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NOTES.

CORRECTION—In his article "Practical Activities in Legal Ethics,"[1] the author, Mr. Chas. A. Boston, stated that the Legal Ethics course at the Albany Law School had been inaugurated by General Thomas H. Hubbard following the adoption of the Canons of the American Bar Association.[2] He has since informed us that it was in 1902 that General Hubbard made his gift to the Albany Law School to found this chair, and that the chair was formally instituted and the opening lecture delivered by its founder on the evening of November 12, 1903.—*Editor.*

[1] December (1913), 62 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 103.

[2] See particularly 62 *Ibid.* 111.

CONTRACT OF SUBSCRIPTION—CONSIDERATION—A promise to contribute money to charitable, religious, or educational purposes, however laudable and morally binding, cannot be enforced upon any principle of contract law. Theory and decision are in irreconcilable conflict with the enforcement of such subscription promise. Many courts, however, seeing only what was to their mind the justice of the situation, have solved the question by cutting the Gordian knot and disregarding the fundamental principles of contracts. However proper this may be from the viewpoint of justice, good faith, or moral obligation, it can only be regarded as a piece of judicial legislation, violative of the governmental functions of the judiciary. In a recent case in Iowa,[1] that State has fallen in line with other jurisdictions in such summary solution of the problem.

To support the subscriber's promise, a consideration is essential. Consideration, according to the traditional definition, is either detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise. Ordinarily, the subscription paper contains neither a request by the subscriber nor a promise by the beneficiary; the subscription usually is a mere gratuity. This objection has been conclusive to the English courts.[2] The American courts also, at first, found this difficulty insuperable, and all such subscriptions were held null and void for want of consideration.[3] The courts, however, had pronounced such defenses as "base and dishonorable," as well as "unjust," and soon found a way to declare them invalid as well.[4] The first attempt to steer clear of the difficulty was made in a New Hampshire decision,[5] where it was argued that when several persons subscribe a paper for some common public object, the promise of each is a consideration for the promise of the others, and the payee of the paper may enforce the promise against each subscriber. This seemed plausible, and a legal way of overcoming the objection, and it was accordingly adopted and approved, without much reflection, in several jurisdictions.[6] But, in most instances, the subscribers do not give their promises in exchange for each other, and, even if they do, and the mutual promises do form a sufficient consideration for each other

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[1] Brokow v. McElroy, 143 N. W. Rep. 1087 (Ia. 1913).

[2] *In re* Hudson, 54 L. J. Ch. 811 (Eng. 1885).

[3] Boutell v. Cowden, 9 Mass. 254 (1812); Trustees v. Davis, 11 Mass. 112 (1814); Foxcroft Academy v. Favor, 4 Greenl. 332 (Me. 1826); Steward v. Trustees, 2 Denio, 403 (N. Y. 1845).

[4] See 16 Am. Law Reg. (N. S.) 548.

[5] Congregational Society v. Perry, 6 N. H. 164 (1833).

[6] Christian College v. Hendley, 49 Cal. 347 (1875); Hegert v. Trustees, 53 Ind. 326 (1876); Petty v. Trustees, 95 Ind. 278 (1883); Allen v. Duffie, 43 Mich. 1 (1880); Edenboro Academy v. Robinson, 37 Pa. 210 (1860).

so as to create a valid contract, it would be a contract between the co-signers only, and not between them and a third person. Now, in many States, a third person cannot sue on a contract made for his benefit; and in several of the States which allow a beneficiary to sue, he cannot bring the suit in his own name. Another view that beneficiary or its representatives imports a promise to apply the funds properly, and this promise supports the subscriber's promises.[7] This, it seems, is purely fictitious and forced reasoning. In a few cases,[8] the fact that other subscriptions have been induced has been held to be a good consideration. But, as Mr. Chief Justice Gray said in one case,[9] this is "inconsistent with elementary principles. Similar promises of third persons to the plaintiff may be a consideration for agreements between those persons and the defendant; but as they confer no benefit upon the defendant, and impose no charge or obligation upon the plaintiff, they constitute no legal consideration for defendant's promise to him." In *Beatty* v. *Western College*,[10] the court enforced the gift "upon the ground of estoppel, after the institution has extended moneys and incurred liabilities on the faith of the promise, and not by reason of any valid consideration in the original undertaking." This avoids the contractual difficulty only by substituting an infringement of the doctrine of estoppel.[11] The most generally accepted theory considers the subscription as an offer, which is made binding when the work for which the subscription was made has been done, or liability incurred in regard to such work, on the faith of the subscription.[12] This necessitates an implied request by the promisor that such liability be incurred—an implication of fact not usually justifiable.

