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NOTES

BROKERS—PLEDGES—REHYPOTHECATION OF STOCK—DEFENSE TO THE ACTION—A somewhat striking decision has been recently handed down by the Supreme Court of Pennsylvania in *Sproul* v. *Sloan*,[1] involving the rights of a pledgee convertor of stocks. The broker was to purchase the stock and carry it on a margin. As the stock was purchased from time to time he mingled it with other stock, all of which he rehypothecated for an indebtedness of his own, without knowledge or authority of the customer. The stock depreciated heavily and the customer, upon learning of the conversion, refused the tender of it, and the demand for the payment of the debt, or balance due the broker. The stock was then sold and the proceeds credited to the customer, and an action brought for the alleged balance. It was ruled that inasmuch as the broker had converted to his own use the stock purchased for the customer (defendant) by hypothecating it for his own indebtedness, he had

[1] 241 Pa. 284 (1913); 88 Atl. Rep. 501.

broken his contract and the tender of the stock before the sale was immaterial, since he was in no position to demand performance by the customer. As soon as the customer had learned of the conversion, he, as was his right, repudiated the contract. The only safe rule is that the broker pledges the stock at his peril.

The effect of this decision is that where a pledgee converts the subject matter of the pledge he thereby presents to the pledgor a total defense to any action upon the contract of pledge or upon the principal indebtedness secured by it, and has apparently, at the option of the pledgor, extinguished all his own rights under it. While in this particular case, in view of the insolvency of the pledgee, a somewhat summary justice to the pledgor lends color to the decision,[2] yet upon a consideration of the relation of the parties as defined at the common law generally,[3] and as defined in Pennsylvania in actions[4] correlative to that of the principal case, *viz.*, pledgor against pledgee, we find that a conversion of the pledge has not been recognized as a defense to, nor as destructive of the obligation, but is admitted as a basis of equitable counterclaim, or by way of recoupment of damages.

The Court of Appeals of New York, in treating the question presented upon exactly the same facts as those of the principal case, ruled[5] that the pledgee had a right of recovery for the credit extended but was liable for the damages sustained by the customer by reason of the subsequent conversion; that the rehypothecation and resulting sale of the stock did not constitute a failure to perform a condition precedent, but established a breach of a condition subsequent to the purchase. This is an express recognition and enforcement of the principal indebtedness despite a conversion of the subject of the pledge.

In *Johnson* v. *Stear*,[6] an action by the pledgor against the pledgee for conversion, the English court ruled that in estimating damages the interest of the pledgee in the security at the time of the conversion is to be taken into consideration, because "the contract creates an interest and a right of property in the goods which is

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[2] And even this phase of decision loses strength in view of the succeeding rights of the insolvent's assignees.

[3] Johnson v. Stear, 10 Jur. N. S. 99 (Eng. 1864); Donald v. Suckling, L. R. 1 Q. B. 585, 609 (Eng. 1866); Halliday v. Holgate, L. R. 3 Exch. 299 (Eng. 1868); 21 Amer. Law Reg. 454; Jones on Collateral Securities, §§420, *et seq.*; Boone, "Mortgages," §306; Paine, "Bailments," 123; Story, Bailments, §315.

[4] Work v. Bennett, 70 Pa. 484 (1870); Rolan v. Bank, 135 Pa. 598 (1890); and compare Stuart v. Bigler, 98 Pa. 80 (1881) and Thompson v. Patrick, 4 Watts, 414 (Pa. 1835), which are easily reconcilable with the rule contrary to the principal case.

[5] Capron v. Thompson, 86 N. Y. 418 (1881), flatly *contra* to Sloan v. Sproul.

[6] 10 Jur. N. S. 99 (Eng. 1864).

