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NOTES.

LAW SCHOOL—DEATH OF DAVID REEVES HENRY—On the eve of graduating from the Law School, David Reeves Henry, a member of the Third-year Class, and an Associate Editor of the LAW REVIEW, succumbed to an attack of typhoid fever on May 14, 1916, at his home at St. Martin's, Philadelphia. Within another week he would have entered upon his final examination, he would have taken the examinations for admission to the Philadelphia Bar in July, and would have been admitted to the practice of the law in the fall. His unexpected death cut short an unusually promising career at its very beginning.

David Reeves Henry was born in Philadelphia on July 7, 1892, the son of John Jackson Henry and Clara Reeves. He received his early education at Chestnut Hill Academy and Haverford School, Philadelphia. He entered Princeton University in 1909, and graduated

four years later with the degree of Bachelor of Arts. He entered the Law School in September, 1913, where he gave early promise of success in the study of the law. He was elected a member of the Sharswood Law Club and the Phi Delta Phi Legal Fraternity, and at the end of his second year, was elected by the Faculty to the Editorial Staff of the LAW REVIEW. Up until almost the day of his death he was an enthusiastic worker in all the phases of his student-life. So sudden was his departure that even this issue of the book he helped to edit contains an article from his pen.

In all his work, both in the class room and among his fellow-students, he had won for himself a place of marked distinction. He was gifted with an unusual quickness of perception combined with a clearness of thought that enabled him to do well everything he undertook. This, together with a faculty for persistent and tireless effort, insured him a high place in the profession. His death has deprived the Law School of an alumnus and friend to which it could well have pointed with pride; the profession has been denied numbering among its members one who would have toiled untiringly and productively in its advancement.

COMMON LAW—EFFECT OF THE ADOPTION BY AN AMERICAN STATE OF THE COMMON LAW OF ENGLAND—The courts of a number of American jurisdictions, in the absence of statutes on the subject, have held that the rules of the common law of England, in so far as they are applicable and are not in conflict with express statutory enactment, are in full force today.[1] In the majority of American States, however, special statutes have adopted the English common law, so far as it is consistent with and adapted to the necessities of the people and is not repugnant to or inconsistent with the constitution and laws of the United States or of the particular state or territory.[2] It may safely be asserted that the common law, as it existed in England at the time of the settlement of the American colonies, has never been in force in all of its provisions in any state of the United States. It has been adopted only to the extent that its general principles were suited to the condition and habits of the colonists, and in harmony with the spirit and objects of American institutions. In *Katz* v. *Walkinshaw*,[3] the court stated

[1] Morris v. Vanderen, 1 Dall. 64 (Pa. 1782); Commonwealth v. Lehigh Valley R. Co., 165 Pa. 162 (1895); Conant v. Jordan, 107 Me. 227 (1912); Mathewson v. Phoenix Iron Foundry, 20 Fed. 281 (1884).

[2] See Going v. Emery, 16 Pick. 107 (Mass. 1834); State v. Musick, 145 Mo. App. 33 (1910); Ferris v. Saxton, 4 N. J. Law, 1 (1818); Waters v. Gerard, 189 N. Y. 302 (1907).

[3] 141 Cal. 116 (1903).

the doctrine to be as follows: "Whenever it is found that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and production, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, require that a different rule should be adopted, one which is calculated to secure persons in their property and possession, and to preserve for them the fruits of their labors and expenditures."[4]

Among the many common-law rules rejected by our courts on the theory that they were inconsistent with the conditions prevailing in the particular jurisdiction, the following may be regarded as typical: The rule as to the right of trial by wager of law;[5] the rule as to the allowance of the benefit of clergy;[6] the rules respecting the exclusive establishment of the Church of England, and the ecclesiastical right to titles, oblations, and other duties;[7] the theoretical unity of husband and wife;[8] the rules relating to the easements of ancient light and air;[9] and the rule that a barrister or attorney cannot, by action, compel payment for his services.[10]

In considering any particular common-law rule, two diametrically opposed doctrines must be kept in mind. One is the general principle expressed in the maxim that where the reason of a rule ceased, the rule also ceased. On the other hand, it must be conceded that whenever a principle of the common law has been clearly and unquestionably recognized and established, the court must enforce it, until it is repealed by the legislature, even though the reason, in the opinion of the court, which induced its original establishment, may have ceased to exist. If the latter doctrine were not recognized, rules of law would be as unsettled and fluctuating as the personal opinions of the different judges administering them might happen to differ concerning the existence of sufficient reason for maintaining them.[11]

In the recent case of *Ketelson* v. *Stilz et al.*,[12] the Supreme

[4] See also Williams v. Miles, 68 Neb. 463 (1903); Luhrs v. Hancock, 181 U. S. 567 (1901).