By reference to the decisions cited in the foot notes, it will be seen that the same courts have often based their decisions on differ-

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[7] Barnett v. Franklin College, 10 Ind. App. 103 (1893); Collier v. Baptist Soc., 8 B. Mon. 68 (Ky. 1847); Trustees v. Fleming, 10 Bush. 234 (Ky. 1874); Trustees v. Haskell, 73 Me. 140 (1882); Helfenstein's Estate, 77 Pa. 328 (1875); Trustees v. Nelson, 24 Vt. 189 (1852).

[8] Hanson Trustees v. Stetson, 5 Pick. 506 (Mass. 1827); Watkins v. Eames, 9 Cush. 537 (Mass. 1852), but this theory was discredited in Cottage St. Church v. Kendall, 121 Mass. 528 (1877); Comstock v. Howd, 15 Mich. 237 (1867), but see Northern R. R. v. Eslow, 40 Mich. 222 (1879); Irwin v. Lombard University, 56 Ohio St. 9 (1897).

[9] Cottage St. Church v. Kendall, 121 Mass. 528 (1877).

[10] 177 Ill. 280 (1898).

[11] See 12 H. L. R. 506.

[12] Miller v. Ballard, 46 Ill. 377 (1868); Trustees v. Garvey, 53 Ill. 401 (1870); Des Moines Univ. v. Livingston, 57 Ia. 307 (1881); First Church v. Donnell, 110 Ia. 5 (1899); Gittings v. Mayhew, 6 Md. 113 (1854); Albert College v. Brown, 88 Minn. 524 (1903); Pitt v. Gentle, 49 Mo. 74 (1871); Irwin v. Lombard Univ., 56 Ohio St. 9 (1897).

ent theories. This serves to show the confusion into which the has been advanced is that the acceptance of the subscription by the law has been thrown on this subject, due to the desire of the courts to enforce a promise binding in morals but not in law, in violation of well-settled principles of contract. If the policy of the State is promotive of education, religion and philanthropy, if it is desirable, from motives of public policy; that such subscriptions, although gratuities, should be enforced because numerous worthy institutions are absolutely dependent upon them, such enforcement should be obtained through suitable enactment by the legislature, and not through judicial legislation which is subvertive of the symmetry of our law.

Y. L. S.

DIVORCE—EXTERRITORIAL EFFECT—What exterritorial effect should a court give to a divorce granted by one State to its citizen from his non-resident wife who was domiciled in another State and not personally served by process? This mooted question arose in an Illinois case[1] where the court had to consider the validity of the defendant's former marriage in order to determine whether the second marriage was bigamous. After a marriage in New York, a husband left his wife and made California his domicil. He brought divorce proceedings against his wife, and although she was not personally served and did not appear, he secured the divorce. Subsequently, the wife remarried in New York and then left with her second husband for Illinois where they cohabited for ten years. The second husband, without obtaining a divorce from her, remarried in Illinois. To an indictment for bigamy, his defense was that his first marriage was invalid; for New York did not recognize the divorce obtained on the non-resident non-appearing defendant who was not personally served. The court, with two judges dissenting, held that the second marriage was not bigamous, as his first marriage in New York was void, his alleged wife being still married to her first husband at the time of her second marriage. The fact that Illinois, the *forum,* recognized the divorce was considered to be immaterial.

The dissenting judges considered the Illinois cohabitation for ten years as equivalent to a common law marriage, inasmuch as Illinois, contrary to New York, recognized the California divorce which rendered the alleged first wife of the defendant competent to contract a common law marriage with him.

The principal case, with its diverse opinions based on the laws of two States not in *accord,* very aptly discloses the fact that the

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[1] People v. Shaw, 102 N. E. Rep. 1031 (Ill. 1913).

courts are in conflict as to the exterritorial effect of certain kinds of divorces. Divorce proceedings partake of the nature of proceedings *in rem* as well as proceedings *in personam;* this is due to the peculiar nature of divorce causes. The purpose of a divorce is to dissolve the mutual relation, the status of the parties,—which is the *res.* At the same time, however, a personal element, not found in actions instituted merely to subject or affect property, is present. As a result, divorce proceedings are frequently called proceedings *quasi in rem.*[2] This fact is the reason for the conflict as to this question. Although the defendant in a proceeding *in personam* must be personally served with notice of the action within the court's jurisdiction or must voluntarily appear, yet in proceedings *in rem* such service is not necessary, the court's jurisdiction depending upon its jurisdiction of the *res* in controversy. The *res* in divorce causes is a double or correlative status, affecting the two parties to the marriage. Consequently, the courts have a complex and difficult question to decide when the domicils of the husband and wife are in two different States.

