cities to be combined? Upon this highly interesting and vital question we look in vain for light in the lengthy opinion—it covers more than eleven pages. The writer indeed says this distinction is "not based upon necessity, nor upon any grounds which the law recognizes as justifying classification," but this means little. What are these grounds additional to "necessity?" And necessity is simply another term for appropriateness, convenience, promotiveness of desirable public ends.[9] To omit to include fragments of two counties in one municipality, seems to us not unjustifiable, even when provision is made for combining fragments of the same county in one municipality. We may remember with advantage the observation of Mitchell, J.[10] "Where the classification is based on genuine distinctions, its expediency is for legislative determination," or again, his declaration; "Classification is a legislative question, subject to

[9] Cf. Commonwealth vs. Gilligan, 195 Pa. 504.

[10] Stegmaier vs. Jones, 203 Pa. 47; Cf. Carn vs. Moir, 199 Pa. 534.

judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classificaeion void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification.[11] The remarks of Beaver, J., upon the undesirability of putting a part of one city into one county, and a part into another, by a fusion of a borough into a city, are applicable, when the fusion is of city and city.[12]

Much of the opinion indicates that the fact that the amalgamation of Pittsburg and Allegheny was the immediate present object of the legislature and that it adopted the general phraseology of the act of 1905, in order primarily to compass this object is deemed sufficient to condemn the statute as local and special. We know, says Mestrezat, J., "that the cities of Allegheny and Pittsburg in Allegheny county are the only two contiguous cities in the state, and that there are no two contiguous cities in any other county in the state. The act therefore is limited to these two cities, and the effect or result of the legislation is the same, and the act is clearly special as if the names of the two cities, and the effect or result of the legislation is the same, and the act is as clearly special as if the names of the two cities had been written in the statute instead of the periphrase used in the description of the cities subject to its operation." He confirms his belief that these two cities were intended, by the statement in the act that cities separated by a stream, river or highway, shall be deemed contiguous.

But, all the legislation for cities of the first class is in-

[11]Seabold vs. Commissioners, 187 Pa. 318. An act classifying bridges into those over streams separating counties, used by public, owned by corporations or private persons, used exclusively for vehicles and foot purposes, and destroyed by ice, flood, etc., or, abandoned by the owners and those not having all of these attributes and providing for the making of the former class public property, was held not local or special with respect to bridges.

[12]Sheradan Borough, 34 Super. 639.

tended for Philadelphia, and it may as well be said that that name might have been as well used in the legislation as the periphrases. The answer to the scruple is furnished by the decision from which he did not dissent in Pittsburg's Petition.[13] "That it applies now," says Brown, J., "and for the present can apply, only to the cities of Pittsburg and Allegheny, and that it was passed for them, can make no difference, if the legislation is general in form and substance, and is not within the prohibition of the constitution: Wheeler vs. Philadelphia, 77 Pa. 338. Individual needs and requirements are responsible for much legislation which now must be general, and when it is so, the causes that lead to it or the particular purposes it is to serve at the time of its enactment, have nothing to do with its constitutionality. It may meet at the time of its passage, the wants of but one community, but if, in the future it will meet these same wants of all other communities, the legislation is as general as if at the time of its passage, there had been no special reason calling for it."

It may be remarked that Mestrezat, J., persuaded himself that the act of 1905 was intended for Pittsburg and Allegheny, because he had judicial knowledge, not merely that there were no other contiguous cities in any county of the state, but that there were no other contiguous cities in the state. Logically, then, he should not have joined in the decision of Pittsburg's Petition.

Mestrezat, J., refuses to see any merit in the contention that at some time in the future, two other cities may become contiguous, and therefore the act of 1905 will furnish a method of their amalgamation. This rise of two other contiguous cities is a possibility so remote that it must be excluded from consideration. But, the legislation for cities of the first and second class has been in existence for 38 years, and during all that time, no second city has got within either class, although, in order to avoid such accession, legislation has been necessary, increasing the re-

[13] 217 Pa. 227.

quisite population. It must be remembered, too, that the possibility of two contiguous cities not in the same county, is scarcely more substantial than that of two contiguous cities within the same county, yet Mestrezat, J. and all his colleagues, seem to have found the act of 1906 not unconstitutional.[14]

It is now time to call attention to the utter unsubstantialness of the distinction between the two acts one of which six judges denounced as void, and the other of which, within a few months afterwards, all uphold. The difference between the acts is, that the earlier provides for the union of two contiguous cities in the same county, the other, of two contiguous cities. Both operate not on all cities, or all cities of any class, but upon cities which are contiguous to other cities. This is a serious narrowing of the range of the act. It applies not to cities 10 miles or 5 miles, or two miles apart, but to contiguous cities. Incontiguous cities are excluded. There are only two such cities in existence. They happen to be in the same county. If Pittsburg's Petition is to be taken seriously, and does not reverse Sample vs. Pittsburg (and it professes to do homage to the latter, by a long quotation) we are to understand that a statute providing for the amalgamation of two cities, which are contiguous and in one county, is local and special while one providing for the junction of two cities which are contiguous, whether they are in the same county or not, is not local or special. So, if any cities at all are to be susceptible of consolidation, cities in different counties must be allowed to consolidate.

But, after Pittsburg and Allegheny have been consolidated, which are in the same county, the legislature may repeal the act of 1906. Should it ever happen later that there are two cities separated by a county line, and two contiguous cities within the same county, it will be impossible to provide for the combination of the latter without making that of the former possible on the same terms. Unless perhaps, a more practical and sensible view of the effect of the constitution may gain a foothold in the judicial mind.

[14]Pittsburg's Petition, 217 Pa. 227.

