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NOTES.

BANKRUPTCY—SALE OF PROPERTY BY TRUSTEE—DOWER INTEREST OF WIFE—The United States District Courts have reached directly opposite results in applying the Bankruptcy Law of 1898, as amended in 1910, to the law of Pennsylvania. The question involved is whether or not, under the act, the purchaser of the bankrupt's property, sold by the trustee under order of court, takes such property free and clear of the inchoate right of dower of the bankrupt's wife. The court for the middle district held just a year ago that such a sale divested the bankrupt's real estate of the wife's dower right.[1] The court for the western district now holds directly *contra.*[2] As is so often the case, the split here is due to a strict interpretation of the words of the Bankruptcy Act on the one hand, and on the other, to a broader interpretation of the act read in the light of the existing law of Pennsylvania.

At common law the wife's right of dower was not considered a part of the estate of her husband and was not affected by pro-

[1] *In re* Cordori, 207 Fed. Rep. 784 (1913).

ceedings in bankruptcy against him.[3] Likewise in Pennsylvania, dower is an estate of the wife and not merely a lien which she has on her husband's estate.[4] However, to this rule there are two exceptions, and it is because of these exceptions that the difference of opinion in the principal cases has arisen. In 1705 an act was passed providing certain methods for taking lands in execution for payment of debts.[5] Though no mention was made of dower, the courts curiously enough interpreted this act and other acts on the subject as permitting the taking of the wife's dower right to sell on execution upon a judgment recovered against her husband, or upon a *scire facias* on a mortgage executed by him alone.[6] Thus the right of dower in Pennsylvania is similar to that right at common law except in so far as the law of Pennsylvania has made the wife's dower a chattel for the payment of the husband's debts. But the courts have refused to extend this abridgment of the common law rule.[7] Mr. Justice Gray in the Supreme Court of the United States said that "the state court has constantly held[8] that, with these exceptions [*i. e.*, those noted, *supra*], the right of dower is as much favored in Pennsylvania as elsewhere, and that the old decisions are not to be extended and that neither an absolute conveyance by the husband nor an assignment by him for benefit of creditors . . . impairs the wife's right of dower."[9]

Relying on the decision of last year[10] it was contended in *re Chotiner*[11] that the trustee under the Bankruptcy Act is, in Pennsylvania, in the same position as a judgment creditor and, therefore, has power to divest the bankrupt's wife of her dower right in the property sold, *i. e.*, that the trustee now comes under the exceptions noted above. The Amendment of June 25, 1910, to Section 47a (2) provides that the trustee "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."[12] Such a creditor under the Pennsylvania exception may divest the wife of her dower rights and the wording of the act would seem to put the trustee into the shoes of a judgment

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[3] *In re* Chotiner, 216 Fed. Rep. 916 (Sept. 17, 1914).

[4] Squire v. Compton, Vin. Ab. Dower, G. pl. 60; Smith v. Smith, 5 Ves. 189 (1800).

[5] Bachman v. Chrisman, 23 Pa. 162 (1854); Diefenderfer v. Eshleman, 113 Pa. 305 (1886).

[6] 1 Sm. L. 57.

[7] Graff v. Smith, 1 Dall. 481 (Pa. 1789).

[8] But greatly extended by statute today in England. See Dower Act, 1833, 3 & 4 Wm. 4.

[9] Kennedy v. Nedrow, 1 Dall. 415 (Pa. 1789); Helfrich v. Obcomyer, 15 Pa. 113 (1850).

[10] Porter v. Lazear, 109 U. S. 84 at p. 88 (1883).

[11] *Supra*, n. 1.

[12] *Supra*, n. 2.

[13] U. S. Comp. St. Supp. (1911), p. 1500.

creditor. Section 70a (5) is also in point.[13] However, it was part of the original Act of 1898 and has been held not to include in the bankrupt's salable property the dower interest of his wife.[14] But the meaning of Section 47, *supra,* is yet to be interpreted by a higher court.