At common law, a married woman merges her legal identity in that of her husband, with the result that on marriage she acquires his domicil.[3] Her domicil changes with every alteration of his domicil, irrespective of her actual presence.[4] The modern tendency, however, is to make an exception to this principle, in certain abnormal relations arising between husband and wife, as where she contemplates bringing divorce proceedings against her husband.[5] In such case, she may select a domicil apart from that of her husband. "The right springs from the necessity for its exercise and endures as long as the necessity continues."[6]

As each sovereign State is supreme within its own boundaries, it may, in any form of proceeding it sees fit, declare on what conditions it will decree a divorce. The other States, however, are not bound to give "due faith and credit" to the decree within their jurisdictions unless the divorcing State had complete jurisdiction of the parties within the laws of those States.[7] Accordingly, where

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[2] Minor, Conflict of Laws, §87.

[3] Minor, Conflict of Laws, §46.

[4] Harrison v. Harrison, 20 Ala. 629 (1852); Dougherty v. Snyder, 15 S. & R. 84 (Pa. 1826).

[5] Cheever v. Wilson, 76 U. S. 108 (1869); Hekking v. Pfaff, 82 Fed. Rep. 403 (1897); Chapman v. Chapman, 129 Ill. 386 (1889); Hartean v. Hartean, 14 Pick. 181 (Mass. 1833); Ditson v. Ditson, 4 R. I. 87 (1856).

[6] Cheever v. Wilson, *supra*, note 5, at page 124.

[7] Minor, Conflict of Laws, §86; Haddock v. Haddock, 201 U. S. 562 (1905).

both parties to a divorce proceeding are domiciled within the jurisdiction of the divorcing State, full effect will be given to it in the other States.[8] On the other hand, if neither party is domiciled in the State where the divorce is obtained, the other States, especially those within which the husband and wife are respectively domiciled, will not give it exterritorial effect, though recognizing its binding effect within the divorcing State.[9]

The difficult case, as stated previously, arises where the husband and wife are domiciled in different States, the domicil of the libellant being in the divorcing State. For, although the court in such case has jurisdiction of the libellant, it only has control over his part of the status, or *res*,—the marriage relation only as respect to him. Its decree, however, will also affect the status of the defendant over whom it has no such jurisdiction. What exterritorial effect shall a foreign State give to such decrees or what preliminary conditions shall it be compelled to require before such exterritorial effect is given?

The jurisdictions, in their answers to this question, may be divided into three groups; each group bases its decision on a distinct theory.[10] One group, represented by *Ditson* v. *Ditson*,[11] holds that, when a State has jurisdiction over the libellant, it also draws to it jurisdiction over the status of the non-resident defendant; and its decree will have exterritorial effect if the non-resident has received such notice as the divorcing State requires, often merely notice by publication in one of its newspapers.[12] A second group,[13] of which New York is the most important jurisdiction, refuses exterritorial effect to foreign decrees, if they have been obtained against non-residents not personally served, unless the defendants have voluntarily appeared. The ground of these decisions is that

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[8] McGill v. Deming, 44 Ohio, 645 (1886); Loker v. Gerald, 157 Mass. 42 (1892); Hunt v. Hunt, 72 N. Y. 217 (1878). When defendant is a resident of the divorcing state, even constructive notice to him will give the decree exterritorial effect. De Meli v. De Meli, 120 N. Y. 485 (1890).

[9] Barber v. Root, 10 Mass. 260 (1813); Bell v. Bell, 181 U. S. 175 (1900); Jackson v. Jackson, 1 Johns. 424 (N. Y. 1806); St. Sure v. Lindsfelt, 82 Wis. 346 (1892), where the divorce was rendered in a foreign country.

[10] Minor, Conflict of Laws, §§92, 93, 94.

[11] 4 R. I. 87 (1856).

[12] Cox v. Cox, 19 Ohio St. 502 (1869); Anthony v. Rice, 110 Mo. 233 (1892); Dunham v. Dunham, *supra;* Hilbish v. Hattel, 145 Ind. 59 (1896); Tiffany, Persons and Domestic Relations (2nd Ed.), §110.

[13] O'Dea v. O'Dea, 101 N. Y. 623 (1886); People v. Baker, 76 N. Y. 78 (1879); Ransom v. Ransom, 104 N. Y. S. 198 (1907). Also adopted in Harris v. Harris, 115 N. C. 587 (1894); Cook v. Cook, 56 Wis. 195 (1882); McCreery v. Davis, 44 S. C. 195 (1894), and perhaps in Love v. Love, 10 Phila. 453 (Pa. 1893).

a divorce cause is a proceeding *in personam,* a doctrine held only by these courts. The third group,[14] following the New Jersey theory based on the principle that a proceeding for divorce is *quasi in rem,* requires that the non-resident defendant be actually notified of the proceeding by mail, message or actual notice of service; depending on which is the best notice practicable. This theory appears to be the best in principle as well as the fairest to both parties.

