Dickinson Law Review - Volume 28, Issue 8

Dickinson Law Review

Vol. XXVIII May, 1924 Number 8

Subscription Price, $1.50 per Year

REVIVAL OF JUDGMENTS BY SCIRE FACIAS[1]

The entry of judgment in common pleas creates a lien upon the real estate of the defendants therein. While this lien is not the object of the judgment and is but an incident thereto, it is nevertheless the basis for realizing the object of the judgment. The lien is not an estate in the lands of the judgment debtor but it makes it possible for the levy of an execution issued upon the judgment binding the land, to attach upon the land as of the date of entry of the judgment, thereby giving a prior judgment creditor a prior claim upon the fund realized by the sale of the land. Thus the judgment creditor and the judgment debtor are not the only persons interested in the judgment lien. There may be heirs or devisees of the defendant, subsequent purchasers and mortgagees of the land and other lien creditors of the judgment debtor. All these are vitally concerned with the extent of this lien.

[1]It is not the purpose of this discussion to treat this subject exhaustively. It is the wish of the writer that it may be considered as an exposition to assist the student rather than an attempt to provide an authoritative treatise for the practitioner.

As between the creditor and debtor in the judgment, the judgment has fixed for all time the status of the parties as to the matter at issue and their respective rights and liabilities. The mere passage of time does not defeat the rights of the creditor nor relieve the debtor of his liability. As between the plaintiff and the defendant, therefore, the lien of the judgment continues to bind the real estate of the defendant as long as his liability under the judgment continues.

The devisees and heirs of a deceased judgment debtor are mere volunteers and take but what is left of their ancestor's estate after the debts are paid. A judgment against a decedent in his life time, therefore, remains a lien upon his real estate as against himself, his heirs and devisees, without revival."

Legislature, however, has spoken in relief of subsequent purchasers and lien creditors. The Act of April 4, 1798, 3 Sm. L. 331, provides that "no judgment.....shall continue a lien on the real estate of the person against whom such judgment may be entered for a longer term than five years." The Act of 1827 supplemented by the Act of June 1, 1887, P. L. 289, provides that "all judgments.....shall continue a lien on the real estate of the defendant for the term of five years from the day of entry or revival thereof, and no judgment shall continue a lien on such real estate for a longer period than five years from the day on which judgment may be entered or revived, unless revived within that period." The words of the Act might apply without distinction between the rights and liabilities of the debtor, his heirs, devisees and subsequent purchasers and lien creditors, but the courts have been uniform in holding that the lien of the judgment is restricted to a period of five

---

[2]Shannon v. Newton, 132 Pa. 375; Sankey v. Commonwealth Trust Co., 22 D. R. 1081.

years as against only subsequent lien creditors and purchasers from the debtor.[3]

The Act of 1887 supra, continues and provides the methods for reviving judgments "by agreement of the parties and terre-tenants filed in writing and entered on the proper docket, or a writ of scire facias to revive the same be sued out within said period." There are, however, other circumstances when the lien of a judgment continues beyond the five year period as against subsequent lien creditors and purchasers under the defendant. "All judgments which at the time of the death of a decedent shall be liens on real estate owned by said decedent at the time of his death..... shall continue to bind such real estate during the term of five years from his death although such judgments be not revived by scire facias or otherwise after his death. Such judgments shall during such term rank according to their priority at the time of such death."[4]

We are concerned, however, at the present writing with revival of judgments by scire facias only.

The Acts uniformly provide, in order that the lien of a judgment continue more than five years, that a writ of scire facias to revive the same be sued out within said period. Former acts provide that the five year period be computed "from the first return day of the term of which said judgment may be entered."[5] More recent acts, however, provide "all judgments.....shall continue a lien.....for the term of five years from the day of entry or revival

---

[3]Zeigler v. Schall, appant., 209 Pa. 526. There are several classes of judgments, however, which are not subject to the limitation. Thus the lien of a judgment in favor of the Commonwealth is not lost by lapse of time. Commonwealth v. Baldwin, 1 Watts 54. Nor a judgment for arrears of ground rents. Wills v. Gibson, 7 Pa. 154.

[4]Act of June 7,1917 P. L. 447, Sec. 15 H.

[5]Act April 4, 1798, 3 Sm. L. 331.

thereof."[6] The judgment is "entered" when lodged with the prothonotary when later indexed and docketed as of that date in the regular routine of the office,[7] and the judgment docket is prima facie evidence of the time when and of the order in which liens are entered.[8] The five year term during which the judgment is "alive" is computed by excluding the day upon which judgment was entered and including the whole of the last day of the five years. Thus a judgment entered April 17, 1876, must be revived by issuing scire facias on or before April 17, 1881. But if the last day, April 17, 1881, falls on Sunday a scire facias issued on the next day, Monday, April 18, 1881, will save the lien.[9] The scire facias must be "sued out" within the five year period. This is not done by merely filing the praecipe for the scire facias within the five year period if the scire facias is not actually docketed and issued within that time. The scire facias must be issued and docketed within that period.[10]

The formal requisites of a scire facias are simply that it must identify the original judgment as to parties[11] date,[12] amount[13] and number and term.[14] The sufficiency of the identification is a question of law for the court and is raised by a plea nul tiel record. The failure to sufficiently identify the original judgment is not a mere irregularity of form which can be raised or waived by the defendant

---

[6]Act June 1, 1887, P. L. 289.

[7]Burns v. Burns, 18 Phila. 389.

[8]Polhemus's Appeal, 32 Pa. 328.

[9]Lutz Appeal, 124 Pa. 273.

[10]Hock's Appeal, 1 Pitts. L. J. 325. Johns Estate, 253 Pa. 532: "A writ is not issued or sued out until it passes from the hands of the prothonotary to the sheriff for service."

[11]Orcutt v. Auar, 30 D. R. 1062; Grennell v. Sharp, 4 Whart. 344; Deitrick's Appeal, 107 Pa. 174.

[12]Wormar's Appeal, 110 Pa. 25.

[13]Walker v. Pennell, 15 S. & R. 68.

[14]Worman's Appeal, 110 Pa. 25.

only; it is a matter of substance which can be raised by subsequent lien creditors. The Acts of Assembly restricting the lien of a judgment to five years were passed for the protection of purchasers and subsequent lien creditors and have no effect upon the liability of the defendant. Thus as against the defendant the formality or informality of the revival is of slight importance but as against purchasers and subsequent lien creditors the revival must be in substantial conformity to the Acts of Assembly, otherwise the judgment is not revived and looses any priority it may have on the list of liens, and the question may be raised by any purchaser or subsequent lien creditor.[15] The scire facias should recite the parties as they appear in the original judgment, the number and term of the original judgment, the date of entry and the amount. The scire facias is usually drawn according to the instructions contained in the praecipe entered, it is therefore essential that the praecipe for the scire facias be correct.

While the courts have and will permit a liberal exercise of the right to amend,[16] amendments which prejudice the rights of subsequent lien creditors or purchasers will not be permitted. Especially is this true where a judgment lien has expired and the effect of the amendment would be to reinstate the judgment lien to its former priority to the injury of another lien creditor.[17]

The effect of "suing out" a scire facias to revive is to continue the lien of the original judgment for five years from the day the writ is issued.[18] The Act of 1887 supplementing the provisions of the former Act of 1827, provides the "suing out" of a writ of scire facias to revive shall operate to continue the lien of the original judgment for five

---

[15]Deitrich's Appeal, 107 Pa. 174.