A consideration of the purpose of the Amendment of 1910 may throw some light on the subject. It would seem that it was passed to remedy a defect in the original act arising over the question of what title the trustee acquired to personal property of the bankrupt, which had been the subject of a conditional sale.[15] In the case cited it was held that, since the trustee was vested with no better title than the bankrupt himself had, the conditional vendor might retake the property for failure of bankrupt to pay for it. Yet the law of the State of Ohio made the conditional sale void as against creditors of the bankrupt. Thus the creditors could have levied on this property previous to bankruptcy, yet subsequently the trustee for benefit of creditors could not. Many cases have since arisen on this question,[16] and it is generally admitted that it was for this purpose that the Amendment of 1910 was passed.[17] On the other hand the Supreme Court of Pennsylvania has flatly said that the amendment has given the trustee "the power to assert every right which such [judgment] creditors could have asserted during the period of four months immediately preceding the filing of the petition in bankruptcy."[18] There is no doubt of the meaning of this. It lays down a broad principle and appears to bring the trustee within that exceptional class which, in Pennsylvania, is allowed to divest the bankrupt's wife of dower right. In spite of this, however, the District Court for the Western District of Pennsylvania maintains that the Bankruptcy Act vests in the trustee "no other estate than the bankrupt's"[19] and insists that the wife holds a separate estate and not a mere chose in action against her husband's estate.[20]

The Bankruptcy Law, as a federal statute, should be enforced throughout the States with as much uniformity as possible. Some fifteen States, including Massachusetts, New Jersey and New York, protect dower even from execution by a judgment creditor or a mortgagee where the wife did not join in making the mortgage.[21]

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[13] The section referred to reads "The trustee of the estate of a bankrupt . . . shall . . . be vested with the title of the bankrupt . . . to all . . . property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

[14] *In re* Hays, 181 Fed. Rep. 674 (1910).

[15] York Mfg. Co. v. Cassell, 201 U. S. 344 (1906).

[16] Holt v. Henley, 232 U. S. 637 (1914).

[17] Collier on Bankruptcy (10th. ed.), §§47, 659.

[18] Bank of N. A. v. Penn Motor Car Co., 235 Pa. 194 (1912).

[19] *Supra,* n. 2.

[20] *Supra,* n. 4.

[21] Ala., Ill., Iowa, Md., Mass., Mich., Miss., Mo., N. J., N. Y., N. C., Ohio,

Thus the 1910 Amendment will have no bearing on this point in these States and the trustee will continue unable to divest the bankrupt's wife of her dower right. To line up Pennsylvania with these States and thereby make uniform the application of the Bankruptcy Act, *in re Chotiner* must be upheld by the Supreme Court of the United States. Clearly the General intent of the Amendments of 1910, as seen by the debates of Congress [22] and their interpretation by the courts,[23] was to deal with the question of conditional sale, *supra*. There is nothing tending to prove that it was to affect the dower right of the bankrupt's wife. Whether that right shall be protected in Pennsylvania depends upon the local law of that State. It is submitted that it is better to carry out the intent of Congress and at the same time retain the common law principle of dower than, merely because of a technical similarity of words, to extend the exceptions which have long existed in the law of Pennsylvania and include the trustee in bankruptcy in that class of persons which is permitted to divest a wife of her traditional dower right.

H. I.

CARRIERS—DISCRIMINATION—As to whether or not the common law provided against discrimination by carriers, there is great diversity of opinion. It would seem that no such rule existed in England.[1] Although there is a decided conflict with respect to this question in the United States, the weight of authority upholds the view that all shippers similarly situated were entitled to equal rates.[2] Legislation in both countries has removed all room for doubt concerning the law to be applied today.[3]

Since today carriers must charge the same rate for substantially the same transportation service at the same time and under substantially similar circumstances, the question arises as to what recovery may be had by a shipper against whom a carrier has discriminated. A recent opinion of the Supreme Court of Minnesota is to the effect that damages are to be measured by the difference between the rate paid by the plaintiff and the lower rate enjoyed by

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S. C., Tenn., Va., and Wis.

[22] Congressional Record, 61st Congress, pp. 2552-4.

[23] *Supra*, n. 14.

[1] Great Western Ry. Co. v. Sutton, L. R. 4 H. L. 238 (1869); Baxendale v. Eastern Counties Ry. Co., 4 C. B. (N. S.) 63 (1858).

[2] Messenger v. P. R. R., 36 N. J. L. 407 (1873); Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 276 (1891). But see *contra*, Johnson v. Pensacola Ry. Co., 16 Fla. 623 (1878), where it is said that the carrier's only duty was to allow reasonable rates.

[3] English Railways Clauses Consolidation Act, §90, 8 & 9 Vict., c. 20 (1845), and Interstate Commerce Act, §2. Almost all of the separate states have enacted similar provisions to apply to interstate commerce.

the favored shipper.[4] In so holding this court refused to follow the Supreme Court of the United States in the case of *Pennsylvania Railroad* v. *International Coal Mining Company*,[5] where this rule of damages was strictly repudiated.