more than a mere lien; and *the wrongful act of the pledgee does not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.*" This case, repeatedly affirmed in England and accorded almost universal approval in American jurisdictions, is fundamentally definitive of the relation of the parties to, and their rights under a contract of pledge, which arises from an obligation (a) on the part of the pledgor to pay a stated indebtedness to the pledgee, to secure the payment of which he places certain property in the hands of the pledgee, who (b) obligates himself either to return the property upon satisfaction of the obligation from other funds of the pledgor, or on sale of the pledge and satisfaction from the proceeds thereof, to return the surplus.[7] The original indebtedness or obligation is superior to and independent of the contract of pledge, the latter being collateral. It is difficult to see wherein a breach of the collateral contract can affect the validity of the principal obligation, other than by way of an equitable counterclaim or cross action, or by recoupment of damages. The original obligation remains, subject to adjustment upon respective claims of the parties, payable to the pledgee,[8] who has never released his chose in action by any method known to the law of contracts. That obligation continues and is binding independently of the status of the collateral security. The pledgee may upon default of the pledgor, elect to proceed personally against him for his debt, without a sale of the security,[9] and obtain a judgment without in any wise affecting his lien.[10] This being true there is slight ground for the contention that a breach of the collateral contract of pledge, or a tort upon the subject matter of the pledge, constitutes a total defense to an action upon the principal obligation.

Nor does there appear to be any tenable reason to support the rule from the defendant's point of view. The transaction opens with an obligation on his part to pay another, and to secure the performance of that obligation he agrees to give that other possession of property in pledge. As already pointed out the original obligation is unaffected. Should the debtor, now pledgor, in consequence of any default or conversion by the pledgee, recover the value of the pledge, still the debt remains and is recoverable, unless

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[7] See cases and text writers referred to in notes 3 and 4 *supra*.

[8] Johnson v. Stear, *supra*, n. 3; Halliday v. Holgate, *supra*, n. 3; Work v. Bennett, *supra*, n. 4; Boone, Mortgages, §§307, 308.

[9] Granite Bank v. Richardson. 7 Met. 407 (Mass. 1844), where the pledge after maturity and during the suit had become worthless; Ward v. Morgan, 5 Sneed, 79 (Tenn. 1857); Elder v. Rouse, 15 Wend. 218 (N. Y. 1836); South Sea Co. v. Duncombe, 2 Strange, 919 (Eng. 1714).

[10] Jones v. Scott, 10 Kan. 33 (1872); Archbald v. Argall, 53 Ill. 307 (1870). But *contra*, as to retention of the lien only, Poole v. Symonds, 1 N. H. 289 (1818).

in such prior action it has been deducted.[11] Although the use of the pledge has been tortious, the pledge is answerable but only in an action[12] (including, of course, cross action and recoupment). The damages go only to the extent of the injury to the pledgor's rights in the pledge subject to the pledgee's special property at the time of the conversion.[13] So, if the pledgor desires to avail himself, *via* defense, of the advantage of the pledgee's tort or default, he is limited to his actual loss; if he desires to recover for the conversion he departs from the contract relation, and is thereby put to separate action.[14]

Nor can the tort of the pledgee be said to be a sufficient justification for depriving the pledgor or where he is insolvent, his assignee of the rights accruing under the principal obligation.[15] The mere fact that the contract has proved to be a poor bargain from the debtor's point of view, has never operated in the eyes of the law to relieve him from performance.

Nor is there anything favorable to the rule to be gathered from the theory that a pledgee is a trustee of the pledge. That theory, while apparently sufficient to define the status of the pledgee with regard to the property,[16] is not tenable in that it fails to account for and include the larger rights and liabilities of the parties with regard to the principal obligation or indebtedness.

J. C. A.

CONTRACTS IN RESTRAINT OF TRADE—LABOR UNIONS—The hat manufacturers of a certain town and vicinity, acting in concert, entered into an agreement with a labor union not to employ any but union labor. The plaintiff, being dropped from the rolls of the local union, was discharged from the employment of one of the manufacturers in pursuance of the agreement, at the instigation of the defendants. The court held that the agreement was contrary to public policy where it embraced an entire industry of any considerable proportion in the community, so that it would operate generally in that community to prevent or to seriously deter craftsmen from working at their trade under favorable conditions without

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[11] Ratcliff v. Davis, Yelv. 179 (abt. 1600); Bac. Abridg. "Bailment," B. The rule obtains in both common and civil law, Story on Bailments, §§315, 316.

[12] Thompson v. Patrick, *supra*, n. 4, and ruling further that after a conversion by the pledgee, should the pledgor surreptitiously get possession of the pledge, he cannot hold it as against the pledgee, or his assignees.

[13] Johnson v. Stear, *supra*, n. 3.

[14] Stearns v. Marsh, 4 Denio, 227 (N. Y. 1847); Bulkley v. Welsh, 31 Conn. 339 (1863).

[15] Judgments upon contracts, it is submitted, are by policy of the common law remedial, not punitive.