[16]Schmidt v. Zeigler, 30 Sup. 104; Handley v. Walsh, 49 P. L. J. 285.

[17]Duffey v. Houtz, 105 Pa. 96.

[18]Silverthorn v. Townsend, 37 Pa. 263.

years more. But the writ must be duly prosecuted or the lien will be gone at the end of that period. And the courts have construed "due prosecution" to mean the obtaining of judgment of revival on the scire facias within five years.[19] It may be noted further in this connection that while suing out the writ within five years of the entry of the original judgment extends the lien of the original judgment for five years from the date the scire facias is issued, the entry of judgment of revival on the scire facias extends the lien for five years more. While this may seem to give greater effect to the scire facias than is intended by the acts this construction is necessary in order to give the statutes effect.[20]

The revival of judgments to continue their lien as against the defendant, subsequent mortgages and lien creditors presents few difficulties. That is not the case, however, as to purchasers or terre-tenants. A terre-tenant is one who purchases real estate, mediately or immediately from the defendant in a judgment, while it is bound by the judgment.[21] These elements therefore appear to be essential in order that one be a terre-tenant: (1) He must be a purchaser of the estate mediately or immediately from the debtor, and (2) the estate must be bound by the lien of the judgment when he takes title.[22] The widow, heirs or devisees of a deceased judgment debtor are not terre-tenant and as such entitled to the same notice that must be given to terre-tenants.[23] An assignee for the benefit of creditors of a judgment debtor is a volunteer and not such a purchaser as would constitute him a terre-tenant,[24] nor is a trustee in

---

[19]Silverthorn v. Townsend, 37 Pa. 263; Lichty v. Rochester, 91 Pa. 444; Phila. v. Scott, 93 Pa. 25.

[20]Ahl's Estate. 6 D. R. 393.

[21]Dengler v. Kiehner, 13 Pa. 38.

[22]Dengler v. Kiehner, 13 Pa. 38.

[23]Specht v. Sipe. 15 Sup. 207.

[24]Fulton's Estate, 51 Pa. 204.

bankruptcy a terre-tenant.[25] Judgment creditors and mortgagees are not included among the beneficiaries of the acts regulating notice to terre-tenants.[26]

The Act of 1798[27] provides for the extension of the lien of a judgment for five years after the first period of five years had expired by suing out a writ of scire facias to revive the judgment. This writ of scire facias was to be served on the terre-tenants or persons occupying the real estate and when possible on the defendant, and where not possible to serve in this manner, proclamation could be made in open court at two succeeding terms by the court crier calling upon all persons interested to show cause why judgment should not be revived; whereupon the court being satisfied of such service and no cause being shown contrary, should direct revival of the judgment against the real estate of the defendant for another period of five years.[28] The Act of 1827[29] provided also for the revival of judgments by agreement of the parties and terre-tenants, filed in writing and entered on the proper docket. These acts made notice to the terre-tenant a prerequisite to a valid revival of the judgment against the land held by the terre-tenant.[30] The terre-tenant was bound by the revival: (1) if he was a party to the amicable scire facias,[31] (2) if he was served by the writ personally, (3) if his tenant or the occupier of the land owned by him was served,[32] or (4) by revival after proclamation in open court.[33] If the judgment is thus revived the terre-tenant is estopped from questioning the

---

[25]Ephretta National Bank v. Sheaffer, 18 Lac. 385.

[26]Lesher v. Gillingham, 17 S. & R. 123.

[27]Act April 4, 1798, 3 Sm. L. 331 Sec. 2.

[28]Act April 4, 1798, 3 Sm. L. 331 Sec. 3.

[29]Act March 26, 1827, P. L. 129.

[30]Armstrong's Appeal, 5 W. & S. 352.

[31]Armstrong's Appeal, 5 W. & S. 352.

[32]In Re Dohner's Assignees, 1 Pa. 101; Geiger v. Hill, 1 Pa. 509.

[33]Colley v. Latimer, 5 S. & R. 211.

creditors lien, but he is not thereby made a defendant in the judgment or personally liable for the debt.[34]

The effect of failing to thus notify the terre-tenant was to relieve his land from the lien of the judgment.[35] The practice grew up under these acts of issuing a scire facias and directing the sheriff to serve the same upon all terre-tenants. In this manner persons were served and made parties who had no interest in the judgment and but slight interest in the property bound thereby. There was no hardship arising from this, however. The hardship under these laws was upon the judgment plaintiff who was compelled to notify the terre-tenant at the risk of losing his lien upon the land. Thus it frequently happened that a dishonest terre-tenant could defraud the judgment creditor by withholding his deed from record and staying out of possession of the land bound by the judgment.[36]

This condition gave rise to the Act of April 16, 1849, P. L. 663 Section 8. This act provides "in all cases when a judgment has or shall be regularly revived between the original parties, the period of five years during which the lien of the judgment continues, shall only commence to run in favor of the terre tenant from the time that he or she has placed their deed on record: Provided that this act shall not apply to any case which has been finally adjudicated or when the terre-tenant is in actual possession of the land bound by such judgment by himself or tenant." The intent of this act was to protect the judgment creditor from the uncertainty incident to the practices growing out of the acts of 1798 and 1827. It restricted the rights of the terre-tenant. Under it the terre-tenant is entitled to notice of the scire facias to revive only when the judgment creditor has notice that the land bound by his judgment is owned by another than the judgment debtor. Such notice

[34]Eberhart's Appeal, 39 Pa. 512.

[35]Chahoon v. Hollenback, 16 S. & R. 425; Barrell v. Adams, 26 Sup. 635.

[36]Armstrong's Appeal, 5 W. & S. 352.

may be given in two ways under this act. The first is the constructive notice which everyone is presumed to have when a deed of transfer is placed on record. The second notice is by actual occupancy and possession of the land by the terre-tenant. The courts have held that record notice does not bind the judgment creditor unless the record shows every step in the passage of title from the judgment debtor to the terre-tenant. The recording of an isolated deed to the property does not entitle the terre-tenant to notice of the scire facias.[37] Possession of the premises, in order to be notice to the judgment creditor, must be exclusive of the judgment debtor. There must be a clear change of possession.[38] It has been held, however, that where the possession of the terre-tenant is not exclusive of the judgment debtor, but is accompanied by actual knowledge of the judgment creditor that the title is in the terre-tenant, so that there can be no uncertainty in the mind of the judgment creditor as to who is in possession by right of title, then the terre-tenant is entitled to notice of the scire facias.[39] In no case is actual notice alone sufficient.[40]

The effect of this act is to continue the lien of a judgment against the land in the hands of the terre-tenant by keeping the judgment "regularly revived between the original parties" so long as the terre-tenant shall not have gone into possession or placed his "title" on record. And where the terre-tenant has gone into possession or placed his title on record, and where the judgment is kept alive as between the original parties, the five year period runs in favor of the terre-tenant from the date he goes into possession or

---

[37]Smith v. Eline, 18 C. C. 560.