[5] Childress v. Emory, 8 Wheat. 642 (1823).

[6] Fuller v. State, 1 Blackf. 63 (Ind. 1820).

[7] Pawlet v. Clark, 9 Cranch 292 (1815).

[8] Jones v. Clifton, 101 U. S. 225 (1879).

[9] Haverstick v. Sipe, 33 Pa. 368 (1859).

[10] Stevens v. Adams, 23 Wend. 56 (N. Y. 1840).

[11] Meng v. Coffee, 67 Neb. 500 (1903); Powell v. Branden, 24 Miss. 343 (1852).

[12] 111 N. E. 423 (Ind. 1916).

Court of Indiana considered the applicability of an established rule of the English common law to the conditions prevailing in Indiana. It is the well-settled law in England, since the case of *Brown* v. *Wooton*,[13] that a judgment, although it is not satisfied, may be pleaded in bar in an action for the same cause brought against another as a joint tort-feasor. The great majority of American courts have held that nothing short of full satisfaction of a former judgment in tort can be a bar to an action against a joint tort-feasor who was not a party to the first judgment.[14] The Indiana court refused to approve the English rule, although the legislature of that state expressly provided: "The law governing this state is declared to be . . . the common law of England, and statutes of the British Parliament made in aid thereof prior to the reign of the James the First [excepting certain enactments] which are of a general nature, not local to that kingdom." The court in reaching its conclusion said: "No rule of the common law could survive the reason on which it was founded. . . . It seems reasonable to hold that the injured party should be entitled to one compensation, and no good reason has been suggested to show why an ineffectual attempt to collect judgment rendered against one of several joint tort-feasors should operate to bar further proceedings against another who is jointly liable."

While it is unquestionable that the court may properly reject a common-law rule if it is inconsistent with the spirit of American institutions and repugnant to the modern idea of justice, it is equally well settled that the power to declare a rule of the common law inapplicable should be used sparingly. Legislative repeal is the ordinary remedy to be utilized when an established rule of the common law is found to be undesirable; it is only the exceptional case that permits of the drastic remedy of judicial abrogation of a settled rule of the common law.

L. E. L.

CONSTITUTIONAL LAW — POLICE POWER — RAILROAD PASSES —During the midle and latter half of the nineteenth century, it became a well-known custom for railroads to issue passes to public officials of the state. This was recognized as an evil and was dealt with by statute in many jurisdictions. Pennsylvania, for example, did what would seem to be the natural thing and provided that no railway should grant free passes to any person except officers or

[13] Cro. Jac. 73, Yelv. 68 f. (Eng. 1606). *Accord*, Bushland v. Johnson, 15 C. B. 145 (Eng. 1854); Brinsmead v. Harrison, L. R. 7 C. P. 547 (Eng. 1872).

[14] Blackman v. Simpson, 58 L. R. A. 410 (Mich. 1899).

[1] Constitution of 1874, Art. 17, Sec. 8.

employees of the company.[1] Likewise, Congress prohibited the issuance of free passes except to certain specified persons not including public officials.[2] In Nebraska, it was made a misdemeanor for a railroad to issue, or for any person, with a few exceptions, to accept, a free ticket.[3] New Jersey, however, dealt with this matter differently than most of the other states and the steadfast purpose of the legislature in that state has been to make passes compulsory rather than to prohibit them. This was done, at first, by provisions in the railway charters that certain heads of state departments should be carried free of charge. Then the General Railroad Act of 1873 provided that certain state officials should be carried free, but this applied only to railroads incorporated under the Act. This was followed by the Act of 1911, which provided that certain designated officials, about for hundred in all and including the Governor and members of the legislature during their various respective terms of office, should pass and repass free of charge on all railroads now or hereafter operated in New Jersey.[4]