MOOT COURT

COMMONWEALTH vs. ROPER

Murder—Testimony of Wife in Behalf of Husband—Cross-examination

STATEMENT OF FACTS

Murder:—Roper's wife testified for him showing an alibi. She was cross-examined as to having made statements that Roper had been near the place of the crime when it was committed. She denied having made these statements. The prosecution then offered proof that she had made them. Objected to, that the wife was thus virtually made a witness against her husband.

Doyle, for the Plaintiff.

Hoffman, for the Defendant.

OPINION OF THE COURT

C. Davis, J. The act of 1887 specifically states that "neither husband nor wife shall be competent nor permitted to testify against each other." The constitution reserves the right for anyone to refuse to testify incriminatingly against himself or herself, but there is no rule neither statutory nor at common law which forbids a wife to testify for her husband in the same manner as if the husband were testifying for himself, and could demand the reservations provided in the constitution and Act of 1887 above stated.

However, if a party offers testimony in his own behalf and in so doing makes statements at variance with remarks made previous to the trial, proof of this variance may be produced to attack the credibility of the witness. Permission to use cross-examination for this purpose is almost unlimited. 40 Cyc. 2714; Commonwealth vs. Rocco, 225 Pa. 113.

When a wife offers testimony for her husband, she automatically assumes a position similar to her husband, were he testifying instead, and can be cross-examined as to having made statements inconsistant with those offered at the trial, and proof of this inconsistency may be produced—Commonwealth vs. Varano, 258 Pa. 445.

Although in the case at bar, the proven inconsistancy of the wife's statements will diminish her credibility and ultimately be harmful to her husband's cause, nevertheless she assumes such a risk when she offers to testify.

Objection is therefore overruled, and proof of the wife's alleged inconsistant statements may be introduced.

OPINION OF SUPREME COURT

But little need be added to the opinion of the learned court below.

When the husband calls his wife to testify for him, he must know that her credibility can be attacked in the usual ways. Has she a bad reputation for veracity? Has she made assertions inconsistent with those she has made as a witness? She can be asked whether she has not made such inconsistent statements, and, her denial that she has will not conclude the question. Other persons may be called to prove that she has made such inconsistent statements. Such is the doctrine of Commonwealth vs. Varano, 258 Pa. 442, and so the court below has held.

Judgment affirmed.

MECHANICSBURG vs. HOOPER

Decedents' Estates—Real Estate—Liability of Devisee for Debts of Deceased Devisor—1917 Fiduciaries Act, Sect. 15, P. L. 476

STATEMENT OF FACTS

For injury to A from ice on pavement of X, he recovered from the borough $500 damages. X has died and 3 years afterwards Mechanicsburg sues X's estate for his negligent causation of the injury for which it has been made liable and obtains a judgment. This is a scire facias against X's administrator and Hooper, X's devisee of land, for the purpose of having execution against this land. The court has permitted the judgment to be obtained against the administrator, but not against Hooper. Appeal.

Lewis for the Plaintiff.

Hutchison for the Defendant.

OPINION OF THE COURT

FALVELLO, J. The main question presented by the facts for decision is whether or not the plaintiff had a lien, for the amount of its judgment against X's administrator, on the land of which X died, seized and which was devised to Hooper.

It is provided by Sec. 15(a) of the Fiduciaries Act 1917, P. L. 447, that "no debts of a decedent shall remain a lien on the real estate of such decedent longer than one year after the decease of such debtor, unless within said period an action for the recovery thereof be brought against the executor or administrator of such decedent, etc."

Was X at the time of his death indebted to the plaintiff? This question may be answered by a quotation from the recent case of Hollidaysburg Boro. vs. Snyder, 258 Pa. 490, at P. 493, where the court said "The limitation imposed by the act" (of June 14, 1901, P. L. 236 whose provisions were practically the same as those in Sec. 15 of the Fiduciaries act of 1917) "relates to debts of the de-

cedent existing at the time of his death, and nothing can be found in any of its provisions that extends it so far as to bring within its scope liabilities of any other kind or nature. At the time of the death of Anna C. Bell" (who owned the property where the 3rd party was injured) "there was no legal duty resting on her to pay the claim of Teresa Green" (the injured party) "which was afterward put to judgment against the borough. Because of its secondary liability, the borough was supposed to have a right of action over against the owner of the property as a primary debtor. But, this was at most unacknowledged and unliquidated so far as it concerned Anna C. Bell. Whether there was any legal liability upon her had not been ascertained and steps had been taken to determine that question. Until determined by a judgment obtained, whether amicably or by suit is immaterial, it remained simply a claim with none of the characteristics of a debt."

In the case at bar X died and three years afterwards the plaintiff sued his estate for his negligent causation of the injury. It is clear, therefore, that at the time of his death, X was not the plaintiff's debtor as respects the claim in this case. It was merely an unliquidated claim against X, which at his death did not become a lien on his real estate. Therefore, Hooper, X's devisee, took the land free from any liability whatsoever for the payment of the plaintiff's claim.

Since the plaintiff's claim was not a debt and, therefore, not a lien on X's real estate, the proceedings under scire facias against the administrator of X's estate and Hooper were of no effect whatever.

The decision we make in this case, only concerns the plaintiff's right to charge the land devised to Hooper with a lien for its claim. The judgment obtained by plaintiff against X's estate for the amount for which it was made liable to A in his action against it is not affected by this decision.

The judgment entered against X's administrator in the seire facias proceedings is reversed and the appeal from the order refusing to enter judgment against Hooper is dismissed.

OPINION OF SUPREME COURT

The distinction between "debt" and "claim," attempted in Hollidaysburg Borough vs. Snyder, 258 Pa. 490, is somewhat impalpable. If the lien of debts is to be limited, it can be thought that at least the same limitation will be applicable to "claims."