[38]Buck's Appeal, 100 Pa. 109; Meinweiser v. Hains, 110 Pa. 468.

[39]Wetmore v. Wetmore, 155 Pa. 507.

[40]Wetmore v. Wetmore, 155 Pa. 507.

records his title.[41] And a scire facias to revive, or an alias scire facias to revive, may be sued out within this five year period to revive the judgment as against the terre-tenant. Thus judgment is entered against A on October 8, 1875; on March 14, 1876, B purchases property from A and records deed and goes into possession on March 17, 1876. On November 23, 1877, scire facias is issued against A alone, without notice to B, the terre-tenant. On March 7, 1881, while the judgment was alive against A, and within five years after B placed her deed on record and entered into possession, an alias scire facias was issued against A, the defendant with notice to B, the terre-tenant. It was held that the judgment was properly and legally revived against B.[42] It should be observed that to bind the terre-tenant it is absolutely necessary that the judgment be "regularly revived" between the parties.[43]

---

[41]Porter v. Hitchcock, 98 Pa. 625; Lyon v. Cleveland, 170 Pa. 611; Uhler v. Moses, 200 Pa. 498. It must be noted that the Act of 1849 expressly excludes from the operation of the act cases "where the terre-tenant is in actual possession of the land bound by such judgment by himself or tenant." Yet the courts seem to apply the act to such cases when they say "unquestionably, the obvious intent of this act (1849) was to continue the lien of the original judgment against the land of the debtor by a revival against him alone, unless the purchaser or terre-tenant put his deed on record, or was in actual possession, in which cases the five years commenced to run in his favor from the date of recording the deed, or from the date he took possession of the land, personally or by his tenant." It would seem more reasonable and logical to suppose that if the Act of 1849 is not to apply where the terre-tenant is in actual possession, that the law as it existed before 1849 would apply to such a case, so that the five years would run in favor of the terre-tenant from the date of entry of the judgment immediately preceding the taking of possession by the terre-tenant, whether such judgment was entered originally, or by revival. Searight's Estate, 163 Pa. 210.

[42]Porter v. Hitchcock, 98 Pa. 625.

[43]Pipher v. Duke, 13 Pa. Sup. 279; Produce Co. v. Dellapa, 1 D. & C. 216.

The law, however, is further modified by the Act of June 1, 1887, P. L. 289, which provides "and no proceeding shall be available to continue the lien of said judgment against a terre-tenant, whose deed for the land bound by said judgment has been recorded, except by agreement in writing, signed by the terre-tenant and entered on the proper docket, or the terre-tenant or terre-tenants, be named as such in the original scire facias." This act is not repugnant to the Act of 1849.[44] Whereas the act of 1849 restricts the rights of terre-tenants, this act places upon the judgment creditor the duty to name the terre-tenant in the original scire facias if his deed is on record. If the terre-tenant has not placed his deed on record the Act of 1849 applies. The judgment being regularly revived as between the parties, the lien of the original judgment will continue against the terre-tenant for five years after he places his deed on record. Thus, October 6, 1892, judgment entered against A. June 26, 1895, A conveys land to B. November 13, 1895, B places deed on record. October 6, 1897 scire facias issued against A and served on A. December 7, 1897, alias scire facias issued against A, and B named as terre tenant. Court held revival against B invalid because B had not been named in original scire facias as provided in Act of 1887. On April 13, 1898, plaintiff issued fiere facias upon the original judgment, with notice to B as terre-tenant. Court held fiere facias was valid, being issued within five years after B put her deed on record, and thereby being within the terms of the Act of 1849.[45] It will be observed that it is the lien of the original judgment, or the judgment binding the land when the terre-tenant places his deed on record, which continues for five years from that date. The revival itself has no effect upon the terre-tenant unless he be named in the original scire facias. To have held that the act of 1887 repealed the act of 1849 would have had the

[44]Uhler v. Moses, 200 Pa. 498.

[45]Uhler v. Moses, 200 Pa. 498.

effect of extending the rights of terre-tenants even beyond those enjoyed under the acts of 1798 and 1827. While to hold that the acts of 1849 and 1887 are not repugnant is to restrict the rights of terre-tenants as before, but to require of the judgment creditor due caution and diligence in pursuing the land bound by his judgment.

It is entirely conceivable that the most equitable practice might be to hold the judgment creditor to the status of the title and possession as it is when the scire facias to revive is issued; thus requiring the judgment creditor to name the terre-tenant in the original scire facias only when the terre-tenant has placed his title on record or gone into possession. And relieving the land of the terre-tenant from the lien of the judgment when he has recorded his title or gone into possession, as provided under the act of 1849, unless the judgment creditor names him in the original scire facias as required by the act of 1887.[46] This practice,[47] however, is not possible if we hold that the two acts are entirely reconcilable. [48]

While the act of 1887 makes no reference to a case where the terre-tenant has gone into possession before the scire-facias to revive has been issued, it has been held that the same rule applies and that the terre-tenant must be named in the original scire facias when he has gone into possession before the scire facias is issued. Such a doctrine is certainly in line with the development of the practice in this phase of the law.

ROBERT L. MYERS, Jr.

---

[46]Uhler v. Moses, 200 Pa. 498.

[47]Suter v. Findley, 5 Sup. Ct. 163; 3 Trickett on Liens 212.

[48]Salmon v. Bachman, 8 Pa. C. C. 144.

MOOT COURT

SLOAN VS. PARVIS

Promissory Notes—Alteration—Evidence—Province of the jury—Negotiable Instruments Act May 16 1901,—P. L. 194.

STATEMENT OF FACTS

Suit on a negotiable note for $1000. The figures 190 were at the place of the year date. Over the 0 a 1 was written, and this was followed by a 2 making the year 1912. Parvis admitted that he made the note, but he objected to the reception of it in evidence until there was satisfactory explaining of the alteration. Sloan contends that innocence, not guilt is to be presumed and that the burden was on Parvis to show that the change had been made without his authority. The court excluded the note.

Wise, for the Plaintiff.

Fager, for the Defendant.

OPINION OF THE COURT

Kornreich, J. This is a suit by the payee against the maker of a negotiable note, on which the year date showed visible alteration.

Section 124, of the Negotiable Instruments Act of 1901 says: Where a negotiable instrument is materially altered without the assent of the parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration. And in section 125 it goes on to say that any alteration which changes the date is a material alteration.

There can be no doubt that the note in this case clearly shows on its face an apparent alteration in a material part of it and this point is not in dispute. The question is, then, in a suit on a negotiable note showing apparent alteration, on whom does the burden lie of proving this alteration was lawfully made.

Beginning with the case of Simpson vs. Stackhouse, 9 Pa. 186 it has been uniformly held that the onus of showing that an alteration in a material part of a negotiable instrument was lawfully made, is on the holder. In that case Chief Justice Gibson in the course of his opinion says in part as follows:

B. "He who takes a blemished note takes it with its imper-

fections on its head. As notes and bills are intended for negotiation, and as payees do not usually receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished which stands until it is repelled; and a holder ought therefore to explain why he took it branded with marks of suspicion which would probably render it unfit for his purposes. The very fact that he received it is presumptive evidence that it was unaltered at the time; and to say the least, his folly or his knavery raised a suspicion which he ought to remove."