It is such complicated decisions as the principal case, involving the different standpoints of the courts as to the exterritorial effect of some divorces, that will inevitably result in a Uniform Divorce Law and thus settle the question in one certain and definite manner.

N. I. S. G.

LANDLORD AND TENANT—DUTY OWED BY LANDLORD TO TENANT—The owner of a building, leasing a part thereof and retaining possession of another part, is bound to exercise ordinary care to avoid injury to his tenant by the manner in which he uses the part retained by him.[1] This duty does not grow out of the relation of landlord and tenant, but is merely one aspect of an obligation, generally incumbent upon one in possession of property to employ reasonable care to so use it as not to injure the owner or possessor of neighboring property.[2] On this principle the owner of a three-story building was held liable in the recent case of *Moroder* v. *Fox,*[3] where he, knowing that the second floor was vacant and unheated and that the water pipes supplying the third story were uncovered and unprotected from frost, allowed them to remain so during the winter time, when they froze and burst, permitting water to escape through the floor to the injury of the goods of the tenant underneath.

There is, however, a strong dissenting opinion by Timlin, J.,[4] on the ground that the landlord owed no duty to the tenant, in anticipation of a freeze, to keep the vacant second floor apartment warm, or in any way to protect the pipes from frost; and since there was no duty imposed by law, there could be no breach of duty, conse-

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[14] Felt v. Felt, 59 N. J. E. 606 (1900); Burlen v. Shannon, 115 Mass. 438 (1873), and see Wharton, Conflict of Laws, §§236, 237.

[1] 3 Farnham, Waters & Water Rights, §966; *dictum* in Buckley v. Cunningham, 103 Ala. 449 (1893); Jones v. Freidenburg, 66 Ga. 505 (1881); Glickauf v. Maurer, 75 Ill. 289 (1874); Railton v. Taylor, 20 R. I. 279 (1897).

[2] Krueger v. Ferrant, 29 Minn. 385 (1882).

[3] 143 N. W. Rep. 1040 (Wis. 1913).

[4] Beginning page 1042.

quently there could be no actionable negligence.[5] To arrive at this conclusion, Timlin, J., relied chiefly on *Buckley* v. *Cunningham*.[6] But in that case the negligence alleged was the landlord's failure to turn off the water from the building in cold weather, and since the only stop cock for this purpose was outside the building and under the control of the city, it was quite as much within the power of the tenant as of the landlord to have the water turned off.[7] It is submitted that had the negligence alleged in the complaint been the landlord's failure to use proper care in looking after the pipes, a different result would have been reached, conforming with the general law as expressed in the principal case.[8]

Upon the same principle, the upper tenant is liable for overflow from upper floor injuring the property of the tenant below.[9] But since the gist of the action is negligence, when this is lacking no liability attaches to the upper tenant.[10]

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[5] Gillis v. Penn. R. R. Co., 59 Pa. 129, 143 (1868); B. & O. R. R. Co. v. Schwindling, 101 Pa. 258, 261 (1882); Goff v. Chippewa, etc., Co., 86 Wis. 237, 245 (1893).

[6] *Supra*, note 1.

[7] One injured by defects in appliances under the landlord's control cannot recover damages if he, himself, was guilty of negligence contributing to the injury. 3 Shearman & Redfield, Negligence (6th Ed.), §723; Davis v. Pacific Power Co., 107 Cal. 563 (1895); Gallager v. Button, 73 Conn. 172 (1900); Taylor v. Bailey, 74 Ill. 178 (1874); Huber v. Ryan, 57 App. Div. 34, 37 (N. Y. 1901); Brown v. Elliott, 4 Daly, 329 (N. Y. 1872).

[8] Tiffany, Landlord & Tenant, §§88, 91; Pike v. Brittan, 71 Cal. 159 (1886), stop cock negligently left open by landlord's janitor; Hysore v. Quigley, 9 Houst. 348 (Del. 1892); Priest v. Nichols, 116 Mass. 401 (1874); Sheridan v. Forsee, 106 Mo. App. 495 (1904); Stapenhorst v. American Manufacturing Co., 36 N. Y. Super. Ct. 392 (1873), leakage of oil; Levine v. Baldwin, 87 App. Div. 150 (N. Y. 1903), overflow from pipes under landlord's control; Rubenstein v. Hudson, 86 N. Y. Suppl. 750 (1904), leaking water pipe; Killion v. Power, 51 Pa. 429 (1866); Kecoughtan Lodge No. 29 v. Steiner, 106 Va. 589 (1907), bursting of water pipe; James Sheehan & Co. v. Barberis, 41 Wash. 671 (1906).

[9] 1 Taylor, Landlord & Tenant (9th Ed.), §175a; White v. Montgomery, 58 Ga. 204 (1877); Rosenfield v. Arrol, 44 Minn. 395 (1890); Miller v. Benoit, 29 App. Div. 252 (1898), affirmed in 164 N. Y. 590; Greco v. Bernheimer, 17 Misc. 592 (N. Y. 1896), in which case the fact of flooding the premises was held *prima facie* negligence.