The 15th section of the Fiduciaries Act, P. L. 1917, p. 476, says that "no debts of a decedent" shall remain a lien for more than one year, unless suit is brought in that time against the executor or administrator. No suit has been brought against the executor or administrator, until more than three years after X's death. The liability of his lands to be taken in execution for "debts" or claims, has become extinct. The court has properly refused to allow a

judgment against Hooper, the devisee of the land. If there is any personal property, payment by the borough may be obtained from it, since only the six-year limitation is applicable to it.

The judgment of the learned court below is

AFIRMED.

JONES vs. SLOAN

Mortgages—Mortgage Bond—Release of Part of Mortgaged Premises—Discharge of Mortgagor

STATEMENT OF FACTS

Action on bond for $2,000. A mortgage for $2,000 accompanied the bond. Sloan later conveyed the mortgaged premises to X for $4,000 of which $2,000 was to be paid to the mortgagee. Subsequently the mortgage was released as to a part of the premises. Later the mortgage was enforced as to the other part and not enough was made to pay the debt. $1,000 of it remained unpaid. This is an action to recover on the bond this $1,000.

OPINION OF THE COURT

Teel for the Plaintiff.

Sternthal, for the Defendant.

VERBLUN, J. This is a case, which necessitates some thought, although much discussion is not required to express an opinion. The counsel for the plaintiff has presented a very able argument but has made one serious mistake. That is in this. The fact that an inference might be drawn that Jones knew of the transaction between Sloan and X and acquisced in it, is not a good reason for drawing an inference that Sloan was acquiescent in the release of part of the mortgaged premises. The reason for my so believing is this. If Jones did not know and acquiesce in the transfer from Sloan to X, still that would not change Sloan's position. He was liable on this bond whether Jones had knowledge and acquiesced or whether he had no knowledge and had not agreed to the transfer. 27 Cyc 1335.

On the other hand if Sloan did not know of Jones' release of part of the premises and acquiesced in this transfer, Sloan was released from liability. Estate of James Hunter, 257 Pa. 32. For this reason I think the plaintiff's case has no foundation and there can be no recovery here.

OPINION OF SUPREME COURT

Sloan gave a mortgage and a bond for $2,000. He subsequently conveyed the land for $4,000, of which $2,000 were to be paid to the mortgagee. Instead of enforcing this duty of the purchaser, by pro-

ceeding on the mortgage, Jones released a part of the premises from the lien of the mortgage, without consent of Sloan. The residue of the premises has not paid the remainder of the debt. We think, however, that by the release, Jones took the risk of the sufficiency of the premises not released to pay the debt. He can not recur to Sloan. The release may have been of a disproportionate amount of the mortgaged lands for the share of the debt which was paid. Indeed, the release may have been gratuitous. It would be unjust to allow Jones to deal capriciously with the land, at the expense of Sloan. "By such release," says Walling J., "the mortgagee assumes the risk of the unreleased portion of the property being of sufficient value to secure his debt." Estate of James Hunter; 257 Pa. 43; Meigs vs. Tunnicliffe, 214 Pa. 495.

In affirming the judgment below, we must say that the opinion indicates no effort to comprehend the case, and it is scarcely worthy of the ability of the writer.

Affirmed.

SLATER vs. ANDREWS

Negotiable Instruments—Promissory Notes—Accommodation Endorsement—Forgery—1901 Negotiable Instrument Act, P. L. 194

STATEMENT OF FACTS

A note for $1000.00 payable to X or order was made by Y for the accommodation of Y and to induce some one to advance the $1000.00 on it Slater's name was written on the back of it by Z, who had no precedent authority to do so. The note was then accepted for a consideration by P. P demanded payment of it after maturity from Slater who though not bound by the signature decided to pay and paid it. Andrews an earlier endorser is sued by Slater.

Morines for the Plaintiff.

Mervine for the Defendant.

OPINION OF THE COURT

SPENGLER, J. We hold that the plaintiff can not recover on the note. The important question in this case is, whether this is a forgery. If so, can it be ratified? Forgery is the false making of an instrument or materially altering one, with intent to defraud, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. In the case at bar Z wrote the name of the plaintiff on the back of the note with no authority to do so. When Z did this he performed the first essential of a forgery, namely, the false making or materially altering an instrument. The facts clearly bring out the point that the name of the plaintiff was placed on it with the intent to defraud, i.e., to induce some one to advance the $1000.00. When Z did this, he performed the second essential of a

forgery. "It is forgery to sign another man's name to a note, without authority, and with intent to defraud, and thus make the instrument appear to be a note of the person whose name is signed." Clark, on Law of Crimes, Par. 394.

The plaintiff contends that the act of Z can be ratified. It is needless to point out that a forgery can not be ratified. It has been held in this state by a long line of decisions that a forgery can not be ratified. Shisler vs. Vandike, 92 Pa. 447; Garret vs. Gontor, 42 Pa. 146; Building and Loan Assn. vs. Walton, 181 Pa. 201; Hall vs. Underwood, 11 Forum 188. The entire argument of the plaintiff is based on the case of Hall vs. Underwood, 11 Forum 188. This case is clearly distinguishable from the case at bar. In the first place the court there held that it was not a case of forgery. The court said: "He did not, apparently, forge it, for he was known by both Rhone and Hall, not to be Underwood and to sign the name of the latter, as agent and he professes thus to sign it." This same case holds that "a ratification for forgery is void; but a ratification of an act which is not a forgery, imparts validity." In the case at bar there existed no agency, real or apparent. In 181 Pa. 201, the Supreme Court expressed itself very emphatically upon the subject of the ratification of a forgery, in which it said: "Forgery does not admit of ratification. The forger does not act on behalf of, nor profess to represent, the person whose handwriting he counterfits, and the subsequent adoption of the instrument can not supply the authority."

The court does not deny that an unauthorized act of an agent may be ratified on the part of the principal. But in this case there existed no agency.

