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NOTES

CONTRACTS—STATUTE OF FRAUDS—AUCTIONEERS—MEMORANDUM—In *Dewar* v. *Mintoft*[1] it appeared that the auctioneer at a sale of land entered on the margin of his copy of the particulars and conditions of sale against the lot, the name of the highest bidder for the lot, and the amount of the bid, but there was nothing to indicate that he was purchaser of the lot. The bidder did not sign the memorandum of agreement contained in the particulars or pay any deposit. He subsequently wrote letters to the vendor and his agent, in which he repudiated his liability under the contract, but set out all the terms of the bargain and referred to the particulars of sale. It was held that the entry by the auctioneer was not a sufficient note or memorandum in writing to satisfy the fourth section of the statute of frauds, but that the later correspondence did take the oral contract out of the statute in spite of the repudiation of liability.

The early English cases deny that the auctioneer is the agent

[1] 81 L. J. 885 (K. B., 1912).

of both parties and therefore hold that his entering the name of the buyer of a lot of land in his book as the purchaser is not a note in writing within the statute of frauds;[2] but in *Emmerson* v. *Heelis*[3] and later cases[4] it was held that an auctioneer is an agent lawfully authorized by the buyer to sign a note or memorandum of a contract for him, whether it be for a purchase of an interest in land or of goods. The memorandum in order to be valid, must have been made contemporaneously with the sale[5] and must state the particulars of the contract.[6] The present English law on the subject seems to be most clearly stated in *Sims* v. *Landray*:[7] "It is settled beyond the probability of now being successfully disputed, that where there is a sale by public auction and the property is knocked down by the auctioneer to the highest bidder, the auctioneer is the agent not only of the vendor, but also of the purchaser, the highest bidder, and that he is the purchaser's agent clearly to this extent, that he is entitled to sign, in the name and on behalf of the purchaser a memorandum sufficient to satisfy the provisions of the statute of frauds, stating the particulars of the contract." The American authorities are to the same effect.[8]

But the memorandum must be clear and complete on its face. So in *Hinde* v. *Whitehouse*[9] it was held that an auctioneer had not satisfied the requirements of the statute by signing the name of the purchaser to the catalogue, that not being connected with or referring to the condition of sale; and in *Baptist Church* v. *Bigelow*[10] that the memorandum was not sufficient within the requirements of the New York statute, where the auctioneer had merely noted the name of the purchaser and the sum bid by him upon the chart of the goods sold. It seems clear that the court was correct in the principal case.

As to the question of correspondence, both text-books and authorities declare that a complete binding contract may be evidenced by letters or other documents relating to one connected transaction from which the names or descriptions of the parties,

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[2] Stansfield v. Johnson, 1 Esp. 101 (C. P., 1794); approved in Buckmaster v. Harrop, 13 Ves. 456, at p. 473 (1807); *cf.*, however, Simon v. Metivier, 1 Black. W. 599 (1766).

[3] 2 Taunt. 38 (1809).

[4] White v. Proctor, 4 Taunt. 209 (1811); Kemys v. Proctor, 3 V. & B. 57 (1813).

[5] Addison, Law of Contracts (11th Ed.) p. 42; Mews v. Carr, 26 L. J. Ex. 39 (1856); Bell v. Balls, 66 L. J. Ch. 397 (1897).

[6] Browne, Statute of Frauds (5th Ed.) sects. 351, 369; Wood, Statute of Frauds, Sect. 371; Kenworthy v. Schofield, 2 B. & C. 945 (1824); Peirce v. Corf, L. R. 43 Q. B. 52 (1874).

[7] 63 L. J. Ch. 535 (1894).

[8] Singstack's Executors v. Harding, 4 Harr. & J. 186 (Md., 1816); Cleaves v. Foss, 4 Greenl. 9 (Me., 1826); Adams v. McMillan, Executor, 7 Port. 73 (Ala., 1838); Morton v. Dean, 13 Met. 385 (Mass., 1847); Gill v. Bicknell, 2 Cush. 355 (Mass., 1848), approving Morton v. Dean, *supra*; Gill v. Hewett, 7 Bush. 10 (Ky., 1869); Ansley v. Green, 82 Ga. 181 (1888); Springer v. Kleinsorge, 83 Mo. 152 (1884); Garth v. Davis & Johnson, 120 Ky. 106 (1905).

[9] 7 East. 558 (1806).

[10] 16 Wend. 28 (N. Y., 1836).

the subject matter of the contract, and its terms may be collected.[11] But will an oral contract be taken out of the statute by letters which admit the making of the contract by the writer, but in terms repudiate his liability? Before there were cases upon this subject, Mr. Blackburn, in his Treatise on the Contract of Sale[12] had said: "It sometimes happens that after a dispute has arisen, a party in a letter signed by him recapitulates the whole terms of the bargain, for the purpose of saying that it is at an end. . . . It has never been decided whether such an admission of the terms of the bargain signed for the express purpose of repudiation can be considered a memorandum to make the contract good, but it seems difficult on principle to see how it can be so considered."