[16] Jones on Collat. Security, 393; Felton v. Brooks, 4 Cush. 203 (Mass. 1849); McCrea v. Yule, 68 N. J. L. 465 (1902).

joining a union; hence the agreement was no justification to the defendants for inducing the plaintiff's discharge.[1]

The cases as to liability for causing the discharge of an employee divide themselves into two classes: (a) those cases where the discharge is procured by means of threats, coercion, *etc.*;[2] and (b) those where the discharge is the result of an agreement previously entered into. Only the cases falling within the second class, of which the principal case is one, will be treated in this note.

Contracts between an employer or an association of employers and a labor union, providing for the employment of members of the union only, are of very recent origin, and the decisions in respect to their validity few in number and not altogether harmonious.

In the earliest case on the question[3] it was held that such a contract was no defense for representatives of the union in an action brought against them individually by a non-union man for damages for procuring his discharge in accordance with the "closed shop" agreement because the contract was against public policy and void. Here the agreement was between the union and an *association of employers*. In the next case,[4] on substantially the same facts, the court held the contract to be consonant with public policy, and valid. The court says that *Curran* v. *Galen*[5] "stands unaffected as authority" and bases its decision on the distinction that in *Curran* v. *Galen* there was an *association of employers*, while in *Jacobs* v. *Cohen*[6] there was but a *single employer* in the agreement; arguing that if the agreement was not such as embraced an entire industry or if it did not operate generally in the community to prevent such craftsmen from obtaining any employment then it is lawful and not void as against public policy. These two cases are followed in *Mills* v. *United States Printing Co.*[7] and in *McCord* v. *Thompson-Starrett Co.*[8] and would seem to crystallize the New York law into two rules: (a) a contract, between an association of all (or practically all) the employers of labor engaged in the same line of business in a single community, by which it is agreed that the employees of the individuals composing the association shall be exclusively members of the union, is against public policy and void, but (b) that a con-

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[1] Connors v. Connolly *et al.*, 86 Atl. Rep. 600 (Conn. 1913).

[2] This class of cases is treated very exhaustively by Prof. Jeremiah Smith, of the Harvard Law School, in 20 HARVARD LAW REVIEW, 253, 345, 428 (1907). See also an article by Dr. William Draper Lewis, Dean of the Law School of the University of Pennsylvania, in 18 HARVARD LAW REVIEW, 444 (1905).

[3] Curran v. Galen, 152 N. Y. 33 (1897).

[4] Jacobs v. Cohen, 183 N. Y. 207 (1905).

[5] *Supra*, n. 3.

[6] *Supra*, n. 4.

[7] 99 N. Y. App. Div. 605 (1904).

[8] 129 N. Y. App. Div. 130 (1908).

tract, between an individual employer and a labor union, by which the employer binds himself to employ and retain in his employ only workmen who are members of the union and only such members as are in good standing, is not against public policy and is valid. As is seen from the principal case, Connecticut apparently has adopted these rules; or it might be more accurate to say it has adopted the first of these rules, since the facts of the case fall within that rule. Yet from the language and the spirit of the decision it is gathered, that it would adopt the second rule if facts were presented to them which demanded a decision on this point.

In *Brennan* v. *United Hatters of North America*,[9] the New Jersey Courts made no adjudication in respect to such a contract, it being unnecessary to the decision in the case but the substance of the decision in *Curran* v. *Galen*[10] and *Jacobs* v. *Cohen*,[11] was stated and it was said: "Whether these decisions are consistent with each other is a question that may require consideration at a future time."

In *Curran* v. *Galen*, the court bases its opinion on the fundamental principle that while it is perfectly lawful to combine for such legitimate purposes as to obtain an advance in the rate of compensation, or to maintain such rate, or to better working conditions; yet such combinations cease to be lawful when they are so extended in their operation as either to intend, or to accomplish, injury to others. When the operations of an organization are such as to promote the common good of its members, they are legitimate instrumentalities, but when they militate against the general public interest by directing their powers toward the repression of individual freedom they cannot be justified. The justification of this latter class of operations would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. In *Jacobs* v. *Cohen* the court nullifies to a large extent the fundamental principle laid down in *Curran* v. *Galen* and seems to, in a measure at least, shift the grounds of the decision. It is submitted that, while the distinction on the facts between the two cases is perfectly evident, yet the reasoning of the court as to why a different legal conclusion should result is not clear or convincing. A vigorous dissenting opinion was handed down by two members of the court.