The plaintiffs in both of these cases had paid the schedule rates for shipments of freight while other shippers engaged in similar business had been allowed rebates by the railroads. The United States court admitted that there was a good cause of action against the railroad for unjust discrimination, but held that nominal damages only could be recovered because the plaintiff had proved no substantial damage. In other words, substantial recovery would be allowed only as compensation for injury received and injury consisted only of loss in business due to being undersold in market by another shipper who was enabled to do this because of the lower rate allowed him. Mr. Justice Lamar, speaking for the court, said in part, "Having paid only the lawful rate, plaintiff was not overcharged. . . . There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered."

The Minnesota court, on the other hand, after discussing this case and declining to follow it, affirmed that their previous convictions were only strengthened by passages in the opinions upon which this decision was based.[6] The rule laid down in the Minnesota case was that the disfavored shipper has a right of action for damages, at least to the extent of the discrimination.[7] This was also the opinion of Mr. Justice Pitney who voiced a vigorous dissent from his colleagues on the United States Supreme Court.[8]

There are many arguments on both sides of the question as to whether the law provides a substantial recovery for unjust discrimination when the claim is founded merely upon the fact that the carrier has allowed a lower rate to one of the plaintiff's competitors. In considering the matter of damages, the first thought that suggests itself is that one who is compelled to pay more to have his goods transported than another who is competing with him, is damaged to the extent of the difference between these two rates. It seems to be a strange theory which can be worked out along the line that he who is allowed transportation for the lower figure is being

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[4] Seaman v. Minneapolis & R. R. Ry. Co., 149 N. W. Rep. 134 (Minn. 1914).

[5] 230 U. S. 184 (1912).

[6] Texas, *etc.*, R. R. Co. v. Interstate Commerce Commission, 162 U. S. 233 (1895), where it was said, "Nor is there any legal injustice in one person procuring a particular service cheaper than another"; and Parsons v. Chicago, *etc.*, R. R. Co., 167 U. S. 447 (1896), in which the court held that one who is charged a reasonable rate has no right to complain because another is given a lower rate.

[7] See opinion in 121 Minn. 488.

[8] 230 U. S. 208-247.

benefited, but no injury is being inflicted upon him who must pay the higher. Under this doctrine recovery may be had only when the goods of the separate shippers come into direct market competition, as in this case alone is it possible to prove damages resulting from the discrimination.

The problem to be solved is whether the legislation which has been passed to regulate this matter and avoid unjust discrimination, was meant to apply purely in cases where consequential damages result, or whether it was not intended to strike at the root of the evil and compel the carrier to charge equal rates to all shippers similarly situated, providing substantial recovery to the amount of the difference if any such shipper were charged more than another. Going back to the Act of Parliament,[9] upon which the Interstate Commerce Act and most of our statutes have been based, we find the cases divided under it upholding the latter view.[10] Inasmuch as these decisions had been rendered previous to the enactment of our legislation on this subject, Mr. Justice Pitney points out that Congress must have had in mind that the same conclusions would be reached under the Interstate Commerce Act.[11] The majority opinion in that case is based upon the fact that a clause expressly allowing the measure of damages to be the difference in rate was struck out of the act before adoption. It appears, however, that this was done in order to provide generally in one clause[12] for damages recoverable for breach of any provision of the act.

An argument has been allowed that if a shipper who has paid no more than the legalized tariff rate is allowed to recover the difference between this and a lower rate enjoyed by a favored shipper, this would amount to the authorization of a second illegal act on the part of the railroad which must charge the regular tariff rate. This contention, however, should bear but little weight. The railroad occupies a position of economic advantage with respect to the shipper, and the law must interfere to protect the latter. Unless a published tariff is considered as sacred, there is no reason to hold that a carrier who has already departed therefrom in one instance should not be compelled to treat all competing shippers alike. It hardly seems logical to say that if one shipper is charged more than others, he may recover the difference provided he paid more than the tariff rate, but not so if he paid exactly the rate prescribed by the tariff. The carrier is guilty of discrimination in the one case as well as the other, and the shipper paying the higher rate is equally injured in both cases.

J. N. E.

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[9] Railways Clauses Consolidation Act, *supra*.

[10] Great Western Ry. Co. v. Sutton, *supra*; London, *etc.*, Ry. Co. v. Evershed, L. R. 3 App. Cas. 1029 (1878); Denaby Main Colliery Co. v. Manchester, *etc.*, Ry. Co., L. R. 11 App. Cas. 97 (1885).

[11] 230 U. S., at page 237.

[12] §8.