The validity of the New Jersey Act of 1911 has been discussed in two recent cases, the alleged invalidity being a violation of the Fourteenth Amendment of the Federal Constitution. In *D. L. & W. R. R. Co.* v. *Public Utilities Board,* a member of the State Water Supply Commission sought to sustain his right to travel free of charge under the act but it was held that the act as applied to him was unconstitutional as it deprived the railroad of due process of law.[5] In a more recent case, it was held that the Secretary of the Governor was entitled to transportation free of charge and that the act as applied to him was not in violation of the Fourteenth Amendment.[6] It was pointed out by the court that the harm resulting from the custom of the railroads to give passes to public officials was in the impression made upon the public mind, which looked with disfavor upon this practice which placed those in charge of the government under obligations to the railroads, and that the policy of the New Jersey Legislature had been to remove the element of gratuity by making the transportation obligatory upon the railroads. In passing upon the constitutionality of the act with regard to these different officials, the test adopted by the court was that if the official in question held a position where his favor might be advantageous or his disfavor detrimental to the railways, the act requiring the railway to transport such an official did not work a deprivation of property without due process of law, for the act in such a case would be a police regulation to carry out the policy of the legislature.

[1] Act February 4, 1887, c. 104, Sec. 1, as amended; Act June 29, 1906, c 3591, Sec. 1; Act April 13, 1908, c. 143, and Act June 18, 1910, c. 309.

[2] Cobbey's Comp. Stat., Secs. 10664-10665.

[3] N. J. Laws of 1911, Chap. 129.

[4] 85 N. J. L. 28 (1913).

[5] Pennsylvania R. R. Co. v. Herrmann, 96 Atl. 665 (1916).

In the earlier New Jersey case,[7] the court cited *Charlotte, Columbia & Augusta R. R. Co.* v. *Gibbes*[8] as nearly in point. This case sustained as constitutional a statute requiring the salaries and expenses of the State Railroad Commission to be borne by the several railroads within the state. But it is submitted that this statute was sustained as an exercise of the taxing power in the nature of a local assessment. The court indicated clearly that if the tax were levied to pay for services in no way connected with the railways, there would be a violation of the Fourteenth Amendment. No attempt was made to sustain the New Jersey Act as a revenue-raising measure, "for obvious reasons" said the court.

Although, in the exercise of the police power, the means to be employed are primarily within the discretion of the legislature, it would seem that the means adopted by the New Jersey Legislature in casting upon the railways the duty of carrying about four hundred persons without compensation, whether in pursuance of their official duties or pleasure, approaches very closely to an arbitrary abuse of its discretion and consequently not a valid exercise of the police power, for while it is true that a state can compel uncompensated obedience to a valid exercise of its police power without violating the Fourteenth Amendment, such a regulation must have a substantial relation to the end to be accomplished.[9]

Moreover, it would seem that the evil of this custom of giving passes was deeper than the mere unfavorable impression upon the public mind. It is submitted that if this New Jersey legislation is valid as an exercise of the police power, it would be an equally valid police regulation for the legislature to provide that the railways should transport doctors or clergymen free of charge.[10] In *Interstate Railway Company* v. *Massachusetts*,[11] Mr. Justice Holmes, speaking for himself alone, "hesitatingly agreed" that to require the railroads to carry school children at half price might be justified under the police power saying that "structural habits count for as much as logic in drawing the line" and stating that a like favor upon doctors or workingmen might not be equally valid.

The validity of the New Jersey Act of 1911 was also sustained, in the cases *supra*, as an exercise of the reserved right of the legislature to alter the charters of the corporations, which this discussion does not purport to treat.

R. H. W.

[7] D., L. & W. R. R. Co. v. Public Utilities Board, *supra*.

[8] 142 U. S. 386 (1891).

[9] Mo. Pac. Ry. Co. v. Omaha, 235 U. S. 121 (1914).

[10] N. J. v. Sutton, 83 N. J. L. 46 (1911). Act requiring street railways to transport policemen free of charge while engaged in their public duties was held constitutional as a valid exercise of the police power. *Contra*, Wilson v. United Traction Co., 72 N. Y. App. Div. 223 (1902).