[10] Smith on Negligence (2nd Ed.), page 31, states the rule: "Where the tenant of an upper floor does not know of the defective state of his receptacle for water, and there is no negligence in his mode of dealing with it, and it overflows and injures the room of the tenant below, the doctrine of Fletcher v. Rylands, L. R. 3 H. L. 330 (Eng. 1868), does not apply, and he is not obliged to keep his pipes from overflowing in any event, but is only liable for negligence." Moore v. Goedel, 7 Bosw. 591 (N. Y. 1861); Steinweg v. Biel, 16 Misc. 47 (N. Y. 1896); Lane v. Scagle, 67 Vt. 281 (1894).

Since the landlord's liability is based on his right of control over the appliances, it follows that if he does not reserve control thereof, he is not liable for injuries from defects in same.[11] So the landlord is not liable for injuries to a tenant in a building caused by the improper use of appliances within the exclusive control of a tenant of another part of the building, for he does not insure against the negligence of his tenants;[12] although he might become liable therefor by express contract.[13] Nor is he liable where the injuries result from defects in appliances on the premises leased by him to another, when these defects arise after the lease without his fault;[14] but he is liable if the damage is caused by defects existing at the time of such lease.[15]

The question of the landlord's liability in the absence of negligence might arise in those jurisdictions which follow *Rylands* v. *Fletcher*.[16] Yet the courts would probably deny the tenant relief on the ground that the introduction or collection of the water by the landlord was not for his own exclusive benefit, but was for the benefit of the building as a whole,[17] or that the landlord may be regarded as a "natural user" of the part of the building retained by him within an exception which has apparently been established to

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[11] 2 Underhill, Landlord & Tenant, §508; White & Co. v. Montgomery, *supra;* McKeon v. Cutter, 156 Mass. 296 (1892); Allen v. Smith, 76 Me. 335 (1884); Brick v. Favilla, 51 Misc. 550 (N. Y. 1906); Whitehead v. Comstock & Co., 25 R. I. 423 (1903).

[12] Jones, Landlord & Tenant, §616; Greene v. Hague, 10 Ill. App. 598 (1882), upper tenant allowing pipes to freeze; Mendel v. Fink, 8 Ill. App. 378 (1880); McCarthy v. York County Saving Bank, 74 Me. 315 (1883); Kenny v. Barns, 67 Mich. 336 (1887).

[13] Dunn v. Robins, 20 N. Y. Suppl. 341 (1892).

[14] Lebensburger v. Scofield, 155 Fed. Rep. 85 (1907); Haizlip v. Rozenberg, 63 Ark. 430 (1897); Leonard v. Gunther, 47 App. Div. 194 (N. Y. 1900).

[15] Ingwersen v. Rankin, 47 N. J. L. 18 (1885); Citron v. Bayley, 36 App. Div. 130 (N. Y. 1899), in which it was said that "a landlord is clearly responsible for damages arising from negligent construction or defects due to his want of care existing at the time of his lease to a tenant."

[16] *Supra,* note 10; and see particularly the opinion of Blackburn, J., in L. R. 1 Exch., at page 278 (1866).

[17] Anderson v. Oppenheimer, L. R. 5 Q. B. D. 602 (Eng. 1880), where a pipe supplying the first floor with water from a tank at the top of a building burst and damaged a tenant's goods in the basement, the landlord was held not liable, because the water was brought on the premises partly for the tenant's benefit; Blake & Co. v. Woolf, L. R. 2 Q. B. D. 426 (Eng. 1898); McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678, 694 (1904); Langabaugh v. Anderson, 68 Ohio St. 131 (1903), escape of oil from tank.

the rule of absolute liability.[18] It now seems well settled that the tenant has no remedy against the landlord in the absence of negligence.[19]

W. G. S.

WILLS—CONDITIONAL LIMITATIONS—RESTRAINT OF MARRIAGE—Several interesting points were raised in the construction of a will in a Maryland case.[1] A devise of land was made to the niece of the testator "so long as she may remain single and unmarried, and, in case of her marriage, from and after that time I give and devise all of my said property to my nephew, Turner Asby Maddox, and to his heirs, absolutely forever." The niece conveyed all her right, title and interest in the estate to the appellee and subsequently died unmarried. The appellee claimed the property as his own, asserting a fee-simple title thereto, but complained that he could not sell or fully enjoy the same because the appellant, Turner Asby Maddox, claims that under the will the title to the property is vested in him in fee simple and that the appellee's grantor took only a life estate subject to a conditional limitation in case she married. It was held that there was a life estate in the niece with a limitation over in fee, in case of marriage or death, to the appellant, Turner Asby Maddox.