The doctrine laid down in this case is upheld in the later cases.

Paine vs. Edsell 19 Pa. 178.

Clark vs. Eckstein 22 Pa. 507.

Hoffner vs. Wenrich, 32 Pa. 423.

Hill vs. Cooley 46 Pa. 259.

Although the burden of explaining the alteration is on the plaintiff, this burden of proof is not necessarily a heavy one; the plaintiff must offer what evidence he can, and the jury will take the question. Positive testimony by the payee that the note has not been altered since it came into his hands is sufficient to take the question to the jury. Miller vs Stark 148 Pa. 164.

But in the case at bar the plaintiff offered no evidence at all, so that there was no question to go to the jury. Hill vs. Cooley 46 Pa. 259.

Not only did the plaintiff fail to offer any evidence, but he claims that the burden was on the defendant to show that the alteration had been made without his authority. This is clearly not the law. That the burden of proving that an alteration of a negotiable instrument was lawfully made is upon the holder, is to well settled a principle to admit room for any argument here. The principle was firmly established in Simpson vs. Stackhouse, supra, by Justice Gibson. We can see nothing in the case at bar to justify a different ruling. The judgment of the court below is therefore affirmed.

OPINION OF SUPERIOR COURT

The date of a note is a material part of it, and an alteration of the date is a material alteration. Hoffner v. Wenrick, 32 Pa. 423, Paine v. Edsell, 19 Pa. 180, Miller v. Gilleland, 19 Pa. 122, Gettz v. Shearer, 20 Pa. 12; Trust Co. v. Getz, 28 Supr. 619.

But, the insertion of a date by a payee or other party in a dateless note is authorized by the Neg. Inst. Act. "Any holder may insert therein the true date of issue." A note could not be excluded

from the consideration of the jury, because it appeared, having been issued without date, to have a date. It would be presumed that the insertion of the date was by one having a right to insert it.

The note in suit virtually bore no date, when the 0 was turned into 1 and a 2 was added. 190 is no possible year, of the issue of a prommissory note. It was plainly intended that a fourth figure should be necessary to express the year. There was implied authority, then, to write the fourth figure. We think the change of the third figure may be treated as authorized likewise, in the absence of evidence to the contrary. There does not seem to be any defence of the statute of limitations, and the substitution of 1 for 0 can apparently, in no way benefit the payee. Since the maker issued the note in so imperfect a form as to call for completion by the payee, we think it is not unreasonable to expect the maker to prove the absence of authority to write both the figures 1 and 2.

The opinion of the learned court below contains a well conceived and expressed discussion, but we incline to the view above repressed by us. Hence the judgment must be reversed with a v. f. d. n.

X BANK VS. JOHN AND MARY LYKE

Married Women—Wife as Surety for husband—Presumptions—Promissory Notes—Act of June 8, 1893.

STATEMENT OF FACTS

The defendant made a note for five hundred dollars to Henderson, who had lent that amount. Mrs Lyke and her husband told him that the money was being borrowed by her for use in improving her house and that she was not the surety for him. So believing, Henderson loaned the money, taking the note which he subsequently had discounted by the plaintiff bank. The bank discounted it because of the reported statement of Mary Lyke.

Kurnan, for Plaintiff.

Kovitch, for Defendant.

OPINION OF THE COURT

Lathero, J. The married Women's act of June 8, 1893, says that hereafter a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise which is necessary, appropriate, convenient or advantageous for the exercise or enjoyment of her separate property.

This note was signed by husband and wife and is prima facie valid, and they are prima facie joint debtors, and if the wife desires to be relieved she must show that the contract was of the kind of which she was prohibited from making. This she did not do and in view of the foregoing facts we must return a verdict in favor of the plaintiff.

OPINION OF SUPERIOR COURT

The trial court has refused to open the judgment and in so doing has virtually decided that there are shown in behalf of the defendant no sufficient facts.

A married woman is not allowed to subject herself to the obligation of a guarantor or surety. Mrs. Lyke alleges that she executed the note as such surety. Such a fact would have been enough, in suit against her, to prevent a recovery. It would, a judgment having been obtained against her by confession on warrant of attorney, have been sufficient to require the court, on proper application, to open the judgment. Prima facie the judgment is valid; the burden of proving the facts that vituate it is upon her. Humphreys v. Logan, 247 Pa. 427, but the court has refused to permit her to furnish the proof.

The apparent ground for this refusal, is, that she has estopped herself from asserting that she was a surety. She obtained the loan for herself on the statement that she, not her husband, was the borrower; that it was intended to be used in the improvement of her separate estate; that she was not surety for her husband. This representation induced the loan.

Whether, where man and wife jointly apply for money, it is intended for him, or her, it is intended that he, not she, shall be primarily liable, can be known only from circumstances, and the declarations of those persons, as to their state of mind. Wife can intend to be surety for husband; husband for wife. So both may intend to be joint borrowers, and use the money for the improvement of their jointly held estate, (e. g. Humphreys v. Logan, 242 Pa. 427. How are persons who deal with them to know which of these possible relations they are assuming? Here Mr. Lyke and his wife asserted to Henderson that she was borrowing the money for use on her land, and expressly denied that she was intending to become a surety.

They were believed by Henderson. He had a right to believe them. They should not be allowed after affirming one state of facts and getting money from him by persuading him of it, to deny it.

Nothing appears to justify exempting Mrs. Lyke from the estoppel which would act upon her, were she an unmarried woman. This case differs from Murray v. McDonald, 236 Pa. 26, in that, in that case, while Mrs. McDonald states in writing that she is not a surety, for any person, the bill itself bore the statement that it was collateral for a note, which note was her husband's so that the lender of the money was apprised of sufficient to cause him to doubt the truth of the denial of suretyship.

Whatever rights Henderson acquired, he passed by endorsement to the bank, the plaintiff, that discounted for him the note.

We approve then of the decision of the learned court below. AFFIRMED.

SORBER VS. McADAMS

Negligence—Proximate cause—Highways—Case for jury

STATEMENT OF FACTS

McAdams stopped his horse on the highway and hitched it to a post on the abutting curb in such manner that the strap, used in the hitching, was easily unloosed. A seven year-old boy, while walking along, tugged at the strap, whereupon the horse became loose from the post and started to run. He came in contact with and injured the plaintiff, Mr. Sorber, who brought an action for damages and recovered a verdict in the former trial. The defendant then moved for a new trial.

Shipkowski, for Plaintiff.

Trembath, for Defendant.

OPINION OF THE COURT

Villa, J. This case comes to us upon motion, by the defendant, for a new trial, the verdict in the lower court having been for the plaintiff in the sum of one hundred dollars.

The learned counsel for the defendant contends that a new trial should be granted because the verdict by the jury is contrary to law and further, that the plaintiff has failed to prove negligence on the part of the defendant. The basis of his contention being that there was no proof of a duty owed by the defendant to the plaintiff; that the plaintiff has not shown a failure, on the part of the defendant to perform the duty, or that the injuries sustained resulted from the non-performance.