The Supreme Court of Massachusetts in *Berry* v. *Donovan*[12] in an elaborate opinion expressly approved *Curran* v. *Galen*, and in adopting the principles there expressed elaborated on them. In the course of the opinion it was pointed out that contracts, the object of which is to compel a workman to join a union, cannot be justified as legitimate competition between workmen, but on the other hand tend to prevent such competition and to foster monopoly. It

[9] 73 N. J. L. 729, 65 Atl. Rep. 165 (1906).
[10] 152 N. Y. 33 (1897).
[11] 183 N. Y. 207 (1905).
[12] 188 Mass. 353, 74 N. E. Rep. 603 (1905).

is no legal objection to action whose direct effect is helpful to one of the parties in the struggle, that it is also directly detrimental to the other. But when action is directed against the other, primarily for the purpose of doing him harm and thus compelling him to yield to the demand of the actor, and this action does not directly affect the property, or business or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act. The gain which a labor union may expect to derive from inducing others to join it, is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of injury upon a third person for the purpose of obtaining it.

C. McA. S.

CORPORATIONS—STOCKHOLDERS' LIABILITY FOR UNPAID SUBSCRIPTIONS—It is well settled that upon the insolvency of a corporation, its creditors may, in a proper proceeding in equity, reach and apply, to the payment of their claims, any unpaid balances to the subscription of the capital stock of the corporation.[1] A recent California decision[2] has once more stated this proposition.

Although this principle can be said to be practically universal, the American courts are not, however, in accord as to the doctrine or theory to be applied in deciding cases arising under it. Three important doctrines, generally followed by the different jurisdictions, have thus far been brought forward by the Federal,[3] Minnesota[4] and Missouri[5] courts, respectively.

The Federal courts apply in these cases the so-called Trust-Fund Theory, based on a *dictum* of Judge Story in *Wood* v. *Dummer*,[6] to the effect that the capital stock of a corporation constitutes a "trust-fund" for the payment of corporate debts. Under this doctrine, no part of the capital of the corporation can be law-

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[1] Sawyer v. Hoag, 17 Wall. 610 (U. S. 1873); Upton v. Tribilcock, 91 U. S. 45 (1875); Hospes v. Manufacturing Co., 48 Minn. 174 (1889); 4 Thompson on Corporations (2nd Ed.), §4935.

[2] Herron Co. v. Shaw, 133 Pac. Rep. 488 (Cal. 1913).

[3] Sawyer v. Hoag, *supra*, n. 1.

[4] Hospes v. Manufacturing Co., *supra*, n. 1.

[5] Chrisman-Sawyer Banking Co. v. Wool Manufacturing Co., 168 Mo. 634 (1902).

[6] 3 Mason's Reports, 308 (U. S. 1824). In this case a bank had divided its capital stock as dividends among its stockholders without paying its creditors, the bank note holders. The creditors brought a bill against the stockholders for the payment of their notes. Judge Story *inter alia* said, "The capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank." This statement was unnecessary, as the bank's acts were fraudulent and void as against its creditors.

fully withdrawn by the stockholders if there are any outstanding corporate obligations to the payment of which it should be applied. If, therefore, any portion of the capital stock for which a stockholder has subscribed has not been paid, such balance remains in the hands of the stockholder impressed with a trust in favor of the corporate creditors; and if the assets are insufficient to discharge the corporate obligations, the creditors may in equity subject the unpaid balance to the payment of their claims.[7] The trust-fund doctrine is not as unqualified as its mere statement would cause one to conclude. For the Federal courts, seeing that the practical application of the doctrine as usually stated would be ruinous to, and destructive of, the business management of corporations, have limited its application, so that it does not really apply until the insolvency of the corporation.[8] This doctrine is, however, inconsistent in many of the decisions based under it; for example, that a creditor who has contracted his debt with the corporation prior to the subscription of the stockholder whom he is serving cannot recover, as he did not rely on such subscription.[9] It is submitted that if the capital stock and unpaid subscriptions, which are a part of the capital, are a trust fund, the fact that one is a prior creditor should make no difference in his right against unpaid stockholders.

