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THE LAW SCHOOL. Dr. William Draper Lewis, of the Philadelphia Bar, has been elected Dean of the Law School and has entered on the duties of the office. Dr. Lewis was formerly editor of the AMERICAN LAW REGISTER AND REVIEW and is known as the collaborator with Mr. George Wharton Pepper in the preparation of Pepper and Lewis' Digests, and also for his contributions to legal literature. A leave of absence for the year has been granted to Professor Townsend. The enrollment of three hundred and thirty students is larger than that of any previous year.

MARRIED WOMEN—CONTRACTS. In the advance sheets of the Northwestern Reporter, dated September 12th, is an interesting case concerning the contractual rights of married women, entitled *The Directors of the Chamber of Commerce* v. *Goodman.* The case was decided by the Supreme Court of Michigan with three of the Justices dissenting.

The plaintiff sued the defendant to recover for an amount due on a subscription. The defendant together with others signed the subscription paper, agreeing to contribute the amount opposite her name in order that the directors of the Chamber of Commerce might be able to locate the Chamber of Commerce building

at the corner of State and Griswold Streets, Detroit. The defendant's subscription was not paid. When it was made she was a married woman and possessed of a valuable building about a block away from the proposed site, and she signed the paper in the belief that the new building would add to the value of her property.

The only question in the case is, had the defendant the legal ability to make the subscription? The contractual power of a *feme coverte* being accorded her by statute, the sole difficulty involved is the interpretation of the Michigan Act of Legislature on that subject. It is provided (How. Ann. St. § 6295) that her separate estate may be contracted, sold, mortgaged, etc., as if she were unmarried.

This right has been uniformly interpreted as giving her not a general capacity to contract, but only the ability to make contracts which relate directly to the improvement of her separate property: *West* v. *Laraway*, 28 Mich. 464; *Emery* v. *Lord*, 26 Mich. 431; *DeVries* v. *Conklin*, 22 Mich. 255; *Reed* v. *Buys*, 44 Mich. 80; *Kitchell* v. *Mudgett*, 37 Mich. 81.

The fact, however, that her property is benefited by a contract is not alone sufficient to make her liable; there must be a direct relation between the contract and her property: *Reed* v. *Buys*, 44 Mich. 80; *Emery* v. *Lord*, 26 Mich. 431; *Willard* v. *Magoon*, 30 Mich. 273; *Newcomb* v. *Andrews*, 41 Mich. 520. If this contract had been entered into by the defendant to purchase property or directly to improve her separate estate her liability would have been unquestioned. The minority of the court were of the opinion that if the effect of the erection of a handsome structure near her property was to increase the value of her building, as the jury found it did, she did in fact acquire property and should be liable on her subscription. The better opinion, as was held by the majority of the court, seems, however, to be that the statute was not made with the intent to remove all the common law disabilities of married women, nor should it be extended by construction to cases not embraced in its language nor within its design: *DeVries* v. *Conklin*, 22 Mich. 259. As it was stated by Mr. Justice Cooley, in *Russell* v. *Bank*, 39 Mich. 671: "The test of competency to make the contract is to be found in this, that it does or does not deal with the woman's individual estate. Possible incidental benefits cannot support it." While that case was one of suretyship nevertheless it seems applicable to the present question. It cannot be doubted but that the benefit to be derived by the defendant's property from her subscription was but incidental and indirect, consequently the application of the test given by Mr. Justice Cooley could lead to no other decision than that reached by the majority of the court. But their decision is not justified on that ground alone, for not only the cases interpreting the statute but the words of the act itself seem to lead to the same conclusion.

THE EXERCISE OF THE DISCRETION OF THE ORPHANS' COURT. WHEN REVIEWABLE? SMITH'S APP. ADVANCE REP. (PA.) OCT. 2, 1896, p. 17. The Act of March 29, 1832, P. L. 190, § 31, gives the Orphans' Court discretionary power to order the sale or mortgage of real estate for the payment of decedents' debts. The later Act of May 29, 1832, P. L. 190, § 59, gives a right of appeal to the Supreme Court, to any person aggrieved by a definitive sentence or decree of the Orphans' Court.