When the question actually arose in *Bailey* v. *Sweeting*[13] the words of Mr. Blackburn gave the court some difficulty, but in spite of them it was held that "the first part of the letter is unquestionably a note or memorandum of the bargain . . . . . it does not cease to be evidence of the contract because the defendant goes on to say that he should not be bound by it." The particular point does not seem to have been frequently passed upon by the courts either in England or America, but the cases which have arisen quote *Bailey* v. *Sweeting* with approval and follow the decision in that case.[14] The weight of authority is undoubtedly to the effect that if a party writes a letter admitting the essential particulars of the contract, but containing a repudiation of the bargain upon bad or insufficient grounds, the letter will constitute a good memorandum of the contract within the statute.[15]

Upon both questions—whether the entry of the auctioneer at the time of sale, or subsequent correspondence admitting the particulars of the contract and repudiating liability, constitute a sufficient memorandum to satisfy the statute of frauds—the court in our principal case appears to have followed principles well recognized in both England and America.

H. A. L.

EVIDENCE—CONSONANT STATEMENTS—HEARSAY—In the case of *Lyke* v. *Lehigh V. R. R. Co.*,[1] the plaintiff's testimony was attacked on cross-examination and by proof of inconsistent statements. To show that the testimony given by the plaintiff was not a recent fabrication, the trial court admitted declarations by the

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[11] Addison on Contracts, (11th Ed.) p. 36, and cases cited; Smith, Law of Fraud, Sect. 381 and cases cited; Wood, Statute of Frauds, Sect. 364, and cases cited.

[12] Blackburn, Contract of Sale, p. 66.

[13] L. J. 30 C. P. 150 (1861).

[14] Wilkinson v. Evans, L. R. 35 C. P. 224 (1866); Buxton v. Rust, L. R. 41 Ex. 172 (1872); Cloth Company v. Hieronimus, L. R. 10 Q. B. 140 (1875); Heideman v. Wolfstein, 12 Mo. Apps. 366 (1882).

[15] See Addison, Law of Contracts (11th Ed.) p. 38; Wood, Statute of Frauds, Sect. 345; Browne, Statute of Frauds (5th Ed.) Sec. 354-a.

[1] 236 Pa. 38 (1912).

plaintiff a short time after the accident consonant with his statements made on the witness-stand. The Supreme Court affirmed the action of the lower court saying, in substance, that under such circumstances as here, where the chief defense was that plaintiff's testimony was perjured and evidence of inconsistent statements had been given to impeach it, consonant statements were admissable.

The doctrine of the admissibility of consonant statements, to remove from a witness the imputation of untruthfulness or lack of memory placed upon him by proof of inconsistent declarations, is not a new one. It apparently made its first appearance in the law in 1670 in the case of *Lutterel* v. *Reynell*[2] where the principle was stated in general terms and without any qualifications. This case was flatly contradicted in 1783 by Justice Buller in *King* v. *Parker*.[3] For some reason, this latter case was completely overlooked by the American courts and we find them stating *Lutterell* v. *Reynell* still to be the law as late as 1823.[4] There are still a few jurisdictions in the United States which have held to the original rule unmodified and allow consonant statements to be admitted whenever a witness's testimony has been impeached by inconsistent declarations.[5] These jurisdictions, while admitting that under the general prohibition against hearsay, this kind of evidence is not admissible, sustain it as an exception for the purpose of sustaining the credibility of the witness.

This class of evidence has never been admitted to prove the facts which the declarations contain,[6] and the majority of jurisdictions which hold that consonant statements are admissible only under special circumstances[7] do not bar them because they do contain such facts but on the broader ground that ordinarily they are worthless. In impeaching a witness by showing contrary statements, the object is to show that he is unreliable, and the fact that he made a statement not under oath, similar to the one he makes at the trial, does not remove the inconsistency or the ininferences arising from such inconsistency.[8] Under some circumstances, however, evidence of this kind is of real value, and under such circumstances practically all jurisdictions hold it is admissible. Usually this is when the witness is charged with testifying under the influence of some motive of interest or relationship prompting him

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[2] 1 Mod. 283 (Eng., 1670).

[3] King v. Parker, 3 Doug. 242 (Eng., 1783).

[4] Henderson v. Jones, 10 S. & R. 322 (Pa., 1823).

[5] Dodd v. Moore, 92 Ind. 397 (1883); Burnett v. R. R. Co., 120 N. C. 517 (1897); Lee v. State, 44 Tex. Crim. 446 (1903).

[6] State v. Parish, 79 N. C. 610 (1878); Maitland v. Bank, 40 Md. 559 (1874).

[7] State v. Hendricks, 172 Mo. 654 (1902); McKelton v. State, 86 Ala. 594 (1888); Mason v. Vestal, 88 Cal. 396 (1891); Davis v. Graham, 2 Col. App. 210 (1892); Ga. R. R. Co. v. Oaks, 52 Ga. 410 (1874); McBride v. Ga. R. R. Co., 125 Ga. 515 (1906); State v. Porter, 74 Iowa 623 (1888); Heod v. State 44 Miss. 731 (1870); Crooks v. Brum, 136 Pa. St. 368 (1890); State v. McDaniel 68 S. C. 304 (1903); Dudley v. Bolles, 24 Wend. 464 (N. Y., 1840).