The Minnesota courts[10] have set forth a doctrine which, though based in a way on the trust-fund theory, is nevertheless much more consistent in its decisions. This doctrine, often called the Deceit Doctrine, places the recovery of unpaid subscriptions by creditors on the ground of fraud or deceit practised on the creditors by the misrepresentation of the stockholders in stating the amount of capital to be greater than it really is. Under this theory, any scheme or arrangement by which stockholders may avoid full payment of the subscription is a fraud on those creditors who rely on full payment; and these creditors may recover on the ground of this fraud. If, therefore, a creditor, whose debt was contracted prior to the stockholder's subscription, sues for an unpaid balance, he cannot recover; he has not relied on any misrepresentation by the stockholder.[11] Likewise, if the creditor knows of the arrangement by which stock is issued fully paid, though in fact only a part of the subscription is paid, he cannot recover since there was no reliance on his part nor fraud practised on him.[12]

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[7] 26 Am. and Eng. Encyc. of Law (2nd Ed.), 1007 *et seq.*

[8] Thompson on Corporations (2nd Ed.), §3418; Graham v. La Crosse Co., 102 U. S. 148 (1880).

[9] Marion Trust Co. v. Blish, 170 Ind. 686 (1908); 4 Thompson on Corporations (2nd Ed.), §5021.

[10] Hospes v. Manufacturing Co., *supra*, n. 1; National Bank v. Mining Co., 42 Minn. 327, 1890.

[11] National Bank v. Mining Co., *supra*, n. 10.

[12] Bent v. Underwood, 156 Ind. 516 (1901); Callanan v. Windsor, 78 Iowa, 193 (1889); Coit v. North Carolina Co., 14 Fed. 12 (1882): *contra* Sprague v. Bank, 172 Ill. 149 (1898); Gillett v. Chicago Co., 230 Ill. 373 (1907).

The Missouri courts[12] have gone a step further and have held that all corporate creditors, without regard to whether their debts were contracted previous or subsequent to the subscription, have a right to apply unpaid subscriptions to the payment of their debts, unless they choose to waive this right. It is submitted that this should be the rule governing a stockholder's liability for unpaid subscriptions, as it conforms "to the demands of business integrity and honesty and is the logical sequence of the voluntary act of the stockholder flowing from his subscription."[14] The theory of "holding out" or reliance, set forth in the Deceit Theory as the foundation of the stockholder's liability, is not absolutely true, inasmuch as when one becomes a creditor of a corporation there is really no "holding out" by existing stockholders as opposed to subsequent stockholders as far as he is concerned. He relies entirely on the capital stock of the corporation, whether subscribed previous or subsequent to his contract with the corporation.

Frequently, charters of corporations provide that the subscription may be paid in property, real and personal.[15] In such cases, the question often arises as to whether there has been an overvaluation of the property, and the courts have settled upon certain rules in deciding these cases. The Federal courts hold that fraud will not be presumed; but if actually proved, it will vitiate the transaction to the extent of compelling the stockholders to pay the difference between the par value of the stock and the actual value of the property.[16] Gross overvaluation is strong and almost conclusive evidence of fraud, according to the degree of overvaluation. The Minnesota courts are in accord.[17] The New York courts will rescind the contract of subscription on the ground of fraud but will not imply a new contract by which the stockholders shall pay the difference between the par value of the stock and the actual value of the property.[18]

N. I. S. G.

PATENTS—INVENTION—DOUBLE USE—The dividing line between a new use involving invention and a mere double use which is not patentable, is one often very difficult to draw, and will depend entirely on the facts of the particular case. An instance of a mere double use is furnished by the recent case of *Weir Frog Co.* v.

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[12] Chrisman-Sawyer Banking Co. v. Wool Manufacturing Co., *supra*, n. 5.
[14] Chrisman-Sawyer Banking Co. v. Wool Manufacturing Co., *supra*, n. 5.
[15] Coit v. North Carolina Co., *supra*, n. 12.
[16] Taylor v. Cummings, 127 Fed. 108 (1903); Taylor v. Walker, 117 Fed. 737 (1902); Coit v. North Carolina Co., *supra*, n. 12.
[17] Hastings Co. v. Iron Range Co., 65 Minn. 28 (1896); see 4 Thompson on Corporations (2nd Ed.), §§3975-93.
[18] Southwork v. Morgan, 205 N. Y. 293 (1912).