Without doubt, the driver of a vehicle upon a highway owes

to the public a duty to be careful. The plaintiff, here, is a member of that class; so that the duty was owing to him. The drivers of vehicles drawn by horses should use care in the handling of such horses and managing the vehicles as the existence and exercise of such right by the public render necessary. 13 County C. 229.

It is not difficult to conceive that the defendant failed to perform his duty in respect to the laws of the highway, and in regard to the plaintiff. In my estimation, the contention of the defendant as to the theory of the "hitching knot" is none to sound, for, in my numerous observations of men and drivers safely securing their horses at a post on the highways, the tendency was to pull the rope or chain tightly, and not to allow a loose knot that might very easily be removed by trespassers merely tugging at such rope or chain. It can safely be said that a careful, prudent man would adopt this latter method in preference to the "hitching knot" referred to by the defendant's counsel.

Again, a prudent man, in hitching his horse on the highway, knowing that he owes a duty of care, can foresee injury to pedestrians as a probable consequence of his not properly securing his also as a probable consequence of his not properly securing his horse; horse or some object about it, as children generally are fond of and attracted by animals, especially horses.

To show the matter of forseeability of damage, let us apply, by analogy, 46 Pa. 122, to the case at bar. There, the defendants had moored their boats in an alleged negligent manner in a channel and entrance to the locks at a dam, on a certain river; so that other boats were stopped outside and exposed to the current, then rapidly rising, until by its force, the plaintiff's boats were carried over the dam and lost, without fault of the owners. The court held that the question of negligence was for the jury, as was the question of forseeing harm. 263 Pa. 541.

In my opinion, the one question here to be settled is whether the act of the defendant was the proximate cause of the plaintiff's injury, or was the act of the seven-year-old boy in tugging at the strap, sufficient intervening cause to offset the alleged negligence of the defendant.

In determining the question of proximate cause and as to the intervening act that will break the causal connection between the original wrongful act and the injury, it may be said that, as per the weight of authority, if the intervening cause and its probable or reasonable consequences could reasonably have been anticipated by the original wrongdoer, the connection is not broken, and the violation of a duty of care on the part of the defendant should make him liable for the natural and probable consequences of his act. 112

Pa. 574, 14 S. W. 78. To be proximate the harm should have been reasonably forseen or contemplated by the actor. 30 County C. 122; 8 County C. 305; 259 Pa. 94.

The test of proximate cause is whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural or probable consequence of the primary cause. 194 Pa. 511. However, it is not for the court to say, as a matter of law, whether or not there was such independent intervening agency as necessarily broke the causal connection between the defendant's act and the injury resulting. 275 Pa. 131.

In considering the question of causation there may be a dispute as to the concurrence of the causes and in the case at bar a controversy on the same score may be stirred. In 49 Cal. 87, where lumber had been carelessly piled by the defendant and remained for a long time in such condition and a stranger caused it to fall upon the plaintiff, it was held that the negligence of the defendant concurring with that of a stranger, is the direct and proximate cause of the plaintiff's injury. Again, negligence is not to be inferred on the mere fact that an accident has occurred. Something more must appear to justify such finding and it is for the plaintiff to show that where there are two concurring causes from which his injury arose, that of the defendant, and for which he should be responsible, is the proximate cause, and that the harm done was the natural and probable consequence of the defendant's act. As to this there should be no controversy, and in review of the authorities on that point we may select one of worthy note, Mr. Justice Sadler, in his elaboration in 272 Pa. 429. The above point is there settled as to the liability and duty to prove, where there is concurrence.

Ordinalily, the question of proximate cause is for the jury, but where the facts are not in dispute, it is for the court to determine whether or not an injury was a consequence likely to flow from the alleged negligent act. The inquiry must always be whether there was an intermediate cause, disconnected from the primary fault and self-operating, which produced the injury. If there was not, the defendant's act must be considered the proximate cause of all consequences resulting therefrom. 139 Pa. 363.

In 275 Pa. 567, it is held that it is for the plaintiff to show that the defendant's negligent act was the sole and proximate cause of the injury; but where the facts are in dispute the question of proximate cause is for the jury and it is so held in 160 Pa. 359.

30 Dist. R. 969. 112 Pa. 574. Are the facts in the case at bar in dispute? I answer in the affirmative.

And now, here, we are asked to grant a new trial, upon motion by the defendant. Where the result depends upon ascertainment of facts or inferences therefrom (which in this case is the negligence in the defendant's act) the case is necessarily for the jury. The exercise of power to set aside perverse verdicts, when injustice is apparent, belongs to the lower court, ordinarily, 260 Pa. 466; (and it is only where there has been an abuse of discretion that a verdict will be set aside by the appellate court). 272 Pa. 429; 267 Pa. 131.

The motion for a new trial should not be granted and the verdict of the lower court should be allowed to stand.

OPINION OF SUPERIOR COURT

It is the duty of the driver of a horse to know its tendency, unless restrained, to walk or run, and thus come in collision with objects. Hence, if the driver stops the horse on a highway, intending to lose control of it for a time, he should fasten it so as to prevent its wandering. Tanney v. Tuttle, 19th case, p. 34, Wigmore's cases on Evidence. It is not enough perfunctorily to tie it. It might loosen the tie, and so escape.

So we think, the driver should imagine that a badly tied knot might be unloosened by a boy, if the horse is fastened to a post at the edge of a pavement. At all events, it is proper for the court to allow a jury to find whether the circumstances, the position of the horse; the possibility of the presence of boys, etc., imposed a duty of care in the manner of fastening, which duty the defendant has not performed.

Men are presumed to know the proclisities of boys, and the jury may rightly assume the duty of a driver, in securing a horse on a highway, to fasten it so that young children could not easily unloose it.

The act of the boy would have been negligent but for this youth. But even were the boy's act negligent, the jury might properly find culpable negligence in the driver, and a sufficiently close nexus between the injury to the plaintiff and the driver's faulty fastening of the horse.

The judgment of the learned court below is AFFIRMED.

PENROSE VS. ECKLES

Real Estate—Adverse Possession—Unseated Lands—Legal Title—Tax Sale—Assessment.

STATEMENT OF FACTS

Sixty years ago X died. He claimed to own a mountain tract which 65 years before his death had been patented by the state to Kemmerer. No conveyance from Kemmerer to immediate grantee, or finally to X was shown. On X's death his administrator obtained leave of the Orphans Court to sell this tract, alleging it to be his, X's. Addison became the purchaser at the sale thus made. Addison's title by several mesne conveyances has passed to Penrose. The deed to Addison recited that the title of Kemmerer had by successive conveyances passed to X but no particulars of any of these conveyances, dates, grantors, grantees were given. After the sale to Addison, he and succeeding owners, while not taking pedis possessio of the land made certain uses of it from time to time such as cutting wood on it, etc., such as owners could properly make. They also paid taxes from year to year which had been assessed as seated. In 1915 the same tract was assessed as unseated. The tax thus assessed was never paid, and a treasurer's sale of the tract took place, the title under which is now in Eckles, who has taken possession.

McGuire for the Plaintiff.

Irwin, for the Defendant.

OPINION OF THE COURT

Lerch, J. In view of the fact that the defendant does not claim under any previous owner of the land, and that the plaintiff's title is not contested previous to the tax sale, the plaintiff's chain of ownership may be dispensed with.