Such appeal is exceedingly rare, however, as the Supreme Court has uniformly held that it will not review the actions of the Orphans' Court in the exercise of its discretion unless it appear on the face of the record that there was a palpable and gross abuse of such discretion. This rule is clearly enunciated in *Williams*'s *Estate*, 140 Pa. 187. Here the Orphans' Court having decreed a sale of decedents' property, and later confirmed the same, upon petition subsequently set the sale aside. On appeal to the Supreme Court it was held that the matter was within the discretion of the Orphans' Court and therefore no appeal would lie. In *Need's Appeal*, 70 Pa. 113, there being already an executor, the court appointed a stranger to make the sale of the premises. On appeal the Supreme Court held that the abuse was not sufficiently palpable upon the face of the record. See also in this connection: *Stiver's Appeal*, 56 Pa. 9; *Schwilke's Appeal*, 100 Pa. 628; *Hoope's Estate*, 152 Pa. 105; *McCredy's Appeal*, 2 Brewster, 200. In *Robinson* v. *McClaren*, 11 Pa. 414, the court went so far in this direction as to decline to disturb a decree of the Orphans' Court, refusing to order the sale of the land of a ward, though it appeared on the face of the record that the auditor had reported the sale to be both necessary and expedient.

Nor will the court review the appointments of guardians by the Orphans' Court: *Gray's Appeal*, 96 Pa. 243.

However, in the recent case of *Smith's Estate*, page 17, Advance Reports, Oct. 2, 1896, the court has indicated the point beyond which the use made by the Orphans' Court of its discretion cannot be ignored.

George Smith died, leaving a farm to his son William, and a house and lot to his son Darwin. The will stated that the testator did not wish that a debt which he owed to William should in any way be charged upon Darwin's share, as the farm left to William was far more valuable than the portion left to the younger son. By a codicil, however, he directed that all his indebtedness, whatsoever, after exhausting the personalty, should be paid out of Darwin's house and lot. Darwin contests the codicil as having been obtained by his elder brother through undue influence. The latter who is also executor applies for an order to sell the house and lot, and there being no personalty, the order is granted in spite of Darwin's protest that the codicil is in course of litigation. The sale takes place and the court confirms it, again under protest from Darwin, who alleges that his interests will be seriously damaged

thereby and that there is no necessity for such hasty proceedings, and he thereupon appeals. The Supreme Court held that by its decree the Orphans' Court had virtually passed upon the validity of the codicil, which was beyond its powers to do, and by its unnecessary haste had wrought great injustice to the appellant.

"If the court supposed it could make Darwin whole out of William's farm, for any loss sustained by the hurried sale, it was without power to make the order, for no court has the power to to direct the sale of one man's property to pay another's debt . . . If the court merely assumed that Darwin would lose his case on appeal, then the decree was an arbitrary exercise of power, which is an abuse of discretion. In either view the decree is not sustainable, for what the appellee seems to term discretion is in both cases mere despotism, the exercise of power by one in authority without basing the exercise of it on established fact or recognized principle." Decree reversed and set aside, the appellee to pay costs.

It seems, therefore, that the court will entertain an appeal in extraordinary cases, but only where the abuse of discretion is flagrant and notorious and appears clearly upon the record.

SALE OF GOODWILL. The law in regard to the right of the vendor, in a sale of the good-will of a business, to solicit his former customers was thought to be permanently settled by *Pearson* v. *Pearson*, 27 Ch. D. 145, and the cases which followed it, but the decision in *Trego* v. *Hunt*, L. R. App. Cas., Dec. 5, 1895, has changed the current of authority, at least in England. In order that the effect of that decision may be more clearly seen, a brief review of the law on the subject is necessary.