Porter.[1] In this case a patent for a semi-automatic derailing switch was held void for lack of invention. The switch was set so as to divert the car from the main track and was held in that position by means of a weight, thereby requiring positive intervention to throw it into its alternative position and causing it to return to the original position when the force was removed. The special utility of the device was in reference to crossings of steam railroads by electric cars. By placing the operating lever at the crossing, or danger point, the conductor of an approaching car, will be compelled to go forward to that point, and hold the switch so that the car can pass and in so doing he gets a view of the other track.

That a patentee is entitled to every use of which his invention is susceptible, is fundamental, whether such use be known or unknown to him.[2] But the person who has taken his device and by improvements thereon, even though slight, has adapted it to a different industry, may thus draw to himself the quality of inventor.[3] For it often requires as much intuitive genius to grasp the idea that a device heretofore used in one art, may be made available in another, as would be necessary to create the device *de novo*. And this is none the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before. As the cases of necessity go entirely upon the particular facts, it is almost impossible to lay down any hard and fast rules for determining the exact point where invention begins. But the underlying principle is the same in all cases, and is well stated in *Potts* v. *Creager*.[4] The court said:

> "As a result of the authorities it may be said that if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote and especially if the use of the old device produce a new result it *may* at least involve invention."

In a doubtful case the fact that a subject of a patent has gone into general use and has displaced other processes or things, which had previously been employed for analogous uses, may be sufficient to turn the scale in favor of the existence of invention;[5] so also a long unsatisfied prior demand.

In the principal case, switches and switch points were old.

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[1] 206 Fed. Rep. 670 (1913).

[2] Tucker v. Spalding, 13 Wall. 453 (U. S. 1871); Brown v. Piper, 91 U. S. 37 (1875); Roberts v. Ryer, 91 U. S. 150 (1875); Penna. Co. v. Locomotive Co., 110 U. S. 490 (1883).

[3] Potts v. Creager, 155 U. S. 597 (1894).

[4] *Ante* n. 3.

[5] Smith v. Dental Vulcanite Co., 93 U. S. 495 (1876).

Operating them by rods or cables running to a distant point was old. The use of a spring or weight to hold the switch point normally in one of its two alternative positions, so that it would always be in that position except while temporary force held it in another position, was old. And it was old to operate this particular kind of a switch from a distance. These features or their equivalents were all present in a patent granted to one Martel.[6] The only difference in Martel's device was that in his patent the switch was used to keep the main track open, while in the Porter patent it was to keep the main track closed. The court has taken the view that "main track," and switch track are mere arbitrary names, and really mechanically identical, for what is a switch to-day may become the main line to-morrow, because of a blockade, or because the superintendent changes his mind. If this be true the Porter patent is clearly only an instance of a double use, namely, keeping the main track closed instead of open. It is suggested, however, that in this case, the words "main track," have a distinct and more particular meaning, in that they refer to the only track which crosses the danger point and leads to the car's destination.

It was further contended that the increased safety derived from requiring the switch to be operated at the danger point was such a new result as to amount to invention. At first glance this might seem to be the case. But upon closer inspection it is clear that there is no actual new result produced; merely a new utilization of an old result. It amounts to no more than an idea for a wider use of an old device without any new mechanical embodiment. And this as pointed out by Judge Grosscup in *Voightman* v. *Perkinson*[7] is not patentable. He said:

> "Concept alone is not patentable. Concept must be accompanied by mechanical embodiment and as the law now stands mechanical embodiment, to make the invention patentable must itself be emancipated. . . . Now in Voightman's patent every mechanical element is found to have pre-existed. . . . Voightman possibly has pointed out to the world a wider use of the pre-existing art than was before known. But the discovery of an enlarged use is not of itself patentable invention."

T. S. P.

WILLS—THE RULE IN SHELLEY'S CASE—In a recent case[1] it was held by the Supreme Court of Pennsylvania that, where the testator devised his real estate to his daughter for life and after her death to descend to and become vested in the children of the

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[6] No. 243,933 (1881).

[7] 138 Fed. Rep. 86 (1905).

[1] Lauer v. Hoffman, 241 Pa. 315 (1913).

said daughter, should she have any, in fee simple, and in default of such children, then to such person or persons as she may by her last will and testament direct; and then followed by a declaration that in no event whatever shall the fee simple to the said real estate vest in the daughter during her lifetime, the rule in Shelley's case applied and the daughter took a fee simple.

