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NOTES

LIABILITY OF THE REAL ESTATE OF A DECEDENT FOR HIS UNRECORDED DEBTS

When a person dies owing debts which have not been reduced to judgment and made a part of the court records against him, any real estate which he may leave is, by law, made an asset for the payment of these debts. Although the primary fund for the payment of a decedent's debts is his personalty, yet the legislature at an early date in Pennsylvania made the decedent's real estate conditionally responsible therefor. The length of time during which the land is liable for the payment of these debts has been gradually reduced by various enactments.

DEVELOPMENT OF DOCTRINE IN PENNSYLVANIA

The foundation for this theory in Pennsylvania was laid in a clause in the original charter to William Penn whereby the freemen of the Province were authorized to "alter the law of England in regard to the descent and enjoyment of lands".¹ In England at the time of the founding of this Province lands of a decedent were not unrestrictedly made assets for the payment of his debts.

In pursuance of this clause, the first General Assembly in December 7, 1682, with Penn's approval modified the English law.² The act of May 3, 1693 made all lands liable for payment of debts without any limitations in favor of heirs.³

Other laws to the same effect were passed in 1697,⁴ 1700, and 1705,⁵ and thus the rule became firmly and finally established in Pennsylvania that the lands of a deceased person whether in the hands of an heir, devisee or even a

¹Duke of York's Book of Laws p. 84.

²Ibid. p. 120.

³Ibid. p. 230.

⁴Ibid. p. 264.

⁵1 Smith's Laws 7, 57.

bona fide purchaser from them, were liable for his debts and that *this liability extended without limit of time.*

Recognizing the inconveniences that arose from such secret and unlimited claims and to cure this evil, the legislature gradually shortened the period for the bringing of actions by Section 2 of the Act of April 19, 1794 as supplemented by Section 4 of the Act of April 4, 1797,⁶ to *seven years* after the decease of the debtor. Under the acts of 1794 and 1797 the decedent's land might be sold on a judgment against the executor or administrator only, without notice to the widow, heir or devisee.⁷ These acts were followed by others and reduced the time within which actions must be brought to *five years* by the Act of February 24, 1834,⁸ Secs. 24 and 34, as result of *Fritz v. Evans*, 13 S. & R. 9; to *two years* by the Act of June 8, 1893,⁹ June 14, 1901,¹⁰ May 3, 1909;¹¹ to *one year* by the Act of June 7, 1917¹² Sec. 15 (a) as amended June 7, 1919.¹³

Strictly speaking, the Acts of 1700 and 1705 had not created the unsecured debts of a decedent, "liens" against his real estate. Their effect was to make his real estate in the hands of his heirs and devisees or purchasers from them, *assets* for the payment of his debts, the same as personal property in the hands of his executors or administrators.¹⁴

The present law is embodied in the Fiduciaries Act of June 7, 1917,¹⁵ Sec. 15 (a) as amended June 7, 1919,¹⁶ limiting the statutory period to one year and providing the procedure for instituting and indexing actions.

⁶Smith's Laws 143, 297.

⁷*Fritz v. Evans*, 13 S. & R. 9 (1825); *Sergeant v. Ewing*, 36 Pa. 156 (1860).

⁸P. L. 70.

⁹P. L. 392.

¹⁰P. L. 562.

¹¹P. L. 386.

¹²P. L. 447.

¹³P. L. 412.

¹⁴*Spear v. Hannum*, 1 Yeates 380, 533 (1794), (1795).

¹⁵P. L. 447.

¹⁶P. L. 412.

PRACTICAL APPLICATIONS OF THE DOCTRINE

This doctrine is the result of the law's policy to give to the creditor some *security* for the collection of his claim apart from the debtor's personal estate through a lien of general debts against the debtor's land.¹⁷

These statutes are ones of limitation and repose for the benefit of widows, heirs and devisees, those claiming under them, and purchasers.¹⁸ Because the Pennsylvania courts favor the heir, they require of the creditor a vigilant prosecution of his demands in the mode pointed out by the statute.¹⁹ Where a creditor has "slept on his rights" he cannot look to the real estate for the payment of his claims. The creditor has the right, however, to bring his action against the executor of the decedent and to prosecute the same to judgment irrespective of the Act of 1917. Any judgment obtained therein would not be a lien on the decedent's real estate, but would entitle the creditor to share in the distribution of any personalty that might come into the executor's hands.