[11] 207 U. S. 79 (1907).

INSURANCE—WHAT CONSTITUTES AN ACCIDENT?—Policies of accident insurance as a rule cover only death or disability which happens as the result of "external, violent, and accidental means." The inquiry arises as to when the cause of an injury is to be considered as accidental, that is, what is the proper construction of the term "accidental means," as used in insurance policies of this nature.

The best definition of the term is given by the United States Supreme Court in these words: "The term accidental is used in its ordinary sense as meaning 'happening by chance, unexpectedly taking place, not according to the usual cause of things'; that if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."[1] So the rule is well established that an accident policy does not insure against an injury that is caused by a voluntary, natural, ordinary movement executed as intended.[2] The courts look not to the resultant injury merely, but to the means producing that result. The injury must not only be unusual and unexpected, but the cause itself must have been unexpected and accidental.[3] However, it is the application of this rule to the varyings kinds of accidental injuries which is sometimes involved in confusion, occasioning, in some instances, divergent opinions by the courts.

Insurance companies seek to protect themselves from fraud by inserting a condition requiring that the accident be caused by external and violent means. The courts have construed this phrase to mean that the cause of the injury must be external, though the injury itself acts internally. Thus, choking to death over food,[4] drowning,[5] asphyxiation,[6] and poisoning,[7] are held to be external forces which operate internally to produce death. Likewise, the courts seem to be agreed in holding that a previous diseased condition will prevent liability for death or injury from accident, especially where the policy specifies accidental injury "independ-

[1] Mutual Accident Ass'n v. Barry, 131 U. S. 100 (1889).

[2] Stone v. Fidelity & Cas. Co., 182 S. W. 252 (Tenn. 1916).

[3] Feder v. Iowa St. Traveling Men's Ass'n, 107 Iowa, 538 (1899); *In re* Scarr (1905), 1 K. B. 367; Smith v. Travelers' Ins. Co., 219 Mass. 147 (1914).

[4] American Acc. Co. v. Reigart, 94 Ky. 547 (1893).

[5] United States Mut. Ass'n v. Hubbell, 56 Ohio St. 516 (1897).

[6] Pickett v. Pacific Mut. Co., 144 Pa. 79 (1891); Paul v. Travelers' Ins. Co., 112 N. Y. 472 (1889).

[7] Healey v. Mutual Ass'n, 133 Ill. 556 (1890).

ently of all other causes."[8] But when the accident causes a disease which hastens death, recovery will not be denied.[9] So far the courts are in accord.

The point upon which the decisions are apparently irreconcilable is this: When a voluntary and intentional movement results in a strain or internal disorder, is it an accident within the purview of the insurance policy? In a recent decision in Tennessee, *Stone* v. *Fidelity & Casualty Co.*,[10] the insured while sick in bed, reached for a paper and raised it suddenly above his head, when his strong blood pressure caused a rupture of the retina and destroyed the sight of one eye. The court held this not to be an injury through "accidental means," for, while the result was not foreseen, the cause producing the result was not accidental but was an ordinary natural movement, executed as intended. The basis of the decision is that the cause of injury itself must have been unexpected and accidental. If the alleged cause was a natural and ordinary movement, and there was no slipping or stumbling, the resulting injury was not produced by accidental means.[11]

However, there are numerous decisions which seem directly opposed to this statement and which have held that, although a natural and ordinary act is done intentionally, if the resulting injury is unexpected and unforeseen and does not follow naturally from the act but in an unusual and unexpected way, it is an accidental injury.[12] It is possible to reconcile some of the cases upon the theory that injuries resulting from acts which are exactly what the insured intended and which are unaccompanied by any intentional or involuntary muscular effort are not caused by "accidental means"; but so caused when the insured's acts bringing about the injury is accompanied by an unanticipated and unintentional movement or circumstance.[13]

An interesting question is involved in another recent case of sunstroke. Two early decisions had held that a sunstroke was to be classified as a disease rather than as an accident and therefore no liability resulted,[14] unless it was expressly included as one of

[8] Stanton v. Travelers' Ins. Co., 83 Conn. 708 (1910); Maryland Cas. Co. v. Morrow, 213 Fed. 599 (1914); Crandall v. Continental Cas. Co., 179 Ill. App. 330 (1913).