A statement of the rule is as follows: "Wherever the ancestor takes an estate of freehold, 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."[2] The rule has no place in the interpretation of a will, and takes effect only when the interpretation has been first ascertained by the application of settled rules of construction.[3] In determining whether the rule is applicable the test is how the donees in remainder are to take. If as purchasers under the donor, then the particular estate is limited by the literal words of the deed and the rule in Shelly's case, has no application. But if the remaindermen are to take as heirs to the donee of the particular estate, then what has been called the superior intent, operates and the first donee takes a fee.[4]

The great point made against the rule is that it disregards the intention of the author of the instrument. In our principal case,[5] in the dissenting opinion it was said that the majority of the court ignored the cardinal rule, time and again announced in all jurisdictions, that a will shall be construed from all four corners and that all four parts of it shall be made to harmonize if possible. The rule in Shelley's case, however, is not really an exception to the rule that the intention of the testator must guide in interpreting a will, but only sacrifices a particular to a general intent.[6] Sir William Blackstone, in his famous argument in *Perrin* v. *Blake*,[7] pointed out that the true question of intent should turn not upon the quantity of the estate intended to be given to the first devisee, but upon the nature of the estate intended to be given to the heirs.[8]

The testator either intends that the estate shall go to the whole line of life tenant's heirs, in succession from generation to generation, in the course marked out by the law of descent; or he intends that it shall go to a portion of those heirs in a course different from that marked out by the law of descent. It is apparent both cannot be carried out unless a new species of estate, unknown to the law, is

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[2] Fearne's Cont. Rem. 28.

[3] Yarnall's Appeal, 70 Pa. 335 (1872).

[4] Shapley v. Diehl, 203 Pa. 566 (1902).

[5] Lauer v. Hoffman, *supra*, n. 1.

[6] Fuller v. Chamier, 12 Jur. N. S. 642 (Eng. 1866).

[7] 1 W. Bl. 672 (K. B., Eng. 1769).

[8] 6 Greenleaf's Cruise, Real Prop. 386. See for same proposition, Deemer v. Kessinger, 206 Ill. 57 (1903).

created. Therefore, one or the other must govern. If it is certain that the heirs of the life tenant are to take by descent, the only method by which this can be accomplished is by vesting in the ancestor an estate capable of descending, or in other words a fee. This is what the rule in Shelley's case does, and in giving the ancestor a larger estate than the creator in terms said, the court is really carrying out the testator's main thought. It is therefore inaccurate to state that the rule destroys the intent.

Where the language used in the instrument brings the devise within the operation of the rule, the words must be taken as they stand, in their strict legal signification. The question is not, whether the testator intended the rule should not operate, for that is not subject to his power, but whether he used words synonymous with heir or heirs of the body as the case may be.[9] Since it is a substantive rule of property, and not of construction, no declaration, however unequivocal, that the ancestor shall have an estate for life only, will be operative; the particular intent thus clearly expressed will be compelled to yield to the general intent expressed by the creation of the estate.[10] In its principle, declared one court,[11] it is very like the rule of the Statute of Uses and of our equity, that disregards the mere form of a title to land, and even some of its minor incidents, and treats it as being his to whom it substantially belongs though the form and intention be otherwise.

In our principal case the majority of the court said that it is clear that in giving the daughter the life estate, the testator intended to make her a source of inheritable succession. They construed the words "descend to" and "become vested in" as standing alone and not controlled by the subsequent positive declarations that they shall not be interpreted so as to create in the daughter a fee simple estate. Much can be said for the argument that the testator meant just the reverse, to wit, that the children should take the fee in their own right, that his main thought was for them as a particular class who were to take from his as purchaser. The rule in Shelley's case does not operate when the limitation in remainder is to the "children" of the life tenant. It is considered as a word of purchase, unless it clearly appears to have been used in the sense of heirs, or heirs of the body.[12] By his positive declaration coupled with the use of the word "children," it might be argued, that the testator clearly showed his intent that the words "shall descend to and become vested in"

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[9] Simpson v. Reed, 205 Pa. 53 (1903).

[10] Trumbull v. Trumbull, 149 Mass. 200 (1889); Martling v. Martling, 55 N. J. Eq. 771 (1896); VanGruten v. Foxwell, 77 L. T. (N. S.) 170 (Eng. 1897).