The question came squarely before the English courts for the first time in *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, and it was decided that the vendor could be enjoined from soliciting his old customers. The reason given by Lord Romilly was that persons are not at liberty to depreciate the thing which they have sold. Eight years later, *Ginesi* v. *Cooper & Co.*, 14 Ch. D. 596 (1880), Jessel, M. R., held the same opinion and, though this was dictum, carried the doctrine to the extent of saying that the vendor must not deal with his old customers even if they followed him of their own accord. In the subsequent cases of *Leggott* v. *Barrett*, 15 Ch. D. 306, and *Walker* v. *Mottram*, 19 Ch. D. 355, these views were substantially affirmed, though the restrictions upon the vendor were held to apply only in the cases of voluntary alienation of the business, not in that of forced sales in bankruptcy.

In 1884, however, in the case of *Pearson* v. *Pearson*, 27 Ch. D. 145, *Labouchere* v. *Dawson*, *supra*, was overruled by Baggallay and Cotton, L. JJ., Lindley, L. J., dissenting. The court considered that *Labouchere* v. *Dawson*, *supra*, had gone beyond anything to be found in the earlier cases, and that it had been much questioned. Cotton, L. J., said: "It is admitted that a person who has sold the goodwill of his business may set up a similar busi-

ness next door and say that he is the person who carried on the old business. I cannot see where to draw the line; if he may by his acts invite the old customers to deal with him, and not with the purchaser, why may he not apply to them and ask them to do so?

American authority upon the subject is very scarce, though an idea as to what the courts would have said if the question had been directly presented, may be gathered from decisions bordering upon it. In *Hall's Appeal*, 60 Pa. 458, it was held that a man who had sold his business, could not hold himself out as having removed from the former place to a new one where he would continue his old business. The court said: "He sold the goodwill of his business to the plaintiff for a valuable consideration and good faith requires that he should do nothing which directly tends to deprive him of its benefits and advantages."

It is well settled, on the other hand, that the vendor may establish a similar business at the next door, if he does not induce anyone to believe that he is the successor of the old business: *Hanna* v. *Andrews*, 50 Iowa, 462; *Bassett* v. *Percival*, 5 Allen (Mass.), 345; *Cattrell* v. *Babcock*, 54 Conn. 122; *Hoxie* v. *Chaney*, 143 Mass. 592; *Smith* v. *Gibbs*, 44 N. H. 335. But an express contract in restraint of trade within a reasonable radius would of course be supported: *Dwight* v. *Hamilton*, 113 Mass. 175; *McClurg's Appeal*, 58 Pa. 51; *Butler* v. *Burleson*, 16 Vt. 176; *Beard* v. *Dennis*, 6 Ind. 200. The general tendency has been only to restrict the vendor when there has been some such positive contract; see *Cattrell* v. *Babcock* (*supra*); *Bergamini* v. *Bastian*, 51 La. Ann. 60. It is most probable that had any case directly upon the point in question arisen, the reasoning of the English courts would have appealed to an American judge.

The case of *Trego* v. *Hunt* (*supra*), expressly approves of *Labouchere* v. *Dawson* (*supra*), and overrules the reasoning of *Pearson* v. *Pearson* (*supra*). In his opinion Lord Herschell, said: "The reason of Baggallay, L. J. (in *Pearson* v. *Pearson*), for dissenting from *Labouchere* v. *Dawson*, so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher court, and, as he thought, without sufficient reason. . . . I propose now to examine the older authorities. I may state at once, that I can find nothing in them inconsistent with the decision in *Labouchere* v. *Dawson*." His Lordship quoted the language of Jessel, M. R., in *Ginesi* v. *Cooper*, *supra*: "Attracting customers to the business is a matter connected with the carrying it on. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill." He then continued himself: "It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill.