The questions raised by this case are: (1) Was this a conditional limitation or a condition subsequent? (2) Was the condition in restraint of marriage? (3) Did the niece take the entire estate absolutely and in fee, subject to be divested only if she married, or did she only take a life estate determinable on her marriage? (4) If she took only a life estate, and since the will is silent as to the disposition of the remainder in the event of her dying unmarried, did the testator die intestate as to this remainder or did it vest in Turner Asby Maddox?

A condition subsequent must be carefully distinguished from a limitation, for if a limitation the estate terminates by force of the limitation alone, while in the case of a condition the estate does not terminate upon its breach, unless an entry or claim is made by the person entitled to take advantage of the condition.[2] Upon the

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[18] Pollock on Torts (9th Ed.), Chap. XII, pages 501, 507; Wilson v. Waddell, 2 A. C. 95 (Eng. 1876).

[19] Foa, Landlord & Tenant (3rd Ed.), p. 134; Cooley, Torts (2nd Ed.), p. 570; Anderson v. Oppenheimer, *supra;* Carstairs v. Taylor, L. R. 6 Exch. 217 (Eng. 1871).

[1] Maddox v. Yoe, 88 Atl. Rep. 225 (Md. 1913).

[2] Co. Litt. 214b; 2 Bl. Comm. 155.

breach of a condition subsequent annexed to a freehold estate, an actual entry, or its equivalent, by the grantor or his heir is generally declared to be necessary in order to revest the estate in the grantor. This was originally based on the theory that the estate having commenced by livery of seisin can be terminated only by an act of equal solemnity.[3] "Regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim."[4] A condition subsequent is usually held to be created by such words as "provided," "on condition that," *etc.*, while a limitation is created by the use of the wrods, "during," "so long as," "while," etc. Limitations are of two sorts: special (or determinable) where there is a possibility of reverter in the grantor or his heirs; and conditional, where the limitation is over to a third party, as in shifting uses or executory devises which take effect in derogation of estates previously limited. One important practical difference between a strict common-law condition, with the right of entry in the grantor or his heirs, and a conditional limitation, with the limitation over to a third party, is in the application of the rule against perpetuities.[5] It has been held that a limitation over to a third person was void as violating the rule, and proceeds with the *dictum,* that if the interest had been in the grantor instead of a third person, then the limitation would have been valid.[6] This *dictum* has been universally followed in America,[7] but is repudiated in England, where the right of re-entry and possibility of reverter are held to be within the rule, and hence void, as well as a limitation over to a third person.[8]

In determining whether or not a condition is in restraint of marriage, it again becomes important to distinguish between a mere condition and one with a limitation over to a third party.

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[3] Litt., §351; Co. Litt. 214b; Ruch v. Rock Island, 97 U. S. 693 (1878); Hubbard v. Hubbard, 97 Mass. 188 (1867); Warner v. Bennett, 31 Conn. 468 (1863); Adams v. Lindell, 72 Mo. 198 (1880); Carter v. Branson, 79 Ind. 14 (1881); Power Co. v. Mahan, 69 Minn. 253 (1897); Osgood v. Abbott, 58 Me. 73 (1870).

[4] Co. Litt. 218a.

[5] 61 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 686.

[6] Brattle Square Church v. Grant, 69 Mass. 142 (1855).

[7] French v. Old South Society, 106 Mass. 479 (1871); Cowell v. Springs Co., 100 W. S. 55 (1879); Tobey v. Moore, 130 Mass. 448 (1881); Hopkins v. Grimshaw, 165 W. S. 342 (1896); Hunt v. Wright, 47 N. H. 396 (1867); Penna. Society v. Craig, 240 Pa. 137 (1913).

[8] Ry. Co. v. Gomm, 20 Ch. D. 562 (Eng. 1881); Dunn v. Flood, 25 Ch. D. 629 (Eng. 1883); *In re* Hollis Hospital, 2 Ch. 540 (Eng. 1899); *In re* Ashforth, 1 Ch. 535 (Eng. 1905).

Notwithstanding the many expressions in the books, it is doubtful whether much remains of the once generally accepted rule, that conditions in restraint of marriage in gifts and contracts are void. In the first place, all the exceptions of the Roman law, from which the doctrine was derived were admitted by the ecclesiastical courts; and the courts of common law and of equity have always looked upon the doctrine with disfavor and have been continuously narrowing its application.[9] The English ecclesiastical courts early adopted, apparently with little regard to difference of circumstances,[10] the rule of the Roman law that, subject to the familiar exceptions, conditions imposing restraint upon marriage were of no effect and would be disregarded. The courts of common law and of equity, however, were restless under the views of the ecclesiastical judges. As the former had jurisdiction of the real estate of decedents, and the latter had to treat in various ways both of the personalty and realty of decedents, the result was that every opportunity was improved of laying down exceptions or qualifications to a doctrine which they were not quite bold enough to repudiate entirely. To this end the intention of the testator or donor came to be looked into more and more, and if possible to be given effect. This alone would seem to have been a virtual abandonment of the Roman rule, which apparently looked to the effect of the gift, regardless of the donor's intention.