DAMAGES—PENALTY OR LIQUIDATED DAMAGES—A sum of money payable upon the breach of an agreement to perform some collateral act, may be either a penalty for failure to perform as agreed or a sum in liquidation of damages caused by the breach. The penalty, being a punishment for non-performance is unenforceable save to indemnify the party injured by the breach, since no one may profit by the wrong of another. On the other hand there are many instances where one suffers by a breach but the damages are not readily ascertainable or are not susceptible of proof and it is highly equitable in such cases that the parties should determine as nearly as possible the amount which will compensate the injured party, who may enforce a stipulation to that effect. It is natural that persons, knowing of the non-enforcibility of penalties, yet wishing to provide for them, will attempt to frame them in such words that they will seem to be liquidation of damages. Again, persons ignorant of the law on penalties, may, contemplating a liquidation of damages in an apt case, term the sum payable on default, a penalty. The attempt on the part of courts to protect defaulting persons from penalties in disguise and to carry into effect the legitimate intent of innocent persons has caused the confusion in the law of penalty and liquidation of damages. The case of *Bankers' Surety Company* v. *Elkhorn Drainage District*,[1] recently decided in Nebraska, if found to contain a correct application of the general rules governing the distinction between a penalty and liquidated damages, will throw great doubt over the decisions which up to this time have been considered the nearest possible approach to uniformity in a subject in which each case must necessarily depend largely on its own facts. That the sum of eleven thousand dollars payable on failure to complete a piece of work costing thirty thousand dollars on a day named, may be collected as a sum named in liquidation of damages is the startling decision in that case.

"The inquiry of the court is not whether the parties have acted wisely, but what was the meaning and intent of the parties; and, when that is ascertained from the language of the parties themselves it must be given effect." The error in the Surety Company case flows from the misapplication of the first principle expressed in that case and the application of the second principle. It is undeniable that the meaning and intent of the parties must be gathered from

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[1] 214 Fed. Rep. 242 (1914). Upon the drainage district's agreement not to enforce forfeiture on December 31, 1910, the construction company entered into a bond to pay thirty dollars per day stipulated damages for every day after December 31, 1910, until the work was completed, provided that if the work was completed on or before December 31, 1911, the bond to be null and void. In November, 1911, the construction company announced its inability to complete the work and, after notification to the construction company and the surety company, the drainage district entered and finished the work in May, 1912. The contested point is the collection of $10,980, being thirty dollars for each day from December 31, 1910, to the same day, 1911.

their language,[2] but there must be a liberal construction of the agreement. The true inquiry is, not what the parties intended to say, but what result they intended to be accomplished by their agreement. That result as found may or may not be one which a court of law or equity will enable them to effectuate.

There is no longer any doubt that courts are not bound by the name given by parties to an agreement to the sum payable on default.[3] A penalty is odious and unenforceable under any name. A penalty has certain attributes, as does a liquidation of damages and a sum having the attributes of what is in law a penalty is a penalty, whether actually called a penalty or liquidated damages. Since the name does not conclude as to further inquiry, the attributes of the amount here made payable may be inquired into. In two respects this resembles a sum named in liquidation of damages. A *per diem* stipulation is *prima facia* a stipulation of damage caused by delay[4] and there is, furthermore, a field here where damages are not readily ascertainable, in fact are highly conjectural. Since non-ascertainability of exact damages is a prime requisite for liquidated damages,[5] this merely tends to show this is a field within which liquidation of damages may operate, but is no proof that this particular sum is in liquidation of damages. Nor was this a true *per diem* stipulation, which involves an increase in the amount due in proportion to the delay in completion. But here either the full amount was to be paid or none was to become due.

There are, then, no presumptions in favor of considering this a liquidation of damages. On the other hand, there are many objections, chief of which is that it answers precisely the definition of a penalty.[6] To apply the rule properly announced by the court in the Surety Company case, and casting aside all surplusage, the bond given was to pay ten thousand nine hundred and eighty dollars, provided that if the work was finished on or before December 31, 1911, the bond to be null and void. It is immaterial that instead of saying ten thousand nine hundred and eighty dollars, the bond read thirty dollars times the number of days in the year 1911, including also December 31, 1910, for the agreement was to pay ten thousand nine hundred and eighty dollars or nothing. If the

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[2] Berger v. Nantz, 172 Ill. App. 623 (1912); Webster v. Bosanquit, L. R. (1912) Ap. Cas. 394; Clark v. Britton, 76 N. H. 64 (1911).

[3] Clydebank Engineering Co. v. Custaneda, L. R. (1905) App. Cas. 6; Grunblatt v. McCall & Co., 64 So. Rep. 748 (Fla. 1914); Diestal v. Stevenson, 2 K. B. 345 (Eng. 1906).

[4] Clydebank Engineering Co. v. Custaneda, *supra*, n. 3; Moses v. Attuono 17 So. Rep. 925 (Fla. 1908).