The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. . . . What obligations then does the sale of the goodwill of a business impose upon the vendor?" His Lordship went on to show that, though it was hard to 'draw the line,' spoken of by Cotton, L. J., *supra*, still certain cases were on one side of it, others on the other, and continued: "If a person who has previously been a partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold and to restore it to himself."

In these sentences his Lordship has stated the kernel of the whole matter. If by frequent decisions it has been settled that the vendor may set up in a similar business next door, that must be accepted, and the mere difficulty of drawing a line between this case and that of soliciting the old customers should not be conclusive against doing so. It certainly does not seem just that a man should be able to sell a thing and then immediately do his best to destroy it. In the domain of tangible property he would be guilty of a trespass, and it appears wholly reasonable that he should here be restrained by injunction.

For an excellent review of the law of goodwill up to and including *Pearson* v. *Pearson* (*supra*), the reader is referred to a former number of this magazine: AMERICAN LAW REGISTER, Vol. 33, p. 216 (1894).

LETTING OF MUNICIPAL CONTRACTS. Recently several cases involving the letting of municipal contracts to the lowest bidder or lowest responsible bidder, have been before the courts in various forms for adjudication.

In the case of *Talbot Paving Co.* v. *City of Detroit*, 67 N. W. 979, the plaintiff paving company brought action against the municipality of Detroit to recover damages alleged to have been sustained by reason of the refusal of the defendant's city council to let to it a contract for paving for which it was the lowest bidder. Another bidder had put in a bid for a slightly higher sum, and was awarded the contract. The plaintiff furnished the contract bonds required by law, and the board of public works thereupon executed

a contract with the plaintiff in due form. The matter was referred to a committee, which after a time reported that the bid was informal, without stating what the informality was, and recommended that the next higher bid be accepted. Plaintiff filed a petition for a mandamus to compel the council to confirm this bid. An answer was given, issue of fact raised, which was sent to court for trial, and finally settled in favor of the plaintiff. In the meantime, however, the paving had been completed. On that account solely, the court said, was the mandamus refused.

The counsel for the city contended that although the contract awarded may have been void, yet the plaintiff, whose bid was rejected, could have no right of action at law to recover prospective profits; that, whenever an action may be brought for a breach of duty imposed by statute, the plaintiff must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. Long, C. J., in the opinion, said that "while under the charter of Detroit, it was the duty of the city to let the contract to the lowest responsible bidder, yet this provision was not passed for the benefit of the bidder, but as a protection to the public," and followed the rule laid down in *Strong* v. *Campbell*, 11 Barb. 138, where a duty is created or imposed for the benefit of another, and the advantage to be derived by the party prosecuting by its performance is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action. This is fully borne out by the case of *Trustees of Village of Plattsburgh*, 16 N. Y. 161, which contains in a note the opinion written by Mr. Justice Selden in the case of *West* v. *Trustees of the Village of Brockport*. The English and American cases on the subject are there reviewed at length. In the course of the learned opinion, it is said, "we see from the two classes of cases that there is an important distinction between the obligations assumed by private individuals for a consideration received from the government or sovereign power of the state and those assumed by public officers. . . . The reason for the distinction appears to be that intimated by Gould, J., in *Lane* v. *Cotton*, 1 Ld. Raym. 646, viz., that the duties in the one case are imposed upon the officer for public purposes only, while in the others they are voluntarily assumed with a view to private advantage. The cases which have been cited show that, in respect to this distinction, corporations have been placed upon the same footing as individuals." This seems to be the true rule, that public officers are not liable to an individual for neglect of duty "except in cases where the act performed or omitted to be performed was with a view to some private advantage." The public may complain and prosecute the delinquent official; but the individual, though injured, has no action for damages unless it can be shown that the duty imposed upon the official is for the individual benefit of the plaintiff, though that benefit be one for the advantage of many. As an answer to the contention that this rule would be a great burden upon the public

and lead to the perpetration of frauds in municipal affairs, two points are made: First, in these instances the public are not the complainants; second, the plaintiff is not in a position to take advantage of the act, because the charter was not made for its individual benefit. The only case which appears to rule a recovery for the individual in such instances as this under consideration is the case of *Adsit* v. *Brady*, 4 Hill, 630. Selden, J., in his opinion above referred to, after a careful analysis shows reasons for believing that the decision in *Adsit* v. *Brady* was based upon a rule which is too broad, a rule which "makes no distinction between officers who owe a duty to individuals from whom they receive a compensation for the performance of some specific service, and those whose obligations are to the public alone; a distinction which seems to rest upon a solid foundation of reason."