The defendants contend that the tax sale was valid. They base their claim upon the Act of June 3, 1885 and Hare vs. South Penn Oil Company, 256 Pa. 119. The act holds that all sales of seated or unseated lands which shall hereafter be made for arrearage of taxes due thereon shall be valid irrespective of the fact whether such lands were seated or unseated at the time of the assessment of such taxes, provided no sale shall be valid, where there was sufficient personal property on the premises to pay the taxes. This statue has no application, as the taxes which the plaintiff supposed and reasonably believed due were paid. There is no evidence that the plaintiff was notified that the lands were assessed as unseated. I do not think the drafters of this act intended that one who has paid seated taxes, and the land being also

assessed as unseated, should be deprived of his property because of any error of the assessor. Such a situation does not I think, come within the spirit of the act. The act was passed to urge deliquents to pay. The plaintiff in this case is not one of that class.

In Hare vs. South Penn Oil Company unseated lands were assessed and sold as such for unpaid taxes. There is no evidence in this case however, that the unseated tax was paid.

The plaintiff bases his claim upon Dougherty vs. Welshans, 233 Pa. 121. The facts in this case and the one at bar are identical. The plaintiff contends that the tax title set up by the defendants is void because these same lands were assessed as seated and the taxes so assessed were paid. No reason has been given why the lands were also assessed as unseated.

Taking all these facts into consideration, the sale was void and judgment must be given for the plaintiff.

OPINION OF SUPERIOR COURT

The facts are imperfectly given in the opinion of the learned court below. In 1897, the land was assessed as seated, and the then owner, C, paid the taxes. It was the same year assessed as unseated, in the name of Kemmerer. The taxes thus assessed not being paid, the land was sold, that is, as we conceive, the same year, the land was doubly assessed, once as seated, once as unseated. The tax on it as seated was paid; that on it as unseated, not paid. Therefore the tax sale. It can need no authority to establish that, if land is thus doubly taxed, and one of the assessments is paid, it cannot be legally sold for the non-payment of the other tax assessment. It follows then that the tax sale did not confer a title upon the defendant.

But the plaintiff in ejectment, must recover on the strength of his own title. If his title is no better than that of the defendant, why should the latter be compelled to yield the possession to him? Has then the plaintiff shown a title? Such possession in the plaintiff, or his predecessors is not shown, as would make a title under the statute of limitations. But, may there not be sufficient evidence of a succession of conveyances from Kemmerer, the patentee; to his grantee, from the grantee of this grantee, etc., until a grant to X? Conveyances from X, are sufficiently distinct. The deed from X's administrator to Addison, is an ancient deed. It recites a succdence of such conveyances. Such evidence as it yields is corroborated by the fact that Addison and his successive grantee exercised acts on the land characteristic of ownership, and paid

taxes assessed in a series of years. No other and rival claimant of the land appears. We think the facts warrant the inference that there was no rival title to that of Addison, etc. We content ourselves with the reference to the case of Dougherty v. Welshame, 233 Pa. 121.

We conclude that the "paper" title passed regularly from Kemmerer to the plaintiff. As the tax sale was invalid, nothing appears to prevent his recovering possession. The judgment of the learned court below is AFFIRMED.

SARAH MAYER VS. RAILROAD CO.

Contributory negligence—Railroads—Horse and Wagon—Grade ....crossing—Collision—"Stop, look and listen"—Conflicting evidence—Case for jury.

STATEMENT OF FACTS

Plaintiff's husband when driving across the tracks of the defendant company was instantly killed by a colliding train, which was moving at the rate of sixty miles per hour. The crossing, though outside of a city, was much traveled. The accident occurred at 11 o'clock A. M. The day was clear. The tracks could be seen for the distance of one half mile. The court told the jury that there could be no recovery, for it could be presumed in the absence of evidence, that Mayer stopped,looked and listened, yet the fact of the collision showed that he had not stopped and looked or that if he had, he had ventured on the track despite what he saw.

Kovitch, for the Plaintiff.

Kurnan, for the Defendant.

OPINION OF THE COURT

Wayne, J. This is an appeal from the judgment of the lower court directing a non-suit to be entered against the plaintiff, setting forth as error the charge of the learned court below.

Passing to the merits of the appeal we find that the court below charged the jury "that there could be no recovery, for it could be presumed in the absence of evidence that Mayer stopped, looked and listened, yet the fact of the collision showed that he had not stopped and looked or that if he had, he had ventured on the track, despite what he saw."

One about to cross a railroad track is under a duty to stop, look and listen and unless he does so there can be no recovery should an accident result from his failure. The deceased's duty

under the circumstances of this case is thus stated in Haas vs. Nothern Central Ry. Co. 49 Pa. Sup. Ct. 107, 109, following a long line of decisions of the supreme court of this state. "The rule that the traveler about to cross a railroad track must stop, look and listen is an absolute and unbending rule of law founded on public policy for the protection of passengers in railroad trains as much as travelers on the common highway, and such stopping, looking and listening must not be merely nominal or perfunctory, but substantial, careful and performed in good faith, with the accomplishment of the end in view. He must stop and look where he can see and hear, and will not be allowed to say that he did so when the circumstances make it plain that by the proper use of his common sense he must have seen the danger."

There never was a more important principle settled, that the fact of the failure to stop immediatley before crossing a railroad track is not merely evidence of negligence for the jury, but negligence per se, and a question for the court: :

North Penna. R. R. Co. vs. Heileman, 49 Pa. 60 and a long line of decisions extending to Hannigan vs. Phila. & Reading R. R. Co. 257 Pa. 240.

Although the presumption is that a person about to cross the tracks of a railroad did stop, look and listen, if upon the facts of the case it is evident that had he done so he must have seen or heard the approaching train, it is the duty of the court to direct a verdict for the defendant.

Carroll vs. Penna. R. Co. 12 W. N. C. 348.

Smith vs. Penna. R. Co. 256 Pa. 504.

Hannigan vs. Phila. & Reading R. Co. 257 Pa. 240.

Milligan vs. R. R. Co. 261 Pa. 344.

Kipp vs. Central R. R. Co. of N. J. 265 Pa. 24.

In the case of Carroll vs. Penna. R. Co. the court said, "The injury received by the plaintiff was attributable solely to his own negligence. It is vain for a man to say that he looked and listened, if in spite of what his eyes and ears must have told him, he walked directly in front of a moving locomotive." This same doctrine has been applied in:

Milligan vs. R. R. Co. 261 Pa. 344 and Kipp vs. Central R. R. Co. of N. J. 265 Pa. 24.

In the case at bar the tracks could be seen for the distance of one half mile. No evidence was introduced to show that the deceased had stopped, looked and listened, neither was there evidence to the contrary; hence, the presumption under the case of Kelly vs. R. R. Co. 274 Pa. 470, is, that the deceased did stop look and listen. However the duty of the traveler does not cease

after he has once stopped, looked and listened; he is required to do so as he goes forward and to be vigilant as long as danger is to be apprehended.

Milligan vs. Phila. & Reading R. Co. 261 Pa. 344.