In the next place the provisions of the Negotiable Instruments Act of 1901 do not permit this action. Section 19 provides that the "signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency." Apparently this section seems to give the plaintiff a right to the action. But the court contends that the act was not intended as a backward step but to improve the principles applicable to negotiable instruments. When the legislature used the words "as in other cases of agency" it no doubt, intended that the words applied to the case where there was an apparent agency, or an agency as in a case of necessity. Taking some of the other provisions of the act into consideration we certainly can not give the interpretation of the plaintiff. Section 23 provides "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative and no right—to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." This section is not applicable to the plaintiff, for the exception applies to a party defendant.

Again we wish to call attention to the words "without authority of the person whose signature it purports to be." The facts of the case state that Z had not authority. Section 66 provides "Every endorser who endorses without qualification, warrants to all subsequent holders in due course,—that on due presentment, he will pay—the amount to the holder, or to any subsequent endorser who may be compelled to pay." In the case at bar the plaintiff was absolutely under no legal duty to pay it. No party whose name was legally upon the instrument could have compelled Slater to pay. The facts of the case bring out the point that Slater even knew that he was not bound upon the instrument, but that in spite of it, he decided to pay. He was clearly a volunteer, and as such he could not recover under this provision. Section 119 provides: "A negotiable instrument is discharged (4) by any other act which will discharge a simple contract for the payment of money." When Slater paid the note knowing that he was not bound by it, he discharged the note, and all parties liable on it, were thenceforth discharged from any further liability. Slater paid the note and his position is that of a person who takes with notice of infirmities. Section 124 provides that: "Where a negotiable instrument is materially altered without the consent of all parties liable thereon, it is avoided, except as, against a party who has himself authorized or assented to the alteration, and subsequent endorsers." Section 125 defines as an alteration any change in the number of parties or the relation of the parties.

The conclusion of the court is that the facts establish a forgery, that a forgery can not be ratified, that where one writes the name of another on the back of a note without any precedent authority, and with the intent to defraud, the person whose name is so written thereon acquires no right under such an instrument against the previous endorsers, and that when money is voluntarily paid, without request of the defendant, and with full knowledge of the facts, can not recover such money.

The court renders judgment for the defendant.

OPINION OF THE COURT

The signing of Slater's name by Z seems, as the learned court below concludes, to have been a forgery. It was without Slater's authority. It would not be the less a forgery, if Z believed that Slater would pay the note, as he actually has done.

The principle is clear, in this state, that validity can not be given to a forgery, by a ratification. But, is this principle applicable? It would be were the effort to bind Slater, on the ground that he had ratified the endorsement. But, no attempt is made to bind him on that or any other ground. He has chosen to pay and had paid the note, that is has become the buyer of it. It is his property. Will the court say that he is not the owner of it? We do not think it should.

As owner, he makes no use of his own endorsement. He can select any one of the series of endorsers, having given the one

selected proper notice of the non-payment of the note at maturity, and compel such person to pay. He has selected Andrews an earlier endorser. Why is he not to be paid by Andrews? Surely not, because he volunteered to buy the note, or, to pay the note. Cf. Hazelwood Brewing Co. vs. Siebert, 258 Pa. 9. He could not be deprived of this right, by the forgery of his name as an endorser.

From the conclusion of the learned court below, sustained as it is by a careful and well written opinion, we must dissent.

Reversed.

MASLIN'S ESTATE

Decedent's Estate—Wills—Corporation Stock—Surplus Profits—Dividends of Corporation—Life-tenant's Estate—Estate of Remaindermen

STATEMENT OF FACTS

Maslin owned 100 shares ($50 per share par) of the stock of the X Company. At his death it had a surplus of $100,000. He gave the stock in trust for his widow for life; remainder to his children. A year after his death, the surplus was divided by a stock dividend among the stock holders. Maslin owning one-tenth of the stock, 200 shares were alloted to the trustee. The widow claimed it. Ten years later, taken out of the profits earned during that time, another stock dividend of 50 shares was declared. The widow claimed this also.

Siegel for the Plaintiff.

Parnell for the Defendant.

OPINION OF THE COURT

KAUFFMAN, J. The questions presented by the facts of this case are: (1) Whether a stock dividend declared upon stock in the hands of a trustee from surplus accumulated before the death of the testator or creator of trust is to be considered as part of the corpus or as income to go to the life tenant? (2) Whether a stock dividend declared upon the same stock from earnings after the death of the creator of the trust is to be considered as a part of the corpus or as income?

In Earp's Appeal 28 Pa. 368, the Supreme Court in an opinion by C. J. Lewis, held that, the portion of the surplus profits accumulated before the death of the testator was an incident of the stock at the time of the death of the testator, and, therefore, was part of the corpus and should go to the trustee. But, that the surplus earned subsequent to the death of the testator was clearly income, and that regardless of the form in which the income was distributed it belonged to the beneficiary of the trust income, i.e.,

the life tenant. In that case, the testator devised certain stocks in trust for his children for their lives. Large surplus profits had accumulated upon the stock at the time of the death of the testator and continued to accumulate subsequent to his death, for several years. A stock dividend of 150 per cent. was then declared and issued out of the surplus profits. The principle laid down in this case has been repeatedly followed by our courts. Among the latest cases are Sloan's Estate, 258 Pa. 368 and McKeon's Estate, 263 Pa. 78.

Judgment is rendered accordingly. The 200 shares are alloted to the trustee, which is the portion of the surplus profits accumulated before the death of testator, and the 50 shares which represents the surplus earned subsequent to the death of the testator, are alloted to the widow.