[9] Rathjen v. Woodmen Acc. Ass'n, 141 N. W. 815 (Neb. 1913); Penn v. Standard Ins. Co., 158 N. C. 29 (1911).

[10] 182 S. W. 252 (Tenn. 1916).

[11] Shanberg v. Fidelity & Cas. Co., 143 Fed. 651 (1905); Smouse v. Iowa S. & Traveling Men's Ass'n, 118 Iowa 436 (1902); Lehman v. Great Western Acc. Ass'n, 133 N. W. 752 (Iowa 1911).

[12] Mutual Acc. Ass'n v. Barry, *supra;* Taylor v. General Acc. Corp., 208 Pa. 439 (1904); Young v. Railway Mail Ass'n, 126 Mo. App. 325 (1907); Patterson v. Ocean, *etc.*, Corp., 25 App. D. C. 46 (1905).

[13] Clidero v. Scottish Acc. Ins. Co., 1892, 29 Scot. L. R. 303; Hastings v. Travelers' Ins. Co., 190 Fed. 258 (1911); Fuller, Accident Insurance, 30.

[14] Sinclair v. Maritime Co., 3 Ellis & Ellis, 478 (Eng. 1861); Dozier v. Fidelity & Cas. Co., 46 Fed. 446 (1891).

the insured casualties.[15] But in *Bryant* v. *Continental Casualty Co.*,[16] the Supreme Court of Texas reversed an earlier opinion and held that a sunstroke is a form of personal injury. The policy in that case expressly provided for the liability of the company "if sunstroke, due to external, violent and accidental means, shall result, independently of all other causes, in the death of the insured," so the question was whether one who had voluntarily placed himself within the influence of the sun's rays and had been overcome, had suffered an injury due to external, violent, and accidental means. The court said that a sunstroke was as clearly an accident as was a lightning stroke.

In a New York case sunstroke has been regarded as an accident.[17] But in Pennsylvania[18] and Indiana[19] the direct opposite has been held, *viz.*, that sunstroke is a disease. The Pennsylvania court has said that, since it is a disease there is no liability for sunstroke unless it is brought about by some concurring accident. The Texas decision flatly refuses to follow this view, leaving the cases irreconcilable.

P. H. R.

PROPERTY—PERPETUITIES—POWERS—IS THE DEGREE OF REMOTENESS OF THE APPOINTMENT MEASURED FROM THE DATE OF THE CREATION OR OF THE EXERCISE OF THE POWER?—While the general rule undoubtedly is that the remoteness of an appointment depends on its distance from the creation and not from the exercise of the power,[1] this rule has been universally applied only to appointments made under special or particular powers. Appointments made under general powers whose exercise is unrestricted have never been subject to the rule.

The last-named proposition has received attention from practically all the text writers. The typical case is where the testator devises a life estate, with power in the life tenant to appoint by deed or will to whom he pleases. In applying the rule against perpetuities to any appointment made under such a power, the date of the making of the appointment is the starting point. The decisions of the courts have always been in accord with this rule, but the question has very rarely been discussed in the opinion of the court. One of the first cases to consider thoroughly the problem

[15] Continental Cas. Co. v. Johnson, 74 Kan. 129 (1906).

[16] 182 So. W. 673 (Tex. 1916); reversing 145 So. W. 636 (1912).

[17] Gallagher v. Fidelity & Cas. Co., 148 N. Y. S. 1016 (1914).

[18] Semancik v. Continental Cas. Co., 56 Pa. Super. Ct. 392 (1914).

[19] Elsey v. Fidelity & Cas. Co., 109 N. E. 413 (Ind. 1915).