Having a clear view of the track for a half mile, it is evident that Mayer did not comply with the well settled rule of stop, look and listen, or that if he did so, that he negligently attempted to cross despite what his eyes and ears must have told him. Applying the well established rule of Carroll vs. R. R. Co. we think that the learned court below handed down a correct decision, and hereby order that the judgment of the lower court directing a non-suit be affirmed.

OPINION OF SUPREME COURT

The learned court below has convincingly shown that the circumstances of a collision between a train and a man, horse, or vehicle crossing the track, may negative the hypothesis that the man had stopped and looked, before venturing upon the track. It has not as adequately considered whether such circumstances exist in the present case as to warrant either the jury or the court in deciding that the deceased did not stop and look, or, if he did, that he recklessly attempted, in the face of peril to cross.

The train could be seen only when within a half mile. It was travelling at the rate of 60 miles an hour. It would be at the place of crossing, within 30 seconds after it became visible. The vehicle should have stopped at some little distance from the track, a few feet at least. Possibly the train was elevated above the road, so that the movements of the horse would not be as swift as otherwise. The nature of the horse is not known. We think the court was not warranted in concluding, without submitting the question to the jury, that had the deceased stopped and not seeing the train, gone across as quickly as he should, his vehicle would have been entirely over the track when the train reached the place of crossing. It appears to us possible for the carriage to have been still partially on the tracks, when the train came up to it, although the deceased looked before he decided to cross, and saw nothing, and although he used all available expedition, in attempting to cross.

In reversing the decision, because the question was not submitted to the jury, we must commend the research displayed by the learned court, and the skill with which its views are expressed.

REVERSED with v. f. d. n.

ROMER v. SLATTERY

Wills—Construction—Life Estate—Children—Estate in Remainder

STATEMENT OF FACTS

John Romer left a will in which he said, "I give to my son, Henry, my farm for his life, and after his death, I give it to his children, (my grandchildren)." Henry, thinking that he has a fee has contracted to convey the land in fee to Slattery. Slattery declining to accept a conveyance and to pay the purchase money, this is an action of assumpsit to recover the purchase money, $5000.00.

Goldman, for Plaintiff.

Goldstein, for Defendant.

OPINION OF THE COURT

Handler, J. This is an action of assumpsit by the plaintiff, Henry Romer to enforce the specific performance of a contract of sale, in which the only question presented is whether the plaintiff has such a title to the premises as the defendant, the purchaser, could be compelled to accept. The plaintiff insists that he has a fee simple; the defendant that he has but a life estate. The testator devised his farm to his son for his life, and after his death, "I give it to his children, my grandchildren," the will stated. It is the contention of the plaintiff, that the limitation to the children is equivalent to a limitation to the heirs of Henry Romer, and as it is abundantly clear, both upon reason and authority, that when an ancestor by any gift or conveyance, takes an estate of freehold, and in the same instrument an estate is limited to his heirs in fee or in tail, "heirs" are words of limitation, and the ancestor takes a fee.

Thus the true construction of the last will and testament of John Romer depends upon the application of the Rule in Shelley's case, and it is incumbent upon this court to pass judgment upon a rule of law that has given rise to more conflicting decisions, and a greater display of legal learning than any other branch of jurisprudence. Although the principle had been recognized and applied as early as A. D. 1325, it appears not to have attracted general attention until A. D. 1590, when definitely stated by Lord Coke in the case from which its name is derived. 1 Coke, 93b.

That it has been adopted and repeatedly recognized in Pennsylvania is unquestionable. That it should have been adopted is perhaps anomalous, when it is considered that its application is pecul-

iar to the English idea of the descent of property; a fortiori when it is considered that the supposed objects of the rule had either disappeared before the establishment of this Commonwealth, or those that remained were devoid of reason. It is obvious that the theory as to the object of the rule considered more reasonable—that of the preservation of feudal reliefs, was never the motive for the adoption of this principle by our early courts. Nor should it have been sustained upon the declaration of Sir William Blackstone in Perrin v. Blake, Hargraves Law Tracts 498, to the effect that its application facilitates the alienation of land, or upon the dissertation of Mr. Hargrave, to the effect that its application prevents the creation of an inalienable fee simple estate. It has never been the policy of courts of law to prohibit the creation of life estates; on the contrary they have always been ready and willing to carry out the provisions of such a creation, even to the stringent enforcement of the incidents thereto. Yet it is upon these two latter grounds that the rule has been emphatically defended. To quote from the opinion of Chief Justice Gibson, in Hileman v. Bouslaugh, 13 Pa. 350.

The rule in Shelley's case ill deserves the epithets bestowed upon it in the argument. Though of feudal origin, it is not a relic of barbarism or a part of the rubbish of the dark ages..... Mr. Hargrave, Mr. Justice Blackstone, Mr. Fearne ascribe it to concomitant objects of more or less value at this day; among them, the unfettering of estates by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it would otherwise be.....and Mr. Hargrave shows, in one of his tracts, that to ingraft purchase on descent would produce an amphibious species of inheritance and confound a settled distinction in the law of estates."

Thus the rule in Shelley's case, ardently defended by our early courts, became so embedded in our system of law as to resist the determined effort that was made by our legislature to abolish it in 1877. "An inertia," said the court in Peirce v. Hubbard, 10 Pa. Co. Ct. 63, affirmed in 152 Pa. 18, "miscalled conservatism, to the discredit of that good word, having prevented such a wise measure of justice from being imbedded in our law."

It will be conductive to a proper understanding of the rule, its requisites and results, to state the elaborate and scientific definition of it as promulgated by Mr. Preston in his work on estates, which is as follows:

"First, when a person takes an estate of freehond, legally or

equitably, under a deed, will, or other writing, and afterward in the same deed, will, or writing, there is a limitation by way of remainder, with or without the interposition of any estate, of an interest of the same quality, as legal or equitable, to his heirs generally or his heirs of his body by that name in deeds or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession, from generation to generation, the limitation to the heirs, will entitle the person or ancestor himself to the estate or interest imported by that limitation.

"Secondly, thus: Whenever the ancestor takes an estate of freehold or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs or heirs in tail, such remainder is immediately executed in possession in the ancestor so taking the freehold, and therefore is not contingent or in abeyance."

It is apparent from an analysis of the above stated definition that certain requisites must concur before the rule will become operative and have force and effect. In the first place, there must be an estate of freehold in the ancestor, and that such an estate is vested in Henry Romer by the provisions of the will is undisputed in the case before us. Secondly, the limitation by way of remainder must be to the heirs general, or special of the first taker. In this connection it is pertinent to point out the distinction between an estate by descent and an estate by purchase. The word "limitation" as used in the rule must be understood, not in the sense of restriction, but as a word describing the extent or quality of the estate devised or conveyed, and the word "purchase" must be understood to mean an estate acquired in a manner to take it out of the ordinary course of descent, that is, as designating certain persons who are to take the estate. So interpreted, a definition of the rule would be as follows:

"When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited to his heirs in fee or in tail, in such cases "heirs" are words describing the extent and quality of the estate, and not those who are to take it."