[5] Webster v. Bosanquit, *supra*, n. 2; Stratton v. Fike, 166 Ala. 203 (1910); Emery v. Boyle, 200 Pa. 249 (1901).

[6] "In general, a sum of money in gross, to be paid for non-performance, is considered a penalty." Whitfield v. Levy, 35 N. J. L. 149 (1871); Wright v. Bott, 163 S. W. Rep. 360 (Tex. 1914).

work was finished on December 31, 1911, nothing was to be paid; if on January 1, 1912, ten thousand nine hundred and eighty dollars was to be the damages agreed on, damages apparently occurring over night. There is no pretense that more than thirty dollars damages was incurred for the delay. This is not a case where there are extraordinary damages by breach on the day certain.[7] It would be a gross misinterpretation of *The Sun Publishing Company* v. *Moore*,[8] cited in the Surety Company case to cite it in support of the proposition that courts will not take into consideration disparity between possible actual damages and a sum named as liquidated damages, for that case stands for the principle that, granted the sum is a liquidation of damages, actual damages cannot be proved. The case does not for a moment deny the rule that gross disparity between actual damages and a sum called liquidated damages is evidence that the sum was intended to have the effect of a penalty rather than liquidated damages.[9] The prior default is immaterial. One cannot take advantage of another's default to impose unconscionable terms upon him,[10] so the entire agreement must stand or fall by itself. It is not analogous to the case of *Thompson* v. *Hudson*,[11] for here there is a new liability imposed.

The court, it is submitted, erred in holding that effect must be given to the intention of the parties. If, as seems to be the case, the parties created a penal liability, courts consistently refuse to carry into effect that intention and to lend their aid to enforcement of a penalty.[12] They will, on the other hand, extend their power to relieve against a penalty already imposed, despite the intention of the parties at the time of agreement actually to pay and impose the penalty.

It might be contended, since the construction company was already in default and the sum of thirty dollars *per diem* could have been collected if it had been actually intended as liquidated damages, that the thirty dollars actually fell due each day until the completion of the work but that as much as had fallen due was released upon completion by way of bonus.[13] But the longer the delay, the greater

[7] Kunkel v. Wheery, 189 Pa. 198 (1899), where contractor, himself under heavy *per diem* stipulation, enforced same against sub-contractor; in Bedford v. Miller, 212 Fed. Rep. 368 (1914), where contractor, under similar circumstances, relieved of his *per diem* liability, could not enforce against his sub-contractor. Curtis v. Van Bugh, 161 N. Y. 47 (1899).

[8] 183 U. S. 642 (1901), actual damages $65,000, liquidated damages $75,000.

[9] Graham v. Lebanon, 240 Pa. 337 (1913); Nichols-Shephard Co. v. Beyer, 168 Mo. App. 685 (1913).

[10] Van Kammel v. Higley, 172 Ill. App. 88 (1912).

[11] L. R. 4 Eng. Ir. 1 (Eng. 1869), where agreement to take smaller sum in satisfaction of larger debt if paid on day certain. *Held:* Larger sum recoverable on failure to pay smaller sum on day named.

[12] Bell v. Scranton Coal Mines Co., 110 Pac. Rep. 628 (Wash. 1910); Nakawaga v. Okamoto, 164 Cal. 718 (1913).

[13] Bonus is not a gratuity but a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be

the amount due and released and the higher the bonus. This is putting a premium on delay and in no sense a sum paid to expedite the work.

Were another objection needed, it might be found in the fact that this sum was named as liquidation of damages caused by delay and not for damage caused by entire breach. Whether courts would allow the plaintiff a reasonable time to complete the work himself or whether they would refuse the stipulation altogether has not been decided.[14] Certain it is that in case of entire breach, the injured party is not limited to stipulate damages.[15] Nor may he allow liquidated *per diem* damages to accumulate indefinitely.[16]

J. F. H.

LICENSES—REVOCABLE OR IRREVOCABLE—THEATRE TICKETS—A recent decision of the English Court of Appeals[1] is of interest because apparently it definitely overrules the well known doctrine of *Wood* v. *Leadbitter*,[2] which is a leading case on this question. In that case the plaintiff Wood had purchased a ticket of admission to the Doncaster Race Course, and had been admitted. He was requested to leave for no apparent reason, and upon refusal was ejected with no more force than was necessary. Baron Alderson laid down the rule that a ticket of this kind gave a mere license revocable at the will of the licensor. The following quotation from his opinion throws light on the manner in which this result was reached. At page 842 he says: "That no incorporeal inheritance can either be created or transferred other than by deed, is a proposition so well established, that it would be mere pedantry to cite authorities in its support," and at page 843: "Now, in the present case the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and remain in a certain close belonging to Lord Eglintown; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land." Briefly then the very foundation of this doctrine is that since the right to

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given, Kenicott v. The Supervisors, 16 Wall. 452 (1872); "£300 per day in excess of consideration for work done is a bonus for *expedition*," Macintosh v. Railway Co., 14 M. & W. 548 (Eng. 1845).