OPINION OF SUPREME COURT

All the property of the corporation, after paying its debts, equitably belonged to the stockholders. Maslin at his death, owned one-tenth of the then surplus, as well as of the other property; i.e., so much of the corporate property, as equalled the par value of the existing shares. When he bequeathed the shares he bequeathed the right to one-tenth of this surplus which was attached to it. But, as he did not bequeath the shares absolutely, to the widow, but only the right to the dividends on them, during her life, so he did not bequeath the right to any part of the accumulations, but only the right to the interest or dividends therein, during her lifetime. Merely changing the form of the right, involved no change in its substance. It was before undivided in conception; but dividing it, into so-called shares, and alloting these shares to the holders of the pre-existing shares, makes no important difference. The court has properly concluded that this accumulated property does not change its ownership, by the stock-dividend. As it was before, the property of the trustee as of the other stockholders, so it remains. The duty on him is to account for the earnings of it, as they arise in the future, and the life tenant will be entitled to such as accrue during his life.

The stock that was issued to absorb earnings made since the holder's life, belongs to the life tenant. The money it represents is earnings which might have been, possibly should have been divided earlier, and in money. That the corporation has detained these earnings, and instead of paying them to the stockholders in money, has declared additional stock, can not change the ownership of this stock. The earnings, as they accrued, were divisible among the stockholders, those for life, and those absolutely, and the same persons are entitled to the additional stock that would have been entitled to the money dividends where place has been taken by the stock. Sloan's Estate, 258 Pa. 368, is sufficient authority.

The judgment of the learned court below is affirmed.

NEFF vs. OTT

Evidence—Witness—Cross-Examination — Credibility— Former Misconduct of Witness

STATEMENT OF FACTS

A witness for Neff was cross-examined by defendant for the purpose of discrediting him, whether 22 years before he had not kept a place for gambling, and 10 years before a saloon where liquor was illegally sold, and whether he had not lived in adulterous relations. The court allowed the questions. Verdict for defendant. Motion for new trial.

Rose for the Plaintiff.

Reynolds for the Defendant.

OPINION OF THE COURT

SCHOENLY, J. The court in the trial of the cause, permitted the following questions in the cross-examination of a witness for the plaintiff: (1) Whether 22 years before, he had not kept a place for gambling? (2) Whether 10 years before, he had not kept a saloon where liquor was illegally sold? (3) Whether he had not lived in adulterous relations? These questions were asked for the purpose of impeaching the testimony of the witness by discrediting him.

The questions, of themselves, were improper, and should not have been permitted. Comm. vs. Payne, 205 Pa. 101; Comm. vs. Williams, 209 Pa. 529; Comm. vs. Varano, 258 Pa. 422; Marshall vs. Carr, 271 Pa. 271.

Counsel for the defendant does not deny the impropriety of the questions nor question the authority of the cases cited in support of their inadmissability. But, he contends that since the questions were answered, the party who called the witness could not object. This contention is evidently based on the rule that it is the personal privilege of the witness to decline to answer such questions as may tend to incriminate him, and having answered them, the party calling the witness can not object.

We do not think however, that this rule is appliable to the case at bar. The witness could not have been prosecuted if he answered the first two questions in the affirmative, since the time of the commission of the acts mentioned is too remote for prosecution. Under Section 77 of the Act of March 31, 1860 (P. L. 450), 2 Purdon 2298, all indictments and prosecutions for all misdemeaners, perjury excepted, must be brought within two years after such

misdemeanor was committed. The witness could therefore, not have incriminated himself in answering the questions.

The facts of the case do not show as of what time the witness was accused of living in adulterous relations. But whether the witness would have incriminated himself or not by answering this question is immaterial to a decision of this case, in view of the plaintiff's right to object to the admission of the first two questions.

We think that the improper admission of the first two questions and answers unfairly prejudiced the jury against the plaintiff's case. A substantial injustice has therefore, been done the plaintiff, and a new trial should be granted.

Motion for a new trial granted, and a new trial ordered.

OPINION OF SUPERIOR COURT

Neff expected to win a verdict against Ott, the defendant, by the testimony of a witness. The influence of this testimony depended on the apparent credibility of the witness. He was asked on cross-examination, by the defendant, whether 22 years before he had not kept a gambling place, and 10 years before a saloon. To have done so would lesen the credit of the witness in the mind of a jury. Was this mode of impairing his credit permissible? According to Marshall vs. Carr, 271 Pa. 271, there are two objections to the mode: (a) When a reputation is relied on, to impeach a witness, it should be comparatively recent reputation, not so old as 22 years or 10 years, and, were evidence of bad conduct (not reputation) depended on to discredit the witness, the discrediting facts should be "misconduct of a comparatively recent date."

(b) The other objection is that "It is well settled in this state that a witness may not be cross-examined as to his alleged misconduct, or even criminal acts, entirely disconnected with the case on trial." That this principle is well settled we must believe, not because we have found a consistent assertion of it, but because the last dictum of the law making body has affirmed it.

Similar objections can be made to the question whether the witness had not lived in adulterous relations. When, does not appeal. The object of the question is to impair the credibility of the witness, in the judgment of the jury. It will naturally and legitimately do so, but the jury must not be permitted to know too much of the reliability of the witnesses. It must be left to grope after satisfaction as to their dependability.

The judgment is affirmed.

ELIZA CAMPBELL vs. THE COAL COMPANY

Negligence—Mines and Mining—Master and Servant—Props for Support—Failure to Furnish—Relative Duties of Mine Owner and Mine Foreman—Act of June 2, 1891, P. L. 176—Act of June 1, 1915, P. L. 712

STATEMENT OF FACTS

Campbell, husband of the plaintiff, was working in the anthracite coal mine of the defendant. He made a demand on the mine foreman for props to support the roof of the chamber where he was working, but the foreman neglected to furnish any. Ten days later he requested the superintendent to furnish props. He promised to do so but failed to furnish them for a week. Campbell, working in the chamber at the end of the week, was overwhelmed by falling roof and crushed to death. His widow sues the company. The defense is that the negligence was that of the mine foreman for which the defendant is not liable.