The courts of common law and equity began to distinguish between conditions precedent and conditions subsequent, holding that if the condition was precedent, it was binding; though the rule of the ecclesiastical judges was allowed to have greater play if the condition was subsequent. At the same time the question as to whether the donor had made a gift over to a third person on breach of the condition concerning marriage began to be taken into account. It was claimed that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation to which the court was bound to give effect. The adoption of these distinctions was a further indication of the desire of the courts to put the case as far as possible upon the ground of the intention of the testator, *i. e.*, whether he intended to impose a general restraint upon marriage or merely to provide for the donee while unmarried. At last the English judges reached the point of declaring that the real question in a particular case was whether the testator intended to discourage marrying or not.[11] Even in view of all the dis-

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[9] Stackpole v. Beaumont, 3 Ves. Jr. 89 (Eng. 1796); Jones v. Jones, 1 Q. B. D. 279 (Eng. 1876); Comm. v. Stauffer, 10 Barr, 350 (Pa. 1849); Cornell v. Lovett, 35 Pa. 100 (1860); Hogan v. Curtin, 88 N. Y. 162 (1882).

[10] Stackpole v. Beaumont, *supra*, n. 9.

[11] Jones v. Jones, 1 Q. B. D. 279 (Eng. 1876).

tinctions taken, and in the actual conflict of authority, there seems to be little doubt that if the provision as to marriage can be construed as not *designed* (even though tending) to impose restraint upon marrying, it must be sustained. And if the question were open, there might be ground to inquire whether conditions in restraint of marriage generally were contrary to public policy.[12]

The principal case[13] decides that the niece took only a life estate determinable on her marriage, citing in support of this proposition several writers[14] and a number of cases.[15] In all the cases, save two, an estate was left to a widow *during widowhood,* or words of similar import. In the other two cases,[16] other provisions of the will or other circumstances showed clearly that the estate was to be only an estate for life. It is submitted that *widowhood* can only exist until the death of the widow and that hence when the words *during widowhood* are used clearly, no more than a life estate is created. But that is no precedent for holding that a devise to an *unmarried* woman until she marries or so long as she remains unmarried, would be only a life estate. It is true that the writers have made no distinction between a married woman and an unmarried woman, but on examination it is seen that they all refer to a statement made by Lord Coke[17] that, "If a man grant an estate to a woman *dum sola fuit,* or *durante viduitate,* or to a man until he be promoted to a benefice, in such case the grantee takes an estate for life determinable." Under the common law a devise was *prima facie* a devise for the life of the devisee, unless a contrary intention appeared in the will (by word of inheritance, *etc.*) but this rule has been changed and a devise is now *prima facie* a devise in fee and words of inheritance are not essential. Hence it is submitted that the quotation of Lord Coke is no longer applicable, as words which created an estate in his day are no longer necessary. At common law surely if the word "heirs" was inserted in a grant, such as Coke speaks of (except in the case of the words *dum viduitate*), a determinable fee would be created and not a life

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[12] Comm. v. Stauffer, 10 Barr, 350 (Pa. 1849); Jones v. Jones, 1 Q. B. D. 279 (Eng. 1876); Allen v. Jackson, 1 Ch. D. 399 (Eng. 1874).

[13] Maddox v. Yoe, *supra,* n. 1.

[14] 2 Bl. Com. 121; 4 Kent. Com. 26; 1 Washb. Real Prop. (5th Ed.) 63; Cruise Dig. Tit. Est. for Life, c. 1, §8.

[15] Knight v. Mahoney, 152 Mass. 523 (1890); Loring v. Loring, 100 Mass. 340 (1868); Dole v. Johnson, 3 Allen, 364 (Mass. 1862); Mansfield v. Mansfield, 75 Me. 509 (1883); Evan's Appeal, 51 Conn. 435 (1883); Cooper v. Poque, 92 Pa. 254 (1879); Danna v. Murray, 122 N. Y. 604 (1890); Harlow v. Bailey, 189 Mass. 208 (1905).

[16] Danna v. Murray; Harlow v. Bailey, *supra,* n. 15.

[17] Co. Litt. 42a.

estate. It is said: "So an estate to A and her heirs, till her marriage, will give a determinable fee. A limitation of this sort differs from a gift to a woman during widowhood."[18] If this is true, and if the word "heirs" is no longer necessary to create a fee, it is difficult to see why the niece did not take a fee. It is submitted that on this phase of the case the decision is doubtful.