[14] 1 Sedgwick, Damages (9th ed.), §419 (1912).

[15] Murphy v. U. S. Guaranty Co., 100 App. Div. 931 (N. Y. 1905); Bacigalupi v. Phoenix Building Co., 112 Pac. Rep. 892 (Cal. 1910).

[16] Phaneuf v. Corey, 190 Mass. 237 (1906); Gillett v. Young, 101 Pac. Rep. 766 (Colo. 1909).

[1] Hurst v. Pictures Theatre (Lim.), 30 T. L. R. 642 (Eng. 1914); also reported in 58 SOL. JOUR. 739.

[2] 13 M. & W. 838 (1845).

enter a place of amusement is a right affecting land, and since a ticket of admission is not a deed, nothing more than a mere revocable license can be created.[3]

The proposition that a simple license is revocable at the will of the licensor is fundamental.[4] This is so though the license is under seal,[5] or written,[6] or founded upon a consideration.[7] It may be revoked by express words to that effect,[8] or by other acts of the licensor indicating an intention to revoke.[9]

But, on the other hand, the proposition is equally well settled that where a license is coupled with a grant "the party who has given it cannot in general revoke it so as to defeat his grant to which it is incident."[10] This is the doctrine of *Hurst* v. *Pictures Theatre,* the case under discussion. On the facts, the case could not be distinguished from *Wood* v. *Leadbitter,* but the court held, with one judge dissenting on the ground that the earlier case was still good law, that, "a license coupled with an agreement not to revoke it for good consideration conferred an enforceable right, and the grant of a right to enter upon the premises and to see a spectacle included a contract not to revoke until the performance was ended." The importance of this decision rests in the fact that whereas under the earlier doctrine, the ticket holder, having no right to remain on the premises, could only recover the price of his ticket when ejected; in the Hurst case it was held a breach of contract for the management of the theatre to eject him and he was therefore allowed consequential damages. Apparently then this case limits the right to revoke the license to cases of violation of the conditions, express or implied, of the contract of admission and though, it is submitted, the decision cannot be supported, having regard to the objection raised by *Wood* v. *Leadbitter,* nevertheless the equitable side of the situation necessitates this ruling. From the practical point of view of everyday life it is undoubtedly true that when a man buys a ticket of admission to any spectacle to which the public is admitted, he understands, as does the management, that if he conducts himself with propriety he will not be interfered with. The Hurst case consequently treats the relation as contractual with the implied condition that so long as the holder behaves himself the management

[3] In Hurst v. Pictures Theatre (Lim.), *supra*; this point was not mentioned by the court.

[4] Elias, Theatre Tickets, p. 5; McCrea v. Marsh, 12 Gray, 211 (Mass. 1858); Burton v. Scherpf, 83 Mass. 133 (1861).

[5] Jackson v. Babcock, 4 Johns. 418 (N. Y. 1809).

[6] Tillotson v. Preston, 7 Johns. 285 (N. Y. 1810).

[7] Cook v. Ferbert, 145 Mo. 462 (1898); Burton v. Scherpf, *supra.*

[8] Troxell v. Iron Co., 42 Pa. 513 (1862); Barksdale v. Haviston, 81 Va. 764 (1886).

[9] Johnson v. Skillman, 29 Minn. 95 (1882).

[10] Wood v. Leadbitter, *supra;* Wood v. Manley, 11 Ad. & El. 34 (Eng. 1839).

agrees not to revoke the license. However, as stated above, the reasoning evades the stumbling block of the court in the Wood case and does not remove it, although this seems to be the only equitable solution of a very difficult problem.

The decision in the Hurst case was also based upon the ground that the trend of judicial opinion in England since *Wood* v. *Leadbitter* has been to depart from that case. In this connection an examination of the English decisions since 1845 is of interest. As early as 1859, Vice Chancellor Page Wood refused to apply the rule in equity,[11] and in *Lowe* v. *Adams*[12] the Master of the Rolls expressed the opinion that, having regard to equitable considerations, it was extremely doubtful that *Wood* v. *Leadbitter* was still good law. In the light of these decisions therefore it is not surprising that a court of law has finally flatly refused to apply the old doctrine.