Reese for the Plaintiff.
R. Morgan for the Defendant.

OPINION OF THE COURT

WITLINGER, J. The question in the case at bar is whether or not the owner of an anthracite mine can prevent a recovery by the plaintiff upon the ground that the negligence perpetrated was that of the mine foreman for which he, the owner, would not be liable.

The early law in Pennsylvania as to the effect of this defense was set forth in Durkin vs. Kingston Coal Co., 171 Pa. 193, as follows: "It has been long settled that a mining boss or foreman is a fellow servant with the other employees of the same master engaged in a common business, and that the master is not liable for an injury caused by the negligence of such mining boss." This case cited Lehigh Valley Coal Co. vs. Jones, 86 Pa. 432; Delaware & Hudson Canal Co. vs. Carrol, 89 Po. 374; Waddell vs. Simoson, 112 Pa. 567.

In 1891, an act was passed, P. L. 176, relating to anthracite coal mines. Under this act it was necessary and obligatory that the mine owner employ a mine foreman who had been certified to by the state. It also attempted to impose liability upon the mine owner for the negligence of the mine foreman. (Section 8, Art. 17). This part of the act was held unconstitutional by the Supreme Court in Durkin vs. Kingston Coal Co., supra., in so far as it at-

tempted to impose liability on the mine owner for the failure of the mine foreman to comply with the provisions of the act which compels his employment and defined his duties. The latest case which states this to be the rule is Lynett vs. Scranton Coal Co., 269 Pa. 554.

The relation of the mine foreman to the mine operator as fixed by the Act of 1891, and as defined in Durkin vs. The Coal Co., supra, was greatly changed by the amendment to that Act approved June 1, 1915, P. L. 712. The Act of 1891 provided that it should not be lawful for any person to act as mine foreman unless registered as a holder of a certificate of qualification or service under the act; but , the amendment adds this provision, "Unless, in the judgment of the employer, he is a person possessed of qualifications which make him equally competent to act in such position." The amending act further provides that the owners "shall have supervision, direction and control of the mine foreman," and that the mine foreman shall be the agent of the operator.

On June 2, 1915, P. L. 736, the Workmen's Compensation Act was passed, which defined the liability of the employer to the employee for injuries received in the course of employment. Section 201 provides that in any action brought to recover damages for personal injuries to an employee in the course of his employment, or for death resulting from such injury, it shall not be a defense, (a) that the injury was caused in whole or in part by the negligence of a fellow employee, or (b) that the employee had assumed the risk, or (c) that the injury was caused by the negligence of the employee. Section 202 provides, "The employer shall be liable for the negligence of all employees, while acting within the scope of their employment, including mine foreman, fire bosses, mine superintendent, and all other employees licensed by the state or other governmental authority if the employer from the class of persons thus licensed; and such employees shall be the agents and representatives of their employers and the employers shall be responsible for the acts and neglects of such employees, as in case of other agents and employees of their employers, and notwithstanding the employment of such employees, the property in and about which they are employed, and the use and operation thereof, shall be at all times under the supervision, management and control of their employers." That this act was constitutional was held in Anderson vs. Carnegie Steel Co., 255 Pa. 33.

In the light of the foregoing statutes it is readily seen that whatever may have formerly been the sufficiency of the defense set forth it is now of no effect. Moreover, the facts of the case at bar show that the superintendent had also received notice and even prior to the passage of the acts of 1915 it was held that in such

case the mine owner was responsible for the negligence of the superintendent. Collins vs. The Coal Co., 241 Pa. 55; Sudnik vs. The Coal Co., 257 Pa. 226. Under the above cited acts of 1915 the mine owner is clearly liable for the negligence of his superintendant.

The defense in this case has been wholly confined to that above stated, namely, that the negligence was that of the mine foreman for which the defendant is not liable. No other question was raised and in view of the above mentioned authorities we are convinced that the defense is not a good one.

OPINION OF SUPREME COURT

It is unnecessary to prolong the discussion of this case. We affirm the judgment of the court below, upon its able opinion.

AFFIRMED.

JENKINS vs. TRUST CO.

Will—Trust and Trustees—Perpetuity—Rule Against Petpetuities—Intention—Effect of Voidness of Ultimate Trust Upon Intermediate Trusts

Broomall for the Plaintiff.

Rose for the Defendant.

OPINION OF THE COURT

SIEGEL, J. This is a bill by Jenkins, one of the children of the testator to have the trust created by the testator's will annulled, and to compel the trustee, the Trust Co., to convey the trust property to the children of the testator. The facts of the case, as presented by the bill are that John Jenkins, the testator, devised land to the Trust Company, in trust to pay the income to his children, or the survivor or survivors of them and on the death of the last to pay the income to the children of the children, for their lives, and to the survivors or survivors of them, and then to convey the land on the death of the last survivor of the grandchildren to the living children, that is, the testator's great grandchildren, as tenants in common.

Does the final disposition of the trust property violate the rule against perpetuities? The learned counsel for the respondent has directed some argument to this point.

The rule against perpetuities prohibits the creation of contingent interest in real or personal property, either legal or equitable, which must not vest within a life or lives in being and twenty-

one years thereafter. Tiffany on Real Property, page 344. If there is any possibility that a violation of the rule may occur, the interest attempted to be created is void. Lilley's Estate, 272 Pa. 143.

It is evident from the facts of the case that the final interest created is contingent. The parties in whom the corpus of the trust is to vest cannot be determined until the death of all the grand-children of the testator.

It is also clearly evident from the facts, we think, that there is a great possibility that the trust estate will not vest within the period allowed by the rule. By the will, the gift of the income of the trust estate to the children and the grand-children, and the gift of the corpus to the great-grand-children, is made in each case, as a gift to a class. No names are mentioned. The corpus of the trust is not to vest in the great grand-children until after the death of all the grand-children, whether now born or to be hereafter born. Even if there were grand-children living at the death of the testator, we think it is clear, that the vesting of the estate is postponed for a period which transcends the period allowed by the rule.