[8] Nichols v. Stewart, 20 Ala. 358 (1852).

to make a false statement. In such cases consonant statements are admitted to show that he made similar statements at a time when the imputed motive did not exist or when motives of interest would have induced him to make a different statement of facts.[9] Again, they are admitted where the story or a part of the story of a witness is claimed to be a recent fabrication.[10] Consonant statements, however, do not include mere conclusions or deductions, which corroborate or support evidence consisting of particular facts occurring in the transaction; former declarations of such deductions are not admissible.[11]

Some jurisdictions impose a further restriction on the admissibility of this evidence, and say that the consonant statement must have been made prior to the impeaching declarations.[12] The reason which is given is that if the rule were otherwise the witness would be able at any time to control the effect of former declarations which he was conscious he had made and which he might now have a motive to weaken, qualify or destroy.[13]

Under facts similar to those in the principal case, it has been held that the motive for the plaintiff to talk in his favor existed as well when the statement was made as when the testimony was given.[14] It would seem therefore that although the law as stated in the principal case is in accord with the majority of jurisdictions, evidence having been admitted to combat the theory of recent fabrication, it is doubtful whether, the witness having had a motive for such declarations, they should have been admitted.

The aforementioned rules do not apply to declarations made by the prosecutrix after the defendant has ravished her. In the cases of rape, such declarations are confined to the bare fact, the details of the occurrence and the identity of defendant being inadmissible.[15] Although the purpose for which these statements are admitted is the same as that for which consonant statements are admitted, that is to corroborate the witness, the reason for admitting the declarations in the case of rape is not the same, but merely a remnant of the old common law practice. Under the old common law, a woman was forced while the crime was recent to go to the nearest village and state the injury to the prominent men and show the signs of violence.[16] Admitting the complaints of the

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[9] Stolp v. Blair, 68 Ill. 541 (1873); Chicago City Ry. Co. v. Mathieson, 212 Ill. 299 (1904); McCord v. State, 83 Ga. 520 (1889), followed in Sweeny v. State, 121 Ga. 293 (1904); Robb v. Hackley, 23 Wend. 52 (N. Y., 1840).

[10] Legere v. State, 111 Tenn. 370 (1903); State v. Petty, 21 Kan. 54 (1878).

[11] Maitland v. Bank, 40 Md. 540 (1874).

[12] Conrad v. Griffy, 11 How. 480 (U. S., 1850); State v. Cody, 15 So. D. 167 (1901); Graham v. McReynolds, 90 Tenn. 697 (1891).

[13] Ellicot v. Pearl, 35 U. S. 439 (1836).

[14] McBride v. Ga. R. R. and Electric Co., 125 Ga. 515 (1906). Plaintiff declared he had been hurt in a railroad accident twenty minutes after accident occurred.

[15] Posey v. State, 143 Ala. 55 (1904); Commonwealth v. Cleary, 172 Mass. 175 (1898).

[16] Glanville XIV, 6.

prosecutrix at the present day is the last remaining trace of this old custom.[17]

E. L. H.

TORTS—INTERFERENCE WITH ANOTHER'S EMPLOYMENT—STRIKES—The legality of strikes and the rights and remedies of employers and employees who are affected by the acts of labor organizations are subjects which have plunged the courts into more conflicting decisions than any other matters which have arisen in modern times. The failure to agree upon what are termed the fundamental and underlying principle, upon which these decisions are based, is here, as in all such cases—barring, of course, the exact circumstances giving rise to the actions—the reason for this conflict. Will that which is lawful when done with a good motive be lawful when prompted by a malicious[1] motive, and will that which is lawful when done by a single individual be lawful when done by a combination of individuals are two of these principles which were carefully considered in *Kemp* v. *Division 241 A, Ass'n. Street and E. Ry. Employees.*[2]

It is sometimes broadly stated that an act which does not amount to a legal injury cannot be actionable because done with a bad intent,[3] and numerous decisions support the proposition.[4] Where the right to act is *absolute*, it is difficult to see how any other conclusion can be sustained, even though the act is not done to benefit the actor, but solely to injure another. Such is the case where the owner of land forcibly ejects a trespasser who refuses to leave, even though the owner may only be gratifying a vindictive spirit in so acting. The erection of a "spite fence," under this view clearly is not actionable; but even on this point, the decisions are in conflict.[5] On the other hand, if the right to act is what may be termed *relative*, there may be some reason for considering the question of motive. Such is the case where one sinks a well on his own premises for the mere purpose of drying his neighbor's spring,[6] or recklessly wastes natural resources without any benefit

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[17] Commonwealth v. Cleary, *supra.*

[1] "Malice," and its derivatives, as used in this note means simply ill-will against a person and does not presuppose the intentional doing of an unlawful act.

[2] 99 N. E. Rep. 389 (Ill., 1912). In this case the court refused to stamp as unlawful a threat to call a strike unless workmen who refused to remain in the union were discharged.

[3] Cooley on Torts (3rd Ed.) 1503.

[4] Allen v. Flood, L. R. App. Cas. 1 (1898); Quinn v. Leatham, (1901) App. Cas. 495, qualifies this case, but does not overrule it; Payne v. Western R. R. Co., 13 Lea. 507 (Tenn., 1884); Chambers v. Baldwin, 91 Ky. 121 (1891); National Protective Assoc. v. Cummings, 170 N. Y. 315 (1902); McCune v. Norwich Gas Co., 30 Conn. 521 (1862); Forster v. McKibben, 14 Pa. 168 (1850). In these cases the act of but a single person was in question.