Turning to the American cases on the point the prevailing rule is in accord with *Wood* v. *Leadbitter*.[13] In Pennsylvania there was *dicta* to the contrary in *Drew* v. *Peer*[14] to the effect that the right of ticket holders "was more than a mere license. It was more in the nature of a lease, entitling them to peaceable ingress and egress, and exclusive possession of the designated seats during the performance on that particular evening." However this *dicta* was expressly disapproved in *Horney* v. *Nixon*[15] and *Wood* v. *Leadbitter* was cited with approbation. Thus the rule here is apparently in accord with that case. But in support of the doctrine of the Hurst case, expressions may be found in some cases which seem to limit the right to revoke to a breach of the contract of admission.[16] In California an act was passed in 1893 to accomplish this same purpose, *i. e.*, that no person may be refused admission to a place of public amusement "provided, that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from such place of amusement."[17] This statute has been held constitutional.[18]

The New York Law Journal approves of the decision in the Hurst case and says: "There is no theoretical justification for holding that a theatre ticket is a mere personal license and as such arbitrarily revocable. The purchase of a theatre ticket is a contract and

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[11] Frogley v. Earl of Lovelace, 1 Johns. Vice Chancery 333 (1859).

[12] L. R. [1911] 2 Ch. 598.

[13] McCrea v. Marsh, *supra;* Burton v. Scherpf, *supra;* Horney v. Nixon, 213 Pa. 20 (1905).

[14] 93 Pa. 234 (1880).

[15] 213 Pa. 20 (1905).

[16] Smith v. Leo, 92 Hun, 242 (N. Y. 1895); Crumore v. Huber, 18 App. Div. 231 (N. Y. 1897).

[17] Cal. Stat. 1893, p. 220.

[18] Greenberg v. Western Turf. Assn., 140 Cal. 357 (1903).

no amount of casuistry can make it anything but a contract." Though the correctness of the first part of this statement in the light of the decisions enumerated is doubtful, it is submitted that the latter part is a correct exposition of what the law should be.

J. W. L.

TRUSTS—ERECTION OF MONUMENT AS A CHARITY—In determining the validity of testamentary provisions for the erection of monuments or for the care and maintenance of tombs and burial grounds, there are two important considerations to be noted: first, does the provision authorize or direct an immediate expenditure; second, does it provide for continued care and maintenance.

It would seem that such a bequest does not constitute a public charity, although generally considered under that branch of the law. Just what is a public charity is not determinable by any well defined rule, but since the Statute of 43 Elizabeth [1] the enumeration of classes therein contained are indicative of the lines within which a gift must fall in order to be upheld as a charity by the court. Or, as has been stated by a modern jurist, "Whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from taint or stain of every consideration that is personal, private or selfish, is a gift for charitable uses."[2] It is clear that a gift for the erection of a monument is not a gift for a charitable use within the rule stated[3] and the court was justified in so holding in the recent case of the *Morristown Trust Company* v. *Mayor of Morristown*.[4] In that case, a legacy of five thousand dollars was appropriated for the erection of a bronze and granite base for the flagstaff in the Morristown Park when the proper consent should be obtained for its erection from the trustees of the park and the municipal authorities of the town; and there was a provision that it was to bear an inscription that it was erected to the memory of the testator's father.

But although a gift for the erection of a monument is not for a charitable use, neither is it open to the objection that it creates a perpetuity, where it provides for the immediate expenditure of the bequest, and it has been frequently held that such a bequest or direction in a will is valid.[5] "To hold otherwise would be to deny the right of the testator to dispose of his estate."[6] It is not necessary

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[1] Stat. 43 Eliz., c. 4 (1601).

[2] Binney, J., in Price v. Maxwell, 28 Pa. 25 (1857).

[3] Trimmer v. Danby, 25 L. J. Ch. N. S. 424 (1856).

[4] 91 Atl. Rep. 736 (N. J. 1914).

[5] Detwiller v. Hartman, 37 N. J. Eq. 347 (1883); Bainbridge's Appeal, 97 Pa. 482 (1881); McIvain v. Hockaday, 36 Tex. Civ. App. 1 (1904).