There is another question in connection with these cases, in respect to which the courts of various jurisdictions are divided. It is this—Is the duty of the officers of a public corporation entrusted with the letting of contracts for municipal supplies and works to the lowest responsible bidders a merely ministerial one, and may the letting of such contracts be controlled by mandamus? The Supreme Court of South Dakota in a case of *habeas corpus* proceedings, *In re McCain*, 68 N. W. 163, takes sides with the courts which have held that the duty is not merely a ministerial one, but the terms of each bid must be carefully considered, and the exercise of judgment cannot be controlled by mandamus. See *Douglass* v. *Com.*, 108 Pa. 559; *Madison* v. *Harbor Board*, 25 Atl. 337; *State* v. *Board*, 24 Wis. 683; *Kelley* v. *Chicago*, 62 Ill. 281; *State* v. *McGrath*, 91 Mo. 386, 3 S. W. 846; *High, Extr. Leg. Rem.*, § 92. But "agents of municipal corporations must maintain themselves within the law in the matter of awarding contracts, and if through fraud or manifest error not within the discretion confided to them, they are proceeding to make a contract which will illegally cast upon taxpayers a substantially larger burden of expense than is necessary, the courts will interfere by injunction to the effect of restricting their action to proper bounds:" *Times Publishing Co.* v. *City of Everett et al.*, 37 Pac. 695, 9 Wash. 518; *Crompton* v. *Zabriski*, 101 U. S. 601; *People* v. *Dwyer*, 90 N. Y. 402; *Mayor* v. *Keyser*, 72 Md. 106; *Beach, Pub. Cor.*, §§ 634, 635; *High, Injunctions*, §§ 1251–1253.

In Nebraska, mandamus was issued where commissioners did not give a contract to the lowest bidder, when the statute enacted that the county commissioners might let contracts to "the lowest competent bidder:" *People* v. *Commissioners, Etc.*, 4 Neb. 150. See *People* v. *Contracting Board*, 46 Barb. 254, and 33 AM. LAW. REG. & REV., N. S. 899.

NEGOTIABILITY OF PROMISSORY NOTES. It is to be regretted that judges continue to add to the unsettled condition of decision upon

questions relating to commercial paper. An unenviable instance of this is found in the reasoning of several judges of the Supreme Court of Michigan, in two cases decided on the same day.

Brooke v. *Struthers*, 68 N. W. Rep. 272 (1896), arose upon a bill to foreclose a mortgage executed to secure the payment of the following instrument:

"$1100.00. April 1, 1890. For value received, April 1, 1893, I promise to pay the Michigan Mortgage Co., Limited, or Bearer, eleven hundred dollars, with interest at seven per cent. per annum, payable semi-annually, which said interest is represented by six coupon notes, one payable at the maturity of each installment of interest, and when paid shall be a voucher for the payment of said installments of interest respectively. All payable at . . . . St. Johns, Mich., with exchange on New York. It is expressly agreed that if the interest should be unpaid and in arrears for the space of thirty days, then from and after the lapse of the said thirty days, the whole of said principal sum, with all the interest unpaid, may, at the option of the holder thereof, become and be due and payable immediately thereafter. This note is of even date with a certain real estate mortgage made by the maker hereof to said payee and collateral hereto. Andrew Struthers."