[5] Letts v. Kesler, 54 Ohio St. 73 (1896), action not maintainable; Flaherty v. Moran, 81 Mich. 52 (1890), *contra.*

[6] See 18 Harvard Law Review 114, and cases cited.

to himself.[7] Now the right of every laborer to cease working for his employer whenever he pleases, and the right of every employer to dispense with the services of an employee whenever he pleases—in the absence, of course, of any existing contractual relation—must in practically every case be what has been termed an absolute right. It ought to follow, therefore, that so far as individual employees and employers are concerned the motive which prompts the decision to quit the employer or discharge the employee, as the case may be, cannot be taken into consideration. The right is absolute and whatever the motive, the damage resulting from the exercise of such right is clearly *damnum absque injuria.*

Now, suppose that a combination of individuals exercises the right which is absolute so far as each individual is concerned, does the resulting damage still remain *damnum absque injuria?* It is certainly true that if the motive in such case is not malicious, but purely a genuine benefit to the individuals severally, through the combination as a whole, there being no intent to injure the party damaged, no action is maintainable.[8] This is the situation which arises when several employees agree among themselves to stop work—*i. e.*, strike—in order to procure higher wages, more sanitary conditions in work-shops, shorter hours, etc. In all such cases the strike is clearly lawful.[9] It will be noted here that the conception of a strike—a mere quitting of employment—in no sense covers unlawful acts performed by the employees either before or after they have quitted the employment in order to make the strike effective. But the situation becomes more troublesome when the motive of the combination is not alone benefit to itself, but also injury to another, and again, when the motive is solely injury to another. If it be contended in such case that the act of the combination is unlawful, it is, in effect, holding that the sum total of several *absolute* rights is a *relative* right, not exactly a logical conclusion. But law is not logic, and so it is not surprising to find that probably a majority of the courts and text-writers hold, in analogy to a conspiracy in the criminal law, that it will not do to treat a combination simply as an aggregate of independent parts, and

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[7] Ohio Oil Co. v. Indiana, 177 U. S. 190 (1899); Hague v. Wheeler, 157 Pa. 324 (1893).

[8] The idea has been advanced that the nature of the employment may create an implied agreement not to quit, at least without reasonable notice. Such was the doctrine implied in Toledo Ry. Co. v. Penna. Co., 54 Fed. Rep. 746 (C. C. of Ohio, 1893). The duty imposed upon the employing company by the Interstate Commerce Law was presumed to be known to the employees here.

[9] Carew v. Rutherford, 106 Mass. 1 (1870); Barr v. Essex Trades Council, 53 N. J. Eq. 101, 114 (1894); Clement v. Watson, 14 Ind. App. 38 (1895); Arthur v. Oakes, 63 Fed. Rep. 310 (1894). Mapstrick v. Ramge, 9 Neb. 390 (1879) is *contra*, but here it was held that striking at the particular hour agreed upon, owing to peculiar circumstances, was equivalent to the actual and wilful destruction of the property.

Early English cases held strikes illegal, Hornby v. Close, 2 L. R. Q. B. 153 (1867), but recent decisions have established their legality. Lyons v. Willans, 1 L. R. Ch. (1896) 811.

measure its rights and responsibilities by the rights and responsibilities of its individual members.[10]

The result of the failure of the courts to adopt a logical conclusion which, it is submitted, will not result in the "incalculable damage" so often intimated in the decisions, has been the adoption of the test of "justifiable cause" in determining the legality of a strike, and what constitutes interference with the right to labor. It is needless to say that hopeless conflict is the result of the question as to what constitutes "justifiable cause."[11]

It must be remembered that, in this discussion, it is presumed that no violence, threats of violence or any other unlawful means have been used by the employees in bringing about a strike. If such has been the case, the act of the individual employee was not the outgrowth of an absolute right, and an entirely different situation is presented. In *Kemp* v. *E. Ry. Employees*,[12] the defendants peacably informed their employers that if the plaintiffs were not discharged they, the defendants, would cease work; they had no grievance against their employers and the sole reason for their action was the fact that Kemp refused to join their union. The court found that the motive of the defendants was not injury to the plaintiff, but benefit to themselves through preservation of their union, and held that whatever damage resulted from the discharge of the plaintiff was *damnum absque injuria*. It is submitted that the court might better have founded their decision upon the right of the combination to do that which the individual members had an *absolute* right to do, than upon the ultimate benefit to the organization. For the benefit to members of the combination is so remote as compared to the direct and immediate injury inflicted upon the non-union workmen, that the law ought not to look beyond the immediate loss and damage to the innocent parties to the remote benefits that might result to the union.

H. W. W.

TORTS—LIABILITY TO BUSINESS GUESTS—A recent decision[1] of the court of King's Bench, in England, affords an interesting example of the difficult legal problems which arise out of the complexities of modern civilized life. The first question presented is as to the status of an individual who is allowed to enter a mercantile establishment under conditions which are contrary to its rules, but who is allowed to violate the customary regulations in order that his patronage may be secured. Is such an individual a trespasser, a licensee, a business guest under special conditions or is

[10] Eddy on Combinations, Vol. 1 § 475; Berry v. Donovan, 188 Mass. 353 (1905); Erdman v. Mitchell, 207 Pa. 79 (1903); Lucke v. Clothing Cutters, 77 Md. 396 (1893); Curran v. Galen, 152 N. Y. 33 (1897). But see Cook on Trade and Labor Combinations, § 8.