We therefore, find that the final disposition of the corpus of the estate, as attempted by the testator, violates the rule against perpetuities, and is void.

We now come to the consideration of the second and more difficult question of the case. The ultimate trust to the great grand-children being void, does its voidness affect the intermediate trusts and render them void also?

The determination of this question, we belieeve, is dependent upon a determination of the paramount intention of the testator in creating the trust, to be gathered from his will.

If the testator, intended, in the creation of the trust, that the trust should exist as a means to effect the final disposition of his property i. e. that the testator's paramount intention in tying up his property in a trust estate, was to insure that it descended unimpaired to the final beneficiaries, the voidness of the final trust voids the intermediate trusts and renders the entire devise invalid, since it is a well settled doctrine that a trust will not be sustained if the object of its creation is unattainable.

This rule appears to be the basis for holding of our Supreme Court in declaring the intermediate trusts void in the cases of Johnston's Estate, 185 Pa. 179; Gerber's Estate, 196 Pa. 336; Kountz's Estate (No. 1), 213 Pa. 390; Gessler vs. Reading Trust Co., 257 Pa. 329, and Lilley's Estate, 272 Pa. 243.

But if the dominant intent of the testator was to provide for his children and the creation of the void portion of the devise was only to prevent alienability by the children, so that they could not

imperil their enjoyment of the income during their lives, and the valid limitation is practically possible of separation from the void, then the entire devise will not be struck down, but effect will be given to the valid portions of it.

On these grounds are based the decisions in Moore's Estate, 198 Pa. 611: Goddard's Estate, 198 Pa. 454; Whitman's Estate, 248 Pa. 285. In Ewalt vs. Davenhill, 257 Pa. 385, the decision of the court is based upon the ground that the valid trust is practically severable from the invalid trust. The statement of the court, in that case, that "where an active trust of the corpus is created to pay the income to one for life, it will not be defeated because of the failure or invalidity of the gift over of the estate," we think is not necessary to the decision of the case, and is obiter dicta, unwarranted by the decisions in previous cases in which the question was involved.

The doctrine of our courts on the question before us was concisely summarized by Mr. Justice Kephart in Lilley's Estate, supra. "It does not follow that simply because the ultimate interests are void, the prior interests too must collapse; only offending limitations are void. But in Pennsylvania, where the limitation of the prior and ulterior estates are so intimately and inseparably intertwined that the failure of the latter disturbs the main and dominant purpose of the testator, of which the prior limitations are a part, such prior and ulterior estates are void; so too when the prior estate is but a mere agency to accomplish a transgression of the rule."

There undoubtedly is always very great room for error in determining what the paramount object of the testator was. The court's interpretation of the paramount intent of the testator in the cases of Johnston's Estate, supra, and Gerber's Estate, supra, has been criticized by eminent authority in 12 Forum 154-155.

But after a careful consideration of the language of the testator's will, we have come to the conclusion that the case at bar comes within the class of cases governed by the latter part of the rule as enunciated by Mr. Justice Kephart. We think that the paramount intention of the testator in creating the trust was not so much to provide for his children, but to prevent his children and grand-children from squandering his estate and thus deprive his further removed descendants of any interest therein. If the testator had desired merely to provide for his children, he could have, and undoubtedly would have, given them the property in fee. If he feared that his children would imperil and destroy their income from the estate by alienating it, the testator could have created a trust estate for their benefit with the power of appoint-

ment to dispose of the estate at their death. But he did not do that. He directs specifically to whom the corpus is to go.

Whitman's Estate, supra, has been cited in several late cases as authority for the proposition that intermediate estates are not infected by the voidness of the ultimate estate. It is so cited in Price's Estate, 260 Pa. 376. We do not think that the true doctrine of the case is broad enough to warrant such citation.

In that case the testator bequeathed his estate to trustees with directions to pay the net income to his wife for life; upon her death to his daughter for life, "free from the control of any husband she may now have or hereafter take;" upon the death of said daughter to divide the principal among the children of said daughter in equal shares, the shares of any male children to be paid to them on their, respectively, attaining the age of 21 years; the shares of the female children, to be held in like trust as declared for the daughter, and upon the decease of any of the female grand-daughters, to divide and pay over their respective shares to their lawful issue, and in case the daughters died without leaving issue, then the corpus to be paid to charities. The court held that the dominant intent of the testator was to provide for his wife and only child during her life; that the subsequent limitation to the daughter's descendants were secondary; and that the ultimate trust was practicably severable from the intermediate trust, and that though the ultimate trust was void, the intermediate trust to the daughter was valid.

It is clearly evident from these facts that the testator intended to so dispose of his property that his wife first have the benefit of it and then his daughter. But in order that the daughter might enjoy the estate free from any interference by a husband, the trust is created. This intention, we think, is clearly shown by the provision in the will that the daughter's income shall be free from the control of any husband she may have or take. By the limitation over to the charity, we think the testator further demonstrated that his paramount intent was to provide for his wife and daughter and not to transmit the estate to his grand-children. As the court points out, the two estates in that case are practically severable, since even if the gift to the grand-children and great grand-children is declared void, the ultimate disposition will then be to the charity, which is unquestionably valid, under the rule that a disposition to a charity is not affected by the rule against perpetuities. Act of May 9, 1889 (P. L. 173). In the case at bar, however, a practicable severance of the void from the valid estates is not possible. The ultimate disposition being void, if the intermediate estate is considered not to be affected, who gets the corpus of the estate? Un-

der such a holding, necessarily, the grand-children. But the testator specifically stated in his will that they should only receive the income.