[11] Price v. Taylor, 28 Pa. 95, 102 (1857).

[12] On the question whether the word "children" is a word of limitation or word of purchase generally, see note to Wills v. Folta, 61 W. Va. 262, 12 L. R. A. (N. S.) 283, 56 S. E. Rep. 473 (1907).

should be construed to mean "shall descend from me and go to."[12] If the will is thus read, no violence is done to the words used, no departure is made from the rule in Shelley's case, and the clear intent of the testator is given effect.

S. L. M.

LEGAL ETHICS—The following questions were recently answered by the New York Lawyers' Association Committee on Professional Ethics:

QUESTION:

Is it proper for a young man of twenty-two, who at present is completing a three-year course at law school, and has worked for about two years in a law office, but has not yet been admitted to practice, to open an office at his place of residence and there do notarial work (he being a notary public), draw various legal papers, manage estates, collect rents and do a general real estate and insurance business?

Also state whether such a pursuit would in any way affect the standing of such a person, when applying for admission to the bar, so that it might give the Committee on Character cause for hesitating in their approval of him?

ANSWER:

In the opinion of the Committee, he should refrain from the business of drawing legal papers. The giving of legal advice by notaries and others who are not admitted to practice law is, in its opinion, dangerous to the welfare of the community, because such persons have not demonstrated their capacity by submitting to examination lawfully established for practitioners of law. The Committee is not aware of any reason why he should not engage in the other employments mentioned to such extent as may not interfere with the proper completion of his law course. The Committee cannot assume to express any views for the Committee on Character.

QUESTION:

An individual engaged in the printing business, and making a specialty of case and brief printing, presents the following question:

"In the opinion of the Committee of Professional Ethics is there impropriety in my advertising in connection with my business the following:

"First Class Briefs Written for the Profession by Able Lawyers.
Also Cases on Appeal Prepared."

and in my employing for my customers lawyers to write briefs and to prepare cases on appeal, making arrangements with them for their compensation by me out of the compensation received by me for the combined work of furnishing to my customers cases on appeal and briefs written by my said lawyers and printed for the use of my customers at my printing establishment?"

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[12] Donovan v. Woodworth, 234 Pa. 507 (1912).

ANSWER:

While this question appears to be propounded by one not a member of the profession, yet since it involves questions of "proper professional conduct," the Committee expresses its opinion as follows:

The course of action suggested would in our opinion be improper for the following reasons:

1. A printer so advertising, even if he were not violating the letter of Section 270 of the Penal Law, which makes it unlawful for a person who has not been duly admitted to the bar to practice law, would certainly be acting contrary to the spirit of that provision.

2. Section 280 of the Penal Law makes it unlawful for a corporation to furnish legal services or advice in this way. We think the principle which underlies this provision applies equally to an individual who is not a lawyer, and makes it equally improper for him to furnish legal services in this manner.

3. The relation between attorney and counsel is of a personal and fiduciary nature, and imposes obligations and responsibilities which cannot be fully realized unless the attorney and counsel deal with each other directly.

4. The relation of the writer of a brief to the Court is one the dignity and responsibility of which are inconsistent with the scheme proposed.

5. The offer by a third party, not an attorney, to furnish or sell the legal services of members of the bar (in this case undisclosed), is derogatory to the dignity and self-respect of the profession and would tend to lower the standards of professional character and conduct.

QUESTION:

Mrs. O. a client of A, an attorney, informs him that she deserted her husband over three years ago. That her husband is living in the city of ——, state of ——, and has resided there, she believes, for a considerable period. That she is satisfied that she can never live with him again under any circumstances.

She desires A, as her attorney, to see Mr. O. to ask him if he will not institute proceedings for a divorce against her in said state of ——, in which state she is informed he is entitled to a divorce on the ground of her desertion, and of which state he has been a resident for a sufficiently long time.

Is A, in accepting the retainer, and having the interview with Mr. O, guilty of unprofessional conduct?

ANSWER:

In the opinion of the Committee, it is not unprofessional to accept such a retainer, and there is no collusion or other impropriety in asking a husband to enforce rights which have already accrued. In view of the only too numerous scandals connected with divorce litigation, however, the Committee believes that attorneys should be particularly careful in all such cases to satisfy themselves that there has been no collusion in the prior conduct of the parties.