The instruments were assigned to complainant by the payee. When the note became due, the Michigan Mortgage Co. accepted a new mortgage and note upon the same premises to take the place of the first, Struthers the maker, having no knowledge of the assignment of the first mortgage to complainant. Of course, the latter note was without consideration. This was in time assigned to one Knapp. Whether or not a decree of foreclosure should be made, depended upon the negotiability or non-negotiability of the note assigned to Knapp. Both sets of instruments were in the same terms. The words "with exchange on New York" are held not to destroy the negotiability of a note in Michigan. AM. LAW REG. & REV., Vol. 35, N. S. 597.

The note and mortgage were simultaneously executed, so that the court very properly construed them together: *Jones, Mort.*, § 71, *Daniel, Neg. Ins.*, §156. The mortgages contained a provision whereby the mortgagor agreed to pay all taxes and assessments upon the premises, and whereby the whole amount of principal and interest should become due and payable in the event of the mortgagor's leaving unpaid any tax or assessment for thirty days.

Justices Hooker and Grant in the principal opinion concluded, in face of all authority, that this provision rendered the note uncertain in time of payment, hence non-negotiable.

In a single paragraph Mr. Justice Montgomery, with whom concurred Long, C. J., and Moore, J., announced his assent to the result that complainant was entitled to a decree of foreclosure, but upon different grounds. When the second mortgage was executed, by a statute of Michigan which did not exist when the first mortgage was executed, a mortgagee was liable to pay the tax upon the mortgage

or upon his interest in the mortgaged land. The provision in the mortgage, referred to above, these judges held, indicated a purpose by the mortgagor to relieve the mortgagee of this statutory obligation, and to that extent rendered the amount payable to or on behalf of the mortgagee uncertain, and therefore the second note assigned to Knapp was non-negotiable. The learned Justice adds that his views of the negotiability of the first note appear in the next case: *Wilson* v. *Campbell*, 68 N. W. 278.

The conclusion of these judges is undoubtedly correct. Though the same provision exists in the mortgage in complainant's hands, no statute then existed, making the mortgagee liable for any taxes, so that the mortgagor promised to do no more than the law compelled him to do; whereas in the second, the maker's independent promise to pay the taxes for which the mortgagee was liable under the law of Michigan, clearly renders the note non-negotiable.

In the other case, to which Mr. Justice Montgomery refers, *Wilson* v. *Campbell*, a note and mortgage similar in provision to those considered in *Brooke* v. *Struthers*, were before the court. These were executed prior to the statute referred to in that case rendering the mortgagee liable for taxes. The court, per Montgomery and Moore, JJ., considered the clause, providing that in default of payment of taxes for thirty days the whole amount should be due and payable, and concluded that under all the authorities such a provision did not render the time of payment uncertain. This certainly overrules the ground taken by Hooker and Grant, JJ., in the preceding case. The opinion then considers the provision relating to payment of taxes, and concludes that it does not render the amount of this note uncertain for the reason stated above. To this opinion Grant and Hooker, JJ., add, "We concur in the above opinion because it is ruled by the case of *Brooke* v. *Struthers*."

That there is no uncertainty as to the time in such cases is the universal rule: *Carlon* v. *Kenealey*, 12 N. W. 139; *Cota* v. *Buck*, 7 Metc. 588; *Ernst* v. *Steckman*, 74 Pa. 13; *Chicago, Etc.*, v. *Merchants' Bank*, 136 U. S. 268. In *Ernst* v. *Steckman* (*supra*), approved by Mr. Justice Harlan, *Chicago, Etc.*, v. *Merchants' Bank* (*supra*), the rule is thus stated: To constitute a negotiable promissory note, the time or event for its ultimate payment must be fixed and uncertain; yet it may be made subject to contingencies upon the happening of which, prior to the time of its absolute payment, it shall become due. The contingency depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note; and not upon any act of the payee or holder, whereby the note may become due at an earlier day.

It is unfortunate that the views of Hooker and Grant, JJ., appear in the reports to unsettle the stability of the rules of the law of commercial paper.