The case of Geissler vs. Reading Trust Co., supra, presents facts somewhat similar to those of the case at bar.

In that case, the testator had created a trust the income of which was to go to certain children, by name, for life, and after their death to their children as a class, and after the death of the last of such grand-children, then the corpus to vest in the testator's great grand-children, per capita. Although the opinion of the lower court, approved by a per curiam opinion of the Supreme Court, does not directly say what interpretation the court places upon the intent of the testator from the facts, yet the cases cited in support of the statement that, "the antecedent estate thus falls, and the heirs at law of this testator are entitled to immediate possession," indicate, we think, that the court believed the dominant intent of the testator to be that the intermediate trusts should be only a means of transmitting his estate to his great grand-children.

We conclude, therefore, that the testator in the case at bar desired to transmit his estate, unimpaired, to his great grand-children. His intent, however, is violative of the law, and cannot be carried out. The object of the trust being thus unattainable, the means to attain that object must also fall, and the testator must be considered as having died intestate in so far as the property in question is concerned.

We cannot, however, grant the prayer of the petitioner in its entirety. The bill does not show affirmatively that the children of the testator are his only heirs at law. The testator having died intestate, as to the trust property, distribution must be made under the intestate laws. The trust property will therefore be placed in the hands of a duly qualified administrator, as provided for by Section 3 (c) of the Fiduciaries Act of 1917, (P. L. 459), who will make proper distribution of the property.

We therefore decree that the trust created by the will of John Jenkins, deceased, be annulled, and direct that the trustee, the Trust Company, transfer the trust property to the duly qualified administrator, who will make proper distribution.

OPINION OF SUPREME COURT

We have read with much satisfaction the careful opinion of the learned court below.

The rule against perpetuities applies to trust estates as well as to others.

The gift of the legal estate to the great grand-children, is in defiance of the rule.

Should, however, the trust have been permitted to operate so long as the beneficiaries of it took an interest, the vesting of which was not unduly postponed?

It is difficult to harmonize the cases on the question whether, if a series of trusts is created the whole series becomes void, if the last term of the series is for any reason void.

The learned court below has possibly dealt with this question as well as the state of the adjudications makes it possible to deal with it.

The appeal from the decree is DISMISSED.

ESTATE OF JOHN SLOAN

Contracts—Suretyship—Payments—Independent Debt of Principal to Same Obligee—Application of Payments—Decedent's Estates

STATEMENT OF FACTS

Harris lent $1,000, to Wm. Sloan, taking from him (a) his note for $1,000, and (b) another note for $1,000, which was signed by Wm. and John Sloan, (brothers). Subsequently, William contracted to borrow from Harris to the extent of $2700. He made payments from time to time, not specifying the debt to which they should be applied. Harris, however applied them, without John's knowledge, to the subsequent created debt. The result is that none of the payments were appropriated to the $1,000 debt, for which John Sloan became surety. He has died. A claim for $1,000 is made upon the note, against his estate.

Doehne, for Plaintiff.

Falvello, for Defendant.

OPINION OF THE COURT

BORYS, J. The questions to be determined by this court upon the established facts stated above are: First, whether a creditor has the right to apply a payment, made by his debtor, to a debt that is least secured. Second, whether the estate of John Sloan shall be liable for the promissory note of $1,000, upon which he as surety was jointly and severally liable with the principal debtor, when payments were applied without notice.

Considering the first question, the general rule, found in 39 Cyc. 1233, is stated as follows: "A creditor may apply a payment voluntarily made by the debtor, without any specific appropriation, where there are two or more debts, to whichever debt he pleases."

In the case before us there were two debts; one secured, the other unsecured. There was a number of payments made by the debtor to the creditor and each time the debtor failed to inform the creditor to what debt to apply the payments. In the absence of such stipulation it appears the creditor applied the payments to the debt that was least secured.

In Hoover vs. Summerville, 67 Pa., Super. 547, concerning the rule relating to the application of partial payments, the court said: "The debtor may direct and control their application; in the absence of any such direction by the debtor, the creditor may make their application; and in the absence of any application thereof by either debtor or creditor, the law will make the application in accordance with the equities of the parties, generally making it to the first or older indebtedness, preferring however the unsecured to the secured claims." The following cases are cited as authority for the rule, supra; Chestnut St. Trust, Etc. Co. vs. Hart, 217 Pa. 506; Richard's Est., 185 Pa. 155; Creasy vs. Reformed Church, 1 Pa. Super. 572. In view of the Pennsylvania decisions the conclusion is, therefore, that the creditor properly applied the payments to the debt least secured.

Considering the second question, the rule, founded in 32 Cyc. 171, provides: "If the principal when making the payment omits to designate how he wishes the money to be applied, the creditor may apply it to any part of the indebtedness of the principal, a surety not having any right to insist upon the application to the debt for which he is liable, nor does it make any difference that the surety was not aware of existence of any other indebtedness of the principal than that for which the surety, became liable." Arbuckle vs. Chadwick, 146 Pa. 393, was decided in accordance with the above rule.

As the weight of authority, seems to be that no notice to surety of application of payments to unsecured claim, was necessary, had he been notified he would have had no right to insist upon application of payment to note for which he was surety. His estate is therefore liable, and the court must allow a recovery.

OPINION OF SUPREME COURT

A surety has a right to the application of securities given by the debtor, for the same debt, not only those given when the surety became bound, but those given subsequently. Spencer on Suretyship, p. 181. It does not seem to follow that, if the creditor receives a payment, having several claims, he is bound to apply it to the debt for which the surety is bound. The right of appropriation is with the debtor; or, he not appropriating, with the credi-

tor. The latter is not bound to apply the payment in discharge of the surety. The decision of the learned court below acords with several cases in this state, the latest of which is Markert's Estate, 252 Pa. 622. The judgment is therefore

AFFIRMED.