The limitation, then, must not be to an individual or individuals of the family of the person to whom the life estate is given, but must be to his heirs general or special, and so comprise the whole line of described heirs as a class of persons to take in succession. As was stated in Guthrie's Appeal, 37 Pa. 9, "The limitation of the remainder should be to the heirs or heirs of the body of him who takes the particular estate of freehold, by that description and

by that character.....It is therefore always a precedent question, in any case to which it is supposed the rule is applicable, whether the limitation of the remainder is made to the heirs general or special, and in solving this question, the rule itself renders no assistance. It is silent until the intention of the grantor or devisor is ascertained."

Whether, then, it was the intention of the testator that the children of Henry Romer should take as a nomen collectivum for the whole line of inheritable blood is the question to be determined. It is true that the words "heirs" and "heirs of the body" most frequently express the relation in which the second takers must stand to the first, in order to come within the rule; and so rigid were the courts at one time that unequivocal words were disregarded and declarations of intention not heeded. Now a contrary rule governs, and if a remainder be limited to persons standing in the relation of heirs general or special of the tenant for life. the law presumes them to take as heirs, unless it unequivocally appears that individuals other than the persons, who are to take simply as heirs, are intended. As was said by the court in Price v. Taylor, 28 Pa. 102,

"Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or special heirs of the first taker will be sufficient. unless it is perfectly clear that such heirs are selected on their own account and not simply as heirs of the first taker."

The onus, then, is upon the plaintiff to show that the word "children," as contained in the will, was not meant by the testator to denote a class of persons who are to take the estate by remainder, as a new line of succession, but was intended as an equivalent to the word "heirs," to define the quality and extent of the estate of the first taker. Prima facie, the word "children," is a word of purchase, and not of limitation, and must be so construed, unless it is clear that the testator used it in the other sense. Oyster v. Knull, 137 Pa. 448; Hunt's Estate, 133 Pa. 260.

This presumption cannot be overcome, unless it appears that in the context of the will, there is present the contrary intent of the testator that the children should take otherwise, and this intention must be so plain, as to preclude any misunderstanding, that the testator intended to deviate from the general rule. Criswell's Appeal, 41 Pa. 288.

It has been decided that the rule in Shelley's case is never a means of ascertaining the intention of the testator; that it presupposes the intent to have been ascertained. Said the court in Klepner v. Laverty, 70 Pa. 70:

"The rule in Shelley's case is not a rule of construction, not a means of ascertaining the intention. It is a rule of law which inexorably declares that where an ancestor takes a preceding freehold, that by the same instrument, whether deed or will, a remainder shall not be limited to his heirs as purchasers.

However, it is to be observed that this intent is distinguishable, and must not be confused with that intention of the testator, which determines the course that the property will take after the termination of the life tenancy. Hence, if it appears from the context of the will that it was the intent of the testator that the children of Henry Romer shall take by descent and not by purchase, such intent will be effected, and the particular intent that Henry Romer should take but a life estate will be defeated.

That such a contrary intention is not expressed in the will of John Romer is apparent from an examination of it. The will simply states: "I give to my son Henry my farm for his life, and after his death, I give it to his children." There is nothing in its context to show that the testator intended to deviate from the general rule, as appeared in Haldeman v. Haldeman, 40 Pa. 29, where the will provided that the estate was to descend to the child or children of the ancestor, "and should, however, either of my daughters die and leave no issue, then such share is to fall back again to the residue, and form a part of the same," which the court said clearly showed that the word "children" was equivalent to the heirs of the testator. Hence, in the absence of such a contrary intention the presumption that the children of Henry Romer are to take as purchasers must prevail.

Thus far, we have considered only the effect of the word "children" in the will; it is to be observed that the words "my grandchildren" are also contained therein. It is true that superadded words of limitation may be merely descriptive, and have no effect whatever, but it is also true that the superadded limitation may denote a different species of heirs from that described by the first words. It is evident, however, that the words "my children" as contained in the will of John Romer does not show a contrary intention that the children should not take as purchasers, but rather they show more conclusively that it was the intent of the testator that a particular class of individuals should take from him, and to negative any possibility that the word "children" was used in the sense of heirs. The remainder, then, is not only limited to the children of the ancestor, which has in many cases been decided to be equivalent to the heirs of him, but is further limited to the

grandchildren of the testator. It was said by the court in Simpson v. Reed, 205 Pa. 53:

"Any form of words, sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will enlarge the estate for life of the first taker in fee or tail by implication."

It is conceivable that if Henry Romer were to die leaving to survive him children and grand children of a deceased child they would comprise his lineal heirs, but they would not all be the grandchildren of the testator.

It is the judgment of this court that Henry Romer, the plaintiff, took but an estate for life by the will of John Romer, and having such an estate, he cannot compel the defendant to accept it, the defendant having contracted to purchase the estate in fee.

OPINION OF SUPREME COURT

A gift to one for his lifetime with remainder to his heirs is not a gift to anybody in remainder, but a gift of everything to the nominal life-tenant. He, not his heirs, takes the whole estate in the land.

But, children is not equivalent to heirs. While children, if there are any, will be heirs, it is possible that there will be no children, and yet that there will be heirs. When a particular kind of heirs, that is, heirs of a particular propinguity to the life taker, to the exclusive of heirs is a remoter relationship is inteuded, the rule in Shelley's case has no application.

Prima facie, the word children means issue of the first generation, and not issue of any and every generation. It may be so qualified however, that its use in a broader sense may be apparent. Here there is no such qualification. On the contrary, the testator explains the expression "his (viz. Henry's) children" by the words, "my (the testator's) grandchildren," and thus shows that he uses the word children in the strict sense.

It follows then, that Henry Romer has only a life estate. He cannot convey a fee. Slattery has contracted for a fee. He cannot be obliged to accept and pay for a life estate. Shields v. Aitken, 236 Pa. 6. Judgment AFFIRMED.

BOOK REVIEW

Handbook of the Law and Practice in Bankruptcy by Henry Campbell Black, L.L.D. Published by the West Publishing Co., St. Paul, Minn., 1924.

It is more than thirty years, since the Law Dictionary of Mr. Black was published. Its merits have been widely recognized. Since its appearance, its author has written several useful treatises, on Judgments, Constitutional Law, Income Taxes, Rescission of Contracts, Judicial Precedents, and has established a reputation for thoroughness, completeness and lucidity of statement. This Handbook on Bankruptcy is his latest, forming the last of the so-called Hornbook Series published by the West Publishing Company. The material of this work is distributed into thirty-four chapters dealing with the various germane topics, such as effect on state insolvency laws, the officers who apply the statute, the persons subject to the bankrupt law, the courts of bankruptcy; petition and adjudication, suits by and against bankrupts, their rights and duties, the rights and duties of creditors, provable debts, set-off of mutual debts, discharge of bankrupts, etc., etc. An appendix gives the bankrupt act of 1898, with all the amendments, and the General Order in Bankruptcy, issued by the Supreme Court of the United States, in pursuance of authority conferred by statute. The book embraces 850 pages, and a comprehensive and logically arranged index, covering 50 pages.

Not the largest book on the subject, this book is clear and terse, omitting nothing of moment, and assisting to a quick discovery of the law which is sought after. The opinion of the publishers that "no important principle has been omitted or inadequately treated," will be justified by the use of the treatise.