Since the will is silent as to the disposition of the remainder in the event of the death of the niece, being unmarried, the question arose as to whether the testator died intestate as to this remainder. The court decided that the testator did not die intestate, but that the remainder vested in Turner Asby Maddox, the one the testator intended to be the ultimate object of his bounty. In this the court followed the settled rule of construction, that the courts will not favor intestacy, particularly in cases such as the one under discussion.[19]

C. McA. S.

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

QUESTION:

In an action, which, among other things, involved the validity of a real property corporation mortgage, in which plaintiff had an interest, a motion for a receiver of the property was made by plaintiff, and in opposition the attorney and President of the corporation submitted his affidavit, wherein he stated that he, in behalf of the Company, had offered to pay plaintiff the interest due him on his share of the mortgage, if plaintiff would sign a suitable paper protecting the Company against any loss attending such payment, and that such offer was still open to plaintiff.

Subsequently plaintiff asked said attorney and President to keep his promise and pay the interest, proferring to sign any such reasonable paper as he might exact. Whereupon said attorney and President declined to pay such interest until he could determine whether or not the Company had some counter-claim against plaintiff which could be set up against the interest, and asserted that if he determined there was such counter-claim, then such interest would not be paid.

Was not such refusal to fulfill such offer and promise, improper and unprofessional?

Does not such offer and refusal amount to a deception of the Court?

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[18] 1 Preston's Estates, 481.

[19] Metcalf v. Farmingham Parish, 128 Mass. 370 (1880); Chappel v. Avery, 6 Conn. 31 (1826); Manderson v. Lukens, 23 Pa. 31 (1854); Lucksford v. Cheeke, 3 Lev. 125 (Eng. 1684); Eton v. Hewitt, 2 Dr. & Sm. 184 (Eng. 1863); Brown v. Hammond, Johns. V. C. Rep. 210 (Eng. 1858); Underhill v. Roden, 2 Ch. D. 494 (Eng. 1876); Aulick v. Wallace, 75 Ky. 531 (1877); Ferson v. Dodge, 23 Pick. 287 (Mass. 1839); Clark v. Tennison, 33 Md. 85 (1870).

ANSWER:

The Committee does not consider that it is unprofessional to withdraw an unaccepted offer, nor does it consider that its withdrawal, as stated, was a deception.

QUESTION:

About twenty years ago A was convicted of a felony. After serving about eight years of his sentence, he was pardoned and restored to full civil rights. Immediately after his pardon he set up in business and has continued in that business at the same address for about ten years. He is peaceful, respectable and well thought of. Recently he was compelled to bring two suits against B, both involving questions of fact. B's counsel knew of A's conviction, his pardon, his restoration to full civil rights and his subsequent clean private and successful business life. Yet on the occasion of each trial (one before a jury,) B's counsel interrogated A concerning his conviction of a crime, the sentence imposed, the time served, the charge and even made certain details of or consequences of the crime a part of his questions. Do you consider this conduct and these questions of B's counsel proper and ethical?

ANSWER:

The Committee considers that wanton, unnecessary or unreasonable inquiry or comment respecting the discreditable past history of a witness or party, is unethical and improper professionel conduct; it cannot, however, assume to say that such inquiry or comment, whether admissible or not under the law of evidence, was, in the case suggested, wanton, unnecessary or unreasonable.

QUESTION:

An action is started in a County Court of this State to recover damages resulting from personal injuries sustained by the alleged negligence of defendant, the plaintiff being represented by Attorney A. While this action is still pending, the plaintiff, through another Attorney B, commences an action in a Municipal Court of the City of New York for the same cause of action. It does not appear that Attorney B has been informed by *his client* (the plaintiff) of the other action pending in the County Court, but the defendant interposes a demurrer to the action in the Municipal Court on the ground that there is another action pending. This demurrer is opposed by Attorney B and is overruled on the ground that the defense of another action pending can only be raised by answer. Attorney B collects ten dollars costs allowed by the Municipal Court on the overruling of the demurrer, and the defendant subsequently serves a verified answer raising the point of the action pending in the County Court, and the case is set for trial. On the trial day neither the plaintiff nor Attorney B appear in the Municipal Court and the case is dismissed on defendant's motion.

1. Do the above facts indicate improper conduct on the part of Attorney B?
2. Should Attorney B ascertain from the plaintiff the fact that another action for the same cause was then pending? If he did not so ascertain, was he negligent in not doing so?

ANSWER:

In the opinion of the Committee, the question discloses no impropriety upon the part of Attorney B, and no fact upon which negligence can be imputed to him, is stated. It would have been proper professional courtesy to notify his adversary of his intention to default, and to consent to discontinue, with his client's assent; but his failure to do so was not professional misconduct.