[1] Lewis, *Perpetuities*, p. 488; Gray, *Rule Against Perpetuities*, Secs. 514, 515, *et seq.*

and the underlying reasons was *Mifflin's Appeal*,[2] a Pennsylvania case decided in 1888. In that case, the power was actually exercised by will. The court held that the donee of such a power was to be regarded as the absolute owner of the property, so far as the application of the rule against perpetuities was concerned.[3]

The real difficulty arises when the rule against perpetuities is applied to an appointment made under a general power to be exercised by will only. A half dozen or more cases in England have established two lines of authority which have generally been said to be distinctly contrary.[4]

The one line of decisions, represented by the earlier cases, involves appointments made under powers created by marriage settlements. The typical case is where property is conveyed to trustees, to pay the income to the husband and wife during their lives, and at the death of the survivor of them, to pay the principal to the children of the marriage, in such shares as the husband shall by will or deed appoint. The husband then appoints to a child for life, remainder to whomsoever the child shall appoint by will. The first case, *Wollaston* v. *King*,[5] decided that the appointment made by the child under his father's will was void for remoteness. The second case, *Morgan* v. *Gronow*,[6] decided that the power of appointment conferred upon the child was void for remoteness.

The other line of cases, of which the principal one is *Rous* v. *Jackson*,[7] involves appointments made under powers created by will. The typical case is where the testator gives property to his wife for life, with remainder to whomever his daughter shall by will appoint. It was held, both in *Rous* v. *Jackson*[7] and in *In re Flower*,[8] which followed *Rous* v. *Jackson*, that, as to appointments made under such a general testamentary power, the rule against perpetuities ran from the date of the daughter's death, and not from the date of the instrument creating the power. It is neces-

[2] 121 Pa. 205.

[3] "If Mrs. Mifflin had actually executed the power [during her lifetime] and caused the title to be conveyed to herself in fee simple, as she had the plain right to do, the limitations of her will would have to be determined upon their own merits, regarding her as the owner in fee and disregarding the previous state of the title. But so far as the application of the rule against perpetuities is concerned, the situation is precisely the same as if she had executed the power." Mifflin's Appeal, *supra*, note 2, at p. 224. See also in *accord*, Bray v. Bree, 8 Bligh N. S. 568 (1834); *Re* Lawrence's Estate, 136 Pa. 354 (1890).

[4] See generally Gray, *Perpetuities*, Secs. 526, 526a, 526b.

[5] L. R. 8 Eq. 165 (1869).

[6] L. R. 16 Eq. 1 (1873).

[7] 29 Ch. D. 521 (1885).

55 L. J. (Ch.) 200 (1885).

sary to note here *In re Powell's Trusts*,[9] in which, on the same facts, it was held that validity of the appointment was measured from the date of the creation of the power. This case contains no reference to either *Wollaston* v. *King*,[10] or *Morgan* v. *Gronow*,[11] and was expressly stated in *Rous* v. *Jackson*,[12] to have been wrongly decided.

In attempting a distinction between these two lines of cases, the reasons for the respective decisions should be noted. In *Morgan* v. *Gronow*,[13] the court said, in speaking of the power given to the daughter by the father's will: "If she had been living at the date of the instrument creating the power, I should have thought that was within the terms of the power. She was not, however, then living, and inasmuch as nothing could vest in her, or her representative, or in any one else, under an exercise of the power, except at a time which might be beyond the limits allowed by the rule as to perpetuities, not only *Wollaston* v. *King*, but principle, obliges me to hold that that is void." In *Rous* v. *Jackson*,[14] the court held as follows: "Lord St. Leonards in his work on Powers, says:[15] 'A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases.' He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable."[16]

The cases upholding the appointments have said not that this general power of appointment by will is a fee, but that it is equivalent to a fee for the purpose of the application of the rules of perpetuities to appointments made under it. In the second line of cases, the power itself is good, as it must be exercised at the termination of a life in being at the time of the creation of the power, *i. e.*, the death of the original testator's daughter. Hence a valid life estate plus a valid power of appointment by will might well be regarded as a fee. But in the first class of case, the power itself is void, because it might be exercised more than twenty-one years after a life in being at the time of the marriage settlement; it is to be exercised at the death of the daughter, who was unborn when the settlement was made and the original power created. Realizing this

[9] 39 L. J. (Ch.) 188 (1869).
[10] *Supra*, note 5.
[11] *Supra*, note 6.
[12] *Supra*, note 7.
[13] *Supra*, note 6, at p. 9.
[14] *Supra*, note 7, at p. 526.
[15] 8th Ed., p. 394.
[16] See also Butler's, Coke on Littleton, 272a.

distinction, how can it be argued that a valid life estate plus a void power of appointment are equivalent to a fee so as to make valid, as regards the rule against perpetuities, an appointment made under a power which is itself void?