[11] 62 L. R. A. 715, note.

[12] 99 N. E. Rep. 389 (Ill. 1912).

[1] Clinton v. Lyons & Co., III K. B. 98 (1912); also 81 L. J. R. 923 (K. B.).

his status similar in all respects to that of ordinary customers? The decision in the case under discussion declared that the plaintiff, who in ignorance of a rule to the contrary, entered the defendant's tea-shop with her dog and was allowed to remain there, was not really "invited" to come in with her dog, but was only "permitted" to do so; and accordingly held that her status was merely that of a licensee.

It is believed that this finding is incorrect; and that a prospective customer who enters an establishment under conditions which violate its rules is either a trespasser or a simple business guest according to whether or not the management acquiesce in this violation of their conditions. It would seem that no individual who enters a place of business for purposes of trade can really properly be regarded as a licensee, since such a status includes only those who come on the premises solely for purposes of their own,[2] while the unquestioned definition of a business guest is that laid down by Willes, J., in the famous case of *Indermaur* v. *Dames*,[3] namely, that it is an individual who "resorts to the premises in the course of business upon invitation[4] express or implied." To return to the principal case, it seems entirely clear that the plaintiff's position is certainly not that of a trespasser, since her entry in violation of the rules of the premises was condoned by the management; it is equally clear that, being on the premises on business and not merely for purposes of her own, she was not a mere licensee, but that she was in fact "resorting to the premises in the cause of business upon the implied invitation" of the defendant company, and was accordingly a business guest, within the definition of Willes, J., who was merely allowed to violate the usual rules of the establishment. Now it appears scarcely logical to say that such an individual was a business guest admitted under special conditions. No conditions were really imposed upon her entrance, but what occurred was that the usual stipulations were removed; and it seems a contradiction to maintain that a guest for whom restrictions have been removed is consequently a guest upon special conditions. In other words, no conditions have been "imposed," but the usual ones have been merely "removed." It is accordingly submitted that acquiescence on the part of the management of an establishment in the violation of their usual rules is simply equivalent to an absolute waiver thereof in the particular instance and should in no way change the

[2] "A license is inferred where the object is the mere pleasure or benefit of the person using the premises, while an invitation is inferred where there is a common interest or mutual advantage to be derived from the visit." Burdick, Torts, p. 456; Campbell, Neg., sec. 33; Bennett v. Ry. Co., 102 U. S. 577 (1880).

[3] L. R. 1 C. P. 274 (1866). The definition given by Willes, J., in this case "has since been regarded on both sides of the Atlantic as the leading authority." Pollock, Torts (5th Ed.), p. 509.

[4] That an individual who enters a mercantile establishment on business does so on an implied invitation is a proposition of law too well settled to be open to question today.

status of the customer in whose favor and for the sake of whose patronage such an exception is made.

The principal case further presents the difficult problem as to the extent of the scope of the status of a business guest. In other words, the question raised is as to how far the legal status of a business guest extends as a protection to such property as the guest may bring upon the premises. It would seem from the statement[5] of Bray, J., that this legal status extends to cover such incidents of personalty as are invited into the business establishment. In denying recovery for injuries to the plaintiff's dog, he says, "Then did the defendants invite the dog into their shop? There is no finding to that effect and it cannot be sufficient if they merely permitted it to come in. In my opinion . . . both claims fail." Now it is entirely clear that whether or not a given article is "invited" to be brought into an establishment or is merely "permitted" to be carried in by the owner must of necessity depend upon the character of the property in question and the nature of the establishment. For instance there can be no doubt that a business guest is always invited to bring into a store or shop such ordinary incidents of personal property as a hat or a watch, or an umbrella or a cane, and consequently such property falls within the protection accorded to the owner by law. It is equally clear that an individual who goes shopping with a large dog or who enters an ordinary business establishment carrying explosives is, even though there is no rule against bringing them in, nevertheless merely permitted to do so. Objectionable property of such a nature is clearly not invited in by the business agencies and consequently such property is not guarded by the status of the owner.

It is believed that this question just discussed has not before been directly presented and it is a matter of considerable difficulty to formulate the correct rule of law which should govern the matter. It is, however, tentatively submitted that the legal status of a business guest should be regarded as including within its protective scope such ordinary incidents of personalty as the average individual would ordinarily take into the kind of establishment in question while shopping, and that the jury should be left to determine whether or not the property in question was of this character.

P. C. M., Jr.

TRUSTS—IS THE PROPAGATION OF CHRISTIAN SCIENCE A CHARITY?—Just how far a court will go to uphold a trust established for charitable purposes is most forcibly illustrated in a recent Massachusetts decision,[1] where a bequest in the will of the late Mrs. Eddy was attacked by her heirs-at-law. The controversy centered around the interpretation of a local statute[2] which prohibited gifts for the benefit of any one church where the amount

[5] On p. 932, L. J. R. (K. B.).

[1] Chase v. Dickey, 13 N. E. Rep. 410 (Mass. 1912).