The Orphans' Court has no jurisdiction to authorize a sale of the decedent's real estate, if all liens have been lost for want of suit or prosecution.²⁰ If the Orphans' Court does authorize a sale when there are no debts which are liens, no title will pass and the sale may be attacked collaterally by the heirs in ejectment;²¹ and the heirs will take the surplus, even as against scheduled debts, if the creditor has not kept his lien alive pending the sale and confirmation thereof.²² The proper practice is to petition

¹⁷Davidson v. Bright, 267 Pa. 580, 586 (1920).

¹⁸Commonwealth v. Beachly, 262 Pa. 545 (1919); Kerper v. Hoch, 1 Watts 9 (1832).

¹⁹Bindley's Appeal 69 Pa. 295 (1871).

²⁰Pry's Appeal, 8 Watts 253 (1839); Clauser's Estate, 1 W. & S. 208, 215 (1841); Aurand's Estate, 40 C. C. 343, (1913).

²¹Smith v. Ribblett, 233 Pa. 300 (1912); Smith v. Wildman, 178 Pa. 245 (1896).

²²Bindley's Appeal, 69 Pa. 295 (1871); Dolan's Estate, 231 Pa. 180, 185 (1911).

for a rule to show cause why the order directing such sale should not be vacated and set aside.²³

No *admission*, however solemn, will dispense with a strict compliance with the statutory mode if the lien is to remain against the land.²⁴ Nor is an *award* in favor of a creditor made by the Orphans' Court equivalent to an action under the statute.²⁵ But where an action has already been started within the proper time an award is a sufficient "prosecution to judgment", by Act of 1919.²⁶

However, where a creditor has failed duly to protect himself by establishing a lien against the real estate, he may still participate in the proceeds of a sale of such property by the application of the doctrine of equitable conversion.²⁷ Under the Act of 1917 if the debt is due at decedent's death the creditor must *begin* an action thereon in assumpsit within one year after the debtor's death against the executor or administrator and *index* it against the decedent and his legal representatives.²⁸ The action is in the Common Pleas court. It has two functions—it gives notice of the claim (by indexing the action as soon as begun in the general judgment index) and it preserves a lien on any real estate within that county for a period of five years. The *mere filing of the claim* with the executor or administrator will not preserve the lien, but the creditor must actually start suit within one year after the debtor's decease. The proceeding is strictly in rem.²⁹ The action after having been properly instituted must be "duly prosecuted to judgment". The question whether it has been duly prosecuted to judgment is one for the court and not for the jury.³⁰ In instituting the action by the issuance of a summons, it is advisable to join the surviving spouse, heirs and devisees in

²³Aurand's Estate, 22 D. R. 343.

²⁴Hemphill v. Carpenter, 6 Watts 22; Oliver's Appeal, 101 Pa. 299 (1882).

²⁵Smith v. Ribblett, 233 Pa. 300 (1912).

²⁶P. L. 412.

²⁷Brennan's Estate, 277 Pa. 509, 511 (1923).

²⁸Myers v. Lohr, 72 Pa. Super. Ct. 472 (1919).

²⁹Soles v. Hickman, 29 Pa. 342, 346 (1857).

³⁰Phillips v. Railroad Co., 107 Pa. 472 (1885).

the original action,⁸¹ rather than to bring them in later by a scire facias because there is a definite time within which the creditor must proceed against the surviving spouse and heirs or devisees, i. e., when they must be made "parties to the action". The scire facias making the spouse and heirs or devisees parties to the action must be issued within five years after the expiration of the period for commencing suit (within six years from the decease of the debtor).⁸² If the creditor has failed to bring in the heirs, etc., within the proper time he cannot proceed to execute his judgment against the decedent's real estate. The usual practice in instituting action under the act is the service of summons on the executor or administrator, and the acceptance of service by him which is docketed "decedent per representative". The creditor should make certain of this service and not rely on the sheriff. The creditor at the time of the issuance of the summons should require that notice of the suit be served on all the heirs, etc. This is necessary if any subsequent judgment is to be binding on the real estate.