The existence of a valid distinction between these two lines of authority is strengthened by two Irish cases, decided in 1891 and 1900, by the same Vice-Chancellor, the Right Honorable Hedges Chatterton, who decided the two cases differently, the facts being similar to *Wallaston* v. *King* [17] and *Rous* v. *Jackson*,[18] respectively. *Stuart* v. *Babington*,[19] similar upon its facts to *Rous* v. *Jackson*, was decided in accordance therewith, and *In re Powell's Trusts*,[20] was disapproved of; *Wollaston* v. *King* and *Morgan* v. *Gronow* were neither cited by counsel nor mentioned in the opinion.[21] *Tredennick* v. *Tredennick*,[22] similar in facts to *Wollaston* v. *King*, expressly follows that case, although *Stuart* v. *Babington* [23] was cited to the court by counsel.

This problem has recently arisen in Pennsylvania in *Hazard's Estate*.[24] In that case, X, by will gave land to A for life, then in trust for B for life, remainder as B should by will appoint; in case of B's intestacy, to B's children. B, by will, gave the property to C for life, then to D for life, remainder to D's children. The court, following the decision in *In re Powell's Trusts* [25] and the conclusion reached by Mr. Gray in his RULE AGAINST PERPETUITIES,[26] held that B's life estate plus the power of appointment by will was

[17] *Supra*, note 5.

[18] *Supra*, note 7.

[19] 27 Ir. L. R. 551 (1891).

[20] *Supra*, note 9.

[21] Stuart v. Babington, *supra*, note 19, on p. 556: "The difficulty in the case arises from the ambiguous use of the relative words, 'general power' and 'particular power'. The words 'general power' are sometimes used to mean a power to appoint, which the donee is free to exercise by deed or will, as distinguished from a particular power which the donee can only exercise in whichever of those two ways is prescribed by the power. In other cases the expression 'general power' is used with reference to the objects of the power, where the donee may appoint to anyone, and is contradistinguished from a particular or special power where the objects are confined to a particular class. The consideration whether a power is general or special, in reference to the question of remoteness, can, in my opinion, only apply when the words are employed in this latter and more proper use of these terms. The doctrine of remoteness does not apply to cases like the present, whether the power be exercisable by deed only or by will only. The true distinction depends on the question whether the objects of the power are general or special."

[22] 1 Ir. Rep. [1900], 354.

[23] *Supra*, note 19.

[24] 25 D. R. 226 (1915).

[25] *Supra*, note 9.

[26] Secs. 526a, 526b.

not equivalent to a fee, and hence that all devises must be judged as of the date of X's death in regard to remoteness, that the remainder to D's children was bad, and that D got a fee simple, his life estate under B's will, and his remainder, in case of intestacy, under X's will, merging. The decision was based directly upon the *dictum* found in *Laurence's Estate*,[27] which is based upon *In re Powell's Trusts*, and upon *Boyd's Estate* (No. 1),[28] which seems to be based upon *Laurence's Estate*.

P. C. IV.

REAL ESTATE BROKERS—RIGHT TO A COMMISSION—Although the business of a real estate broker is of comparatively recent origin, yet it is surprising to note the great number of cases, that have arisen during the last quarter of a century, which involve the relation of principal and broker in respect to real estate transactions. As might be expected, most of the adjudicated cases deal with a real estate broker's right to a commission and under what circumstances he is entitled to one.

In general, to entitle a broker to a commission, he must be able to show that he was actually employed by his principal, either expressly or impliedly, as mere voluntary services, rendered in the hope that there may be compensation afterward given, are not sufficient to entitle him to recover.[1] It must also appear that the services of the broker were the efficient cause of the contract of sale having been made, and this may be shown by merely proving that it was brought about by an introduction of the property to the buyer, either by an advertisement or by any other services.[2] If the services rendered do not result in a contract between the principal and the other party then, in the absence of any contrary provision in his contract, the broker is not entitled to any compensation, because he takes the chance that there may be no result from such services.[3] But if the broker has fully performed his undertaking by producing a person, who is ready and able to purchase or lease his employer's property upon the terms stipulated, then his right to a commission is not defeated by an arbitrary refusal of the owner to consummate the transaction.[4]