[2] R. L. c. 37, § 9.

involved exceeded two thousand dollars. In this case the devise, far in excess of two thousand dollars, was to the "Mother Church" in Boston in trust for the purposes of keeping in repair certain of the church buildings, while the balance of the income and as much of the principal as might be deemed wise was to be devoted to the promotion and extension of Christian Sicence as taught by the testatrix herself.

Though there were many points raised in the dispute, for the purposes of this discussion it is sufficient to dwell only upon the manner in which the charity was supported in the face of the existing statute.

It may be generally said that the distinction between public and private trusts lies in the fact that in the former instance the benefit accrues to an indefinite number of persons at large,[3] while in the latter case, certain definite, defined, specified objects are designated as the beneficiaries.[4] The fact that the bequest is made to a voluntary, unincorporated association will in no way defeat the charity provided the general charitable intention of the testator is clear.[5] Once established that a trust for charitable purposes has been created, the courts will not allow it to fall for want or inability of trustees to take,[6] and in some circumstances where the bequest is void because contrary to the law, the objects will be carried out under the *cy pres* doctrine.[7] In such cases there is no reason to suppose that the discretion of any particular trustee has anything to do with the essence of the trust gift.[8]

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[3] Perry on Trusts, § 710; Parker v. May, 5 Cush. 336 (Mass., 1850); Everett v. Carr, 59 Me. 335 (1871); Coggesshall v. Pelton, 7 Johns. Ch. 294 (N. Y., 1823).

[4] Teele v. Bishop of Derry, 168 Mass. 341 (1897); Russell v. Allen, 107 U. S. 163 (1882), *per* the court: "Trusts for public charitable purposes are applied under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their direction, and instruments creating them should be construed so as to give them effect if possible and to carry out the general intention of the donor, when clearly manifested, even if the particular form and manner pointed out by him can not be followed. They may and indeed must be for the benefit of an indefinite number of persons, for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the supervision of a court of chancery."

[5] Attorney-General v. Oglander, 3 Bro. Ch. 166 (1790); Re Dudgen, 74 L. T. 613 (1896); Burrill v. Boardman, 43 N. Y. 254 (1871); Libby v. Tobbein, 163 Mo. 477 (1890); Chamber v. Higgins' Exec., 20 Ky. Law 1425 (1899); Christian Church v. First Church of Christ, 219 Ill. 503 (1906).

[6] Keith v. Scales, 124 N. C. 497 (1899); Estate of Winchester, 133 Cal. 271 (1901); St. Peter's Church v. Brown, 21 R. J. 367 (1899); Hesketh v. Murphy, 35 N. J. Eq. 23 (1882); Appeal of Eliot, 74 Conn. 586 (1902); Jones v. Watford, 62 N. J. Eq. 339 (1901); Leda v. Huble, 75 Iowa, 431 (1888); Bliss v. American Bible Society, 2 Allen 334 (Mass., 1861).

[7] Moggride v. Thackwell, 7 Ves. Jr. 75 (1862); Woman's Christian Asso. v. Kansas City, 147 Mo. 103 (1898).

[8] Hayter v. Trego, 5 Russ. 113 (1830); Denyer v. Druce, Tamlyn's 32 (1829); Walsh v. Gladstone, 1 Phil. Ch. 290 (1843); Brown v. Higgs, 8 Ves. Jr. 571 (1803); Cole v. Wade, 16 Ves. Jr. 29 (1807).

Where legacies are given in trust for purposes that are clearly charitable, but these purposes are joined with words that authorize the trustees to expend the fund for other purposes which are not charitable the whole gift falls.[9] But the courts make a distinction where a residue is given to charity and out of such residue certain bequests are made which are subsequently unenforceable. Such void bequests merely fall into the residue and the whole of the fund is applied to the charitable purpose.[10] Of course, if it is impossible to execute the particular charity for which provision is made, the devise falls altogether.[11]

In the present case, there was a devise for the upkeep of church buildings, payable out of the general fund given to the spread of Christian Science. It was contended that the first part of the trust was void and so the whole should be inoperative. But the repair of parishes has long been held a valid charitable object[12] and so the courts were confronted with the sole proposition whether the intention of the testatrix was to have the fund devoted for the promotion of her own religion in the Christian world or whether the benefit was to be confined to the members of the "Mother Church" in Boston. In the latter instance, the gift would necessarily have to fall owing to the prohibitive statute. But in reaching a contrary conclusion, the court seemed to have in mind the peculiar and almost supernatural disposition of the donor. Though the bequest on trust was undoubtedly to the Boston congregation, who were unable to act as trustees owing to the statute, yet the wording in the concluding phrase was of such a broad and liberal nature that the court had little difficulty in upholding it as a charity.

Just what influence the popularity and enthusiasm for this twentieth century religion, so prevalent among a respectable, yet thinking class of citizens, had upon the minds of those rendering the decision is a question more of psychological interest than of legal import. Suffice it to say that the case is valuable for the authorities cited and interesting as illustrating to what extent the courts of that jurisdiction will go in supporting a trust whenever the tenets and dogmas of any Christian belief are involved.[13]

W. A. W., 2nd.

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[9] Gibbs v. Ramsey, 2 Ves. & B. 295 (1813); Kendall v. Granger, 5 Beav. 300 (1842); Gill v. Attorney-General, 197 Mass. 232 (1908); Williams v. Kershaw, 5 Law J. (N. S.) Ch. 84 (1835); Minot v. Attorney-General, 176 Mass. 189 (1905).