[6] Detwiller v. Hartman, *supra*, n. 5.

that the monument be to the memory of the testator. It is a good gift if to the memory of the testator's parents;[7] or to the memory of certain distinguished men.[8] A bequest for the purchase of a burial lot and fence therefor is analogous to a gift for the erection of a monument and has been so held.[9] Such gifts stand on the same footing as an expensive funeral.[10]

But where, under our second consideration, the testamentary provision creates a perpetual trust for the preservation and maintenance of the graves or monuments of the testator or other named persons, it is void as being repugnant to the Rule against Perpetuities.[11] Such a gift, to be valid, must be of such a nature that it can be upheld as a charitable use, and that this may be possible the general public, and not merely individuals, must have an advantage in it. Just what is sufficient to make the gift one for a charitable use is not clear, but it seems well established at common law that a provision for a trust for the purpose of keeping a private burial lot in repair is not made a charity by a direction that any surplus shall be applied to the general maintenance of the cemetery,[12] or other charitable use.[13] By statute in many states, however, it is provided that gifts for the care and maintenance of graves, cemeteries and churchyards shall not fall by reason of being made in perpetuity, but shall be held to be made for a charitable use.[14] Such acts are of course valid.[15]

A distinction is made between a bequest in trust to apply the income for the benefit of a churchyard as a whole, and one for the maintenance of a particular grave or graves therein. A gift of the former kind is almost universally held to be a charitable gift,[16] and this even though the gift be for the upkeep of a family burying ground.[17]

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[7] Masters v. Masters, 1 P. Wms. 423 (1717); Fite v. Beasley, 12 Lea, 328 (1891).

[8] Gilmer v. Gilmer, 42 Ala. 9 (1868).

[9] Detwiller v. Hartman, *supra*, n. 5; Fite v. Beasley, *supra*, n. 7.

[10] Mellick v. The Asylum, Jacob. 180, 23 Rev. Rep. 21 (Eng. 1821).

[11] Sherman v. Baker, 20 R. I. 446 (1898); Hilliard v. Parker, 76 N. J. Eq. 447 (1909); Bates v. Bates, 134 Mass. 110 (1883); *Re* Davitt, 188 N. Y. 567 (1907).

[12] Hilliard v. Parker, *supra*, n. 11; M. E. Church v. Gifford, 5 Pa. C. C. 92 (1888).

[13] Coit v. Comstock, 51 Conn. 352 (1883).

[14] Penna. Act of May 26, 1891, P. L. 119; N. J. Act of 1878; N. Y., C. 198 of Laws of 1884; Mass. Pub. Stat., chap. 116, §36.

[15] Nauman v. Weidman, 182 Pa. 263 (1897); Moore v. Moore, 50 N. J. Eq. 554 (1892); First Pres. Church v. McKallor, 35 App. Div. 98 (N. Y. 1898); *Re* Bartlett, 163 Mass. 509 (1895).

[16] *Re* Vaughan, 33 Ch. Div. 187 (Eng. 1886); Hopkins v. Grimshaw, 165 U. S. 342 (1897).

[17] Swasey v. Amer. Bible Soc., 57 Me. 523 (1869).

There is a middle class of cases where the bequest is for the erection and perpetual upkeep of a monument to the testator or certain designated individuals, but is so tied up with a public benefit that the whole bequest will be upheld as a charitable use. Such cases must be decided on their facts and whether or not such a gift will be held valid will be largely determined by the benefit that will accrue to the public thereby.[18] Within this class the recent New Jersey case seems to fall and the court, considering the purpose of the bequest, was clearly justified in holding that it was not for a charitable use. Notwithstanding this, the gift might have been upheld had it provided for the immediate erection of a monument in memory of the testator's father. The gift, however, was to take effect "when the proper consent should be obtained for the erection of the monument from the trustees of the park and the municipal authorities." It is clear that such consent might never be secured and the gift was therefore void as repugnant to the Rule against Perpetuities.

R. M. G.

[18] In Smith's Estate, 181 Pa. 109 (1897), a testamentary provision for the erection of a memorial monument or arch in Fairmount Park, Philadelphia, and the construction of a children's playhouse and grounds, and for the preservation and maintenance thereof forever, was held to be for a charitable use on the ground that the monument would serve to keep alive the spirit of patriotism and remembrance of the deeds of distinguished Civil War veterans whose statues were directed to be placed thereon, notwithstanding the fact that the testator directed to be placed upon the main column a bronze statue of himself, with his name underneath in large letters, and that the buildings to be erected should contain a memorial tablet. But *cf.* McCaig v. Glasgow University (1907), Sess. Cas. 231, where a testator directed the income of his heritable estate to be made a perpetual trust for the purpose of erecting—first, statues of himself and other members of his family, and secondly, artistic towers on his estate, declaring that his wish was to encourage rising young artists, and for that purpose prizes were to be given for the best plans for the proposed statues and towers, it was held that the public in general would not be benefited, and for that reason the use was not charitable and therefore void.