However, as a broker occupies a *quasi* fiduciary relation to his employer, he is bound to act in good faith in his dealings with him and to make a full disclosure of all material facts which might

[27] 136 Pa. 354 (1890).
[28] 199 Pa. 487 (1901).
[1] Holmes v. Neafie, 151 Pa. 392 (1892).
[2] Earp v. Cummins, 54 Pa. 394 (1867).
[3] Pierce v. Truitt, 21 W. N. C. 569 (Pa. 1888).
[4] Kifer v. Yoder, 198 Pa. 308 (1901).

affect the action of his employer in the premises. If a broker intentionally conceals such facts from his principal, then the latter is justified in refusing to carry out his part of the agreement and the former will be deprived of his right to a commission.[5] One of the most interesting situations, in cases of this kind, occurs when the name of the real purchaser of the land is concealed and the name of a ficticious person is substituted. In such cases this fact may or may not be material, depending upon the particular circumstances.

In a recnt case,[6] where the terms on which the sale was to be negotiated called for one-half the price in cash, and a mortgage for the remainder, it was held that the employer was entitled to know who the purchaser was. It has also been held that such concealment and substitution will preclude the recovery of commissions if the principal suffered any injury thereby. So, where a broker concealed the name of the real purchaser and substituted the name of a person of straw at the instance of the real purchaser, who hoped thereby to obtain a better bargain, the principal was justified in breaking off the negotiations on discovering the deception practised upon him.[7] And where a broker, who claimed he had sold his principal's property for the stipulated price and had received part of the purchase price as earnest money, tendered a receipt for the same, made out in his name instead of that of the purchaser, it was held that the owner might refuse to sell without becoming liable for commissions, on the ground that the broker was himself the purchaser.[8]

But where the principal has no interest in the financial responsibility of the purchaser and the identity of the latter is in no way related to the amount of the purchase price, then the concealment of the identity of the latter will not preclude a broker from recovering his commission on a sale of the land.[9] Accordingly, where the conveyance was made to a third person at the instance of the real purchaser, who did not wish to give his notes for certain deferred payments, and the owner had received in full the price asked for the land, which was all it was worth at the time of the sale, the court held that the vendor was not prejudiced in any way.

However, it has been held that an arrangement between a real purchaser and a broker, whereby a third person is held out to the principal as the ostensible purchaser, is contrary to public policy, and so recovery of commissions should not be allowed, although

[5] Pratt v. Patterson, 112 Pa. 475 (1886).
[6] Coppage v. Howard, 96 Atl. 642 (Md. 1916).
[7] Wilkinson v. McCullough, 196 Pa. 205 (1900).
[8] Hayden v. Grillo, 35 Mo. App. 647 (1889).
[9] Veasey v. Carson, 177 Mass. 117, 53 L. R. A. 241 (1900). See also Reich v. Workman, 161 S. W. 180 (Ark. 1913).

no injury might result to the principal.[10] This reasoning is erroneous, it is submitted, in that it lays stress upon the idea of public policy, rather than looking at the question from its practical aspect. If the principal is in no way prejudiced and receives what his property is actually worth, then it should be immaterial whether the person, introduced to the principal, is the real purchaser or merely a straw man.

In some jurisdictions a broker doing business without a license, required by statute or ordinance, is not entitled to any compensation for his services,[11] but in others such a statute or ordinance will not prevent a broker from suing for a commission earned, as the necessity of a license is considered a question between the state or city and the licensee, with which third persons are not concerned.[12] While Pennsylvania is in accord with the former view,[13] yet a commission on a sale of real estate may be received in the absence of a license, if it can be shown that the contract was a special one for the sale of a particular piece of real estate, entered into by one who did not hold himself out to the world as a real estate broker.[14]

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[10] Hafner v. Herron, 165 Ill. 242 (1897).
[11] Eckert v. Collot, 46 Ill. App. 361 (1892).
[12] Prince v. Baptist Church, 20 Mo. App. 332 (1886).
[13] Luce v. Cook, 227 Pa. 224 (1910).
[14] Woods v. Derron, 229 Pa. 625 (1911).

*This note was prepared by Mr. Henry just prior to his death, notice of which occurs elsewhere in this issue.—Ed.