[10] Dawson v. Smally, L. R. 18 Eq. 114 (1868); *In Re* Birkett, 9 Ch. Div. 576 (1878); Fisk v. Attorney-General, L. R. 4 Eq. 521 (1867); Hoare v. Osborne, L. R. 1 Eq. 583 (1866); Mayor of Lyons v. East India Co., 1 Moore P. C. 175 (1836); Dexter v. Harvard College, 176 Mass. 192 (1900); *In Re* Rogerson, L. R. 1 Ch. Div. 715 (1901).

[11] *In Re* White, 33 Ch. Div. 449 (1886).

[12] Attorney-General v. Bishop of Chester, 1 Browns C. C. 444 (1785); *In Re* Vaughan, L. R. 33 Ch. Div. 137 (1886).

[13] McAlister v. Burgess, 161 Mass. 269 (1894); Jackson v. Phillips, 14 Allen 539 (Mass. 1867), where it was said: "A charity is a gift to be applied consistently with existing laws, for the benefit of an indefinite number of per-

WILLS—THE RULES IN WILD'S AND SHELLEY'S CASES—In *Wild's Case*, it was resolved that "if A devises his lands to B and to his children or issue, and he hath not any issue at the time of the devise, the same is an estate tail; for the intent of the donor is manifest and certain that his children or issue should take, and as immediate devisees they cannot take because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore, then, such words will be taken as words of limitation."[1] In a late Pennsylvania case,[2] under facts identical, the court held that the devisee took a life estate and that his children, if there should be any, would take the remainder in fee. Wild's Case dismissed such an interpretation with the remark that it was not the testator's intent. Both these courts, and all others, would admit, or, rather, would assert that the testator's intent was the pole star to guide them in navigating the difficult flood of testamentary language; with the same beacon before them, they arrive at antipodal harbors. The later decision would seem to be more logical and certainly more satisfactory. If the professed intent is to benefit the children surely the most effective way of doing it is by giving them the estate in remainder rather than by the doubtful expedient of giving their father a fee, especially where the contingent remainder can no longer be barred.

The above difference of opinion is one of construction, purely, and over questions of construction courts not infrequently are at odds. As to the question under discussion here, there seems to be an almost equal division. In England, the rule in Wild's Case is still the law.[3] In some American jurisdictions, it has been expressly applied in decision,[4] in others approved in *dictum*.[5] On the other hand, it has been flatly repudiated in a number of jurisdictions.[6] Frequently, it has been quoted without comment either way, but cases directly involving the application of the rule are not numerous.

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sons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

[1] 6 Co. Rep., 16 b. This rule is a *dictum*; the decision in the case was that a gift to A and after his decease to his children gave A a life estate only.

[2] Chambers v. Union Trust Co., 235 Pa. 610 (1912).

[3] Scale v. Barter, 2 B. & P. 485 (Eng., 1801); Broadhurst v. Morris, 2 B. & A. 1 (Eng., 1831).

[4] Nightengale v. Burrell, 15 Pick. 104 (Mass., 1833); Parkman v. Bowdoin, 1 Sumn. C. C. 359 (Fed., 1833); Vanzant v. Morris, 25 Ala. 285 (1854).

[5] Graham v. Flower, 13 S. & R. 439 (Pa., 1826); Cannon v. Barry, 59 Miss. 289 (1881); Chrystee v. Phyfe, 19 N. Y. 344 (1859);

[6] Carr v. Estell, 16 B. Monroe 309 (Ky., 1855); Faliso v. Currir, 55 N. H. 392 (1875); Jossey v. White, 28 Ga. 270, where the court says, in speaking of this rule: "With the reason of this or any other technical lore, connected with this branch of the law, I have nothing to do. Thank God, it no longer encumbers our statute book. Under our late act, it will soon be buried, with the numerous other follies and fossil remains of a bygone age;" but, see Butler v. Ralston, 69 Ga. 485 (1882) where the rule is applied.

That the rule is one of construction to ascertain the testamentary intention can be seen readily from its relation to the more general law. The word "children" when used in will or deed is presumptively a word of purchase, just as the words "heirs" or "heirs of the body" are presumptively words of limitation. Both presumptions are equally strong, but both can be rebutted, only, however, by definite and conclusive manifestations of a contrary intent.[7] The word "issue" is almost colorless; standing alone it is weakly presumptive of limitation, but it may be influenced either way by the proximity of the other words. The rule in Wild's Case s said to be an exception to the presumption arising from the word "children," but this appears to be a misstatement.[8] It is not an exception, it simply establishes facts sufficient to rebut the above presumption. Inasmuch as it is merely a rule of construction to arrive at the intent of the donor, it would seem that it too should be subject to rebuttal. In fact, in one English case, the court refused to apply the rule where, as the court saw it, there would result an over-riding of the testator's intent.[9]