If the claim is not due at the debtor's death and does not mature until more than one year after his death the creditor files a statement which gives notice of his claim until it becomes due. The creditor has one year after his cause of action arises to start action thereon.⁸³ The creditor files in the office of the Prothonotary of the county where the action is to be instituted and also in the county where the real estate is situated, a statement of his claim and has it indexed in accordance with the provisions of the Fiduciaries Act. The filing of the statement of the creditor's claim within one year of the decedent's death constitutes a notice to all the parties in interest of the possibility of bringing an action of assumpsit after the demand becomes due.⁸⁴ When the claim becomes due the creditor files a

⁸¹Kirk v. Van Horn, 265 Pa. 549 (1920).

⁸²McMurray's Adm's. v. Hopper, 43 Pa. 468, 471 (1862); Hope v. Marshall, 96 Pa. 395 (1880).

⁸³Pyles v. Bosler, 11 D. & C. 38 (1928).

⁸⁴Commonwealth v. Cooper, 192 Pa. 424 (1899).

praecipe in assumpsit joining the owner of the land and refers to the prior proceeding to continue the lien of the claim against the real estate of the decedent.

The *statutory lien* is not the same as the lien of a mortgage or judgment, for a decedent may, by an imperative power given to his executors to sell his land for the payment of his debts, relieve the land from the lien of his general debts which he cannot do as to liens of record and the unsecured creditors are remitted to the fund realized from such sale.³⁵ The purchaser takes the land subject to recorded debts but gets it free from the general debts when he buys it under this absolute power of sale. However, where the power of sale is discretionary, conversion takes place only when the land is sold. In the meantime and from the moment of the testator's death general debts have acquired a lien which can be continued or divested only in the mode provided by statute.³⁶

When a creditor has failed to take the proper steps to enforce his remedy for the collection of his claim until after the period limited by statute, the land is discharged of liability and the heir or devisee holds it free and clear thereof. Laxity on the creditor's part also deprives him of the right to have the rents from the real estate of the decedent, though ordinarily they are regarded as personal property, applied to the payment of the alleged claims after the expiration of the statutory period. The only effect of the judgment is to prevent the lapse of the statutory lien and not to create a new one.³⁷ This lien continues to the end of five years from and after the date prescribed for the commencement of the action, whether judgment be recovered during the first or the second period,³⁸ because it is not the judgment rendered against the personal representative that confers the quality of the lien on the debts

³⁵ Cadbury v. Duval, 10 Pa. 265 (1849); Seeds v. Burk, 181 Pa. 281 (1897).

³⁶Seeds v. Burk, 181 Pa. 281, 288 (1897); Hunt's Appeal, 105 Pa. 128 (1884); Chamberlain's Estate, 257 Pa. 113 (1917).

³⁷Trevor v. Ellenberger, 2 P. & W. 94 (1830).

³⁸Hope v. Marshall, 96 Pa. 395 (1880).

of the deceased person. This dates everywhere from his death.⁸⁹

From a consideration of the many cases construing the various acts which the legislature has passed on the subject, we can discern a disposition on the part of the courts to impose a strict construction on these statutes which do not create a lien but limit its duration only. If a creditor is to avail himself of the statutory remedy he must carefully follow the procedure set forth in the acts.

Leo F. Dodson

COMMENTING ON THE WEIGHT OF THE EVIDENCE AND THE CREDIBILITY OF WITNESSES IN THE CHARGE TO THE JURY

In the majority of states, usually because of statutory or constitutional provisions, trial courts are not permitted, in charging juries, to comment on the facts, or express an opinion on the weight of the evidence or the credibility of witnesses.¹ There the jury prevails as the sole fact finding agency, divorced from all suggestions and leads of the trial court.² Any remark made by a judge, whether direct or indirect, intentional or inadvertent, from which the jury may infer what his opinion is, as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is error.³ However, at common law and in Pennsylvania it is not error for the trial court in its charge to the jury to express an opinion on disputed questions of fact, provided such questions are ultimately left to the jury for their decision, without any direction as to how they

⁸⁹Breden v. Agnew, 8 Pa. 233, 236 (1848).

¹38 Cyc. 1646; Tait v. Murphy, 80 Ala. 440; Randolph v. McCain, 34 Ark. 696; Miller v. Stewart, 24 Cal. 502; Stacy v. Cobbs, 36 Ill. 349; Goss v. Calkins, 162 Mass. 492; Ross v. State, 29 Tex. 499.

²State v. Williams, 31 S. C. 4.

³Fuhrman v. Huntsville, 54 Ala. 263; State v. Ah Tong, 7 Nev. 148; State v. Dick, 60 N. C. 440.