Not until the donor's intent is ascertained is the more famous and more controverted rule in Shelley's Case[10] called into play. Then if it is found that the testator or grantor, in using the word "heir" or "issue" or "children," had in mind the sum total of those who might claim through the devisee, or grantee, named as an ancestor, and not a certain definite individual or class of individuals in existence at the termination of the first donee's life, the rule must be applied and the latter takes a fee tail or a fee simple. The rule supplements and puts into effect the intention as first ascertained by the court. It has nothing to do with determining the intent; it is simply an automatic rule of law relating to the tenure of land, and as such is arbitrary and irrebuttable.[11] In the United States, it has suffered from legislative displeasure and has either been expressly revoked or practically legislated out of existence by statutory rules to the effect that a gift to a man for life and after his death to his heirs, issue or children shall be taken to be a life estate followed by a remainder, in short, that these words shall always be interpreted as words of purchase when used in this manner. A gift to a man and his heirs will remain as it always was, a gift in fee. What of a gift to a man and his children? Will the old rule in Wild's Case apply to it and having been applied to resolve the intent, will the rule in Shelley's case apply to make it a fee? Clearly not in those jurisdictions where the latter has been

[7] Kent's Commentaries, p. 229; Washburn on Real Property, Vol. 2, p. 275; Rogers v. Rogers, 3 Wend. 503 (N. Y., 1829); Lessee of Findley v. Riddle, 3 Binney, 139, 148 (Pa., 1810); Doe v. Goff, 11 East, 668 (Eng., 1809); Guthrie's Appeal, 37 Pa. 9 (1860).

[8] Chrystie v. Phyfe, 19 N. Y. 344 (1859); and see the criticism in Cannar v. Barry, 59 Miss. 289 (1881).

[9] Buffar v. Bradford, 2 Atkyn 220 (1741).

[10] 1 Co. 93b, 104b (1579–1581).

[11] Perrin v. Blake, 1 W. Bl. 672 (1769); but see, Phillips, "The Rule in Shelley's Case." (London, 1805) p. 19.

revoked, but what of these other jurisdictions? Probably and properly, the courts would hold that this came within the spirit of the act so as to give the children a remainder in fee, as was held in the Pennsylvania case without the aid of a statute. In several, the rule remains unimpaired by statute and preserving much of its old vigor, although the courts seem reluctant to call it into action through misapprehension as to its real function.[12]

To return to the Pennsylvania case, it quotes the rule in Wild's Case and its alternative which is really a statement of earlier common law. It is: "Where a man devises land to A and his children or issue and he has issue of his body then his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears to the contrary, and therefore they shall have but a joint estate for life." Compare this with the first rule and it will be seen that it makes a world of difference whether or not there were children at the time of the devise. To a layman if not to a lawyer this variation in fact would hardly seem to warrant the wide difference in the conclusions. The words used in the original case were "at the time of the devise" which apparently means at the time of the execution of the will. Some courts take it to mean at the time the will takes effect, at the death of the testator.[13]

This second resolution or rule was used in early Pennsylvania cases, but they are practically overruled today and now a gift to a man and his children will give him a life estate with remainder to the children whether or not there were children at the time of the devise.[14] In the Pennsylvania case first alluded to, the court considered the question, under the facts there presented, as *res nova* and held in accord with cases under the second rule that the devisee took a life estate only. There are, however, earlier cases which by way of dictum, if not by actual decision, would seem to justify a contrary conclusion.[15]

Authorities are not united in respect to this second rule. England, apparently, accepts it along with the first.[16] Several American jurisdictions have applied it in decision or approved it in *dictum*.[17] Usually it is coupled with the first rule and both are stated to be the general law. But other jurisdictions have refused to apply it, and, as in Pennsylvania, have given the devisee named

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[12] Price v. Griffin, 150 N. C. 523 (1909); Bails v. Davis, 241 Ill. 536 (1909); Guthrie's Appeal, 37 Pa. 9 (1860).

[13] Jarman on Wills, Vol. 3, (5th Am. Ed.) p. 177.

[14] Rule 2 was applied in Graham v. Flowers, 13 S. & R. 439 (Pa., 1826), and in Shirlock v. Shirlock, 5 Pa. 367 (1847), and was repudiated in Hague v. Hague, 161 Pa. 643 (1894); Coussey v. Davis, 46 Pa. 25 (1863); and in Vaughn's Est., 230 Pa. 554 (1911).

[15] Seibert v. Wise, 70 Pa. 147 (1871); Cresslio's Est., 161 Pa. 424 (1894); Oyster v. Oyster, 191 Pa. 606 (1899).

[16] Webb v. Byng, 8 De G. M. & G. 633 (1856).

[17] Nightengale v. Burrell, 15 Peck. 104 (Mass., 1833); Allen v. Hoyt, 5 Metc. 325 (Mass., 1842); Buzzo v. McCarty, 86 Ind. 352 (1882); Dean v. Long, 122 Ill. 447 (1887); Utz Est., 43 Cal. 201 (1872); Wills v. Foltz, 62 W Va. 262 (1907).

a life estate, remainder to the children as a class, to open and let in after-born children.[18] In one case, it was held that such words created a fee even though children were living.[19] It should be remembered that this latter rule likewise merely establishes a presumption and can be rebutted by evidence of a contrary intent of the testator as appears in the statement of it.[20]

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[18] Comsey v. Davis, 46 Pa. 25 (1863) and Pa. cases cited in Chambers v. Trust Co., 235 Pa. 610 (1912); Hatfield v. Sohier, 114 Mass. 48 (1873).
[19] Mosby v. Paul's Adm'r., 88 Va. 533 (1892).
[20] Jarman, Vol. 3, p. 179.