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CORPORATIONS—SUBSCRIPTIONS TO STOCK. In an action by the assignee of a corporation to recover the amount of a subscription to stock, the complaint stated that defendant had agreed with others to form the corporation and subscribe to the stock. HELD, that the agreement becomes a valid contract upon the incorporation, and that the corporation may enforce it. (*Sanders. v. Barnady,* 151 N. Y. Supp. 580.)

The law in New York relating to subscription to stock of an unformed corporation seems to be in an unsettled condition. The courts have distinguished between agreements to form a corporation and subscribe to its stock, and agreements to subscribe for stock when the corporation is formed. In the former instance the subscription is treated as an offer made to the corporation, which offer continues in existence and is accepted by the corporation when formed. Upon such acceptance, a valid contract comes into existence which the corporation may enforce. (*Yonkers Gazette Company v. Taylor,* 30 A. D. 334; Morawetz on Corporations, Sec. 47). The logical objection to this doctrine is that at the time of making the subscription, there is no corporation in existence and hence the subscription cannot be treated as an offer, it being difficult to imagine an offer without an offeree. But the rule has the undoubted value of being simple and practical. On the other hand, when the agreement is a mutual one to subscribe to stock in a corporation to

be formed, the courts have refused to allow the corporation to enforce it. The grounds laid down are that the corporation is not a party to the contract, has furnished no consideration for it and is not such a beneficiary of it as to be allowed to sue upon it. (*Lake Ontario Shore R. R. v. Curtis,* 80 N. Y. 219; *Woods Electric Co. v. Brady,* 181 N. Y. 145; *Avon Springs Sanitarium Co. v. Weed,* 119 A. D. 560, 189 N. Y. 557.) In the principal case, the agreement was to form a corporation and subscribe to its stock. It is clearly within the New York rule as laid down in *Yonkers Gazette Company v. Taylor,* supra, and hence it is submitted that the decision is sound.

DOWER—WHEN WIFE PUT TO HER ELECTION. The testator, after making some specific bequests, devised all the residue of his estate, consisting of personal property and real estate, to his wife and children "absolutely and in fee simple, share and share alike." The real estate was situate in the District of Columbia, in New Jersey and in New York. The Will was probated in the District of Columbia, and under its laws the terms of the Will barred the wife's dower. Subsequently, the wife, without claiming her dower interest, joined in the conveyance of the real estate. Seven years after probate, learning of her rights under the law of this State, she brings an action to admeasure her dower. HELD that there was no estoppel, since she did not know of her right and hence could not waive it; that the dower interest in the New York property is to be determined by the laws of this State; that, under the law of this State, "a provision of a Will, in favor of the wife, in order to bar her claim to dower, must be so clear and incompatible therewith as to compel the conclusion that that was what testator intended." (*Roessel vs. Roessel,* 163 A. D. 344.)

"A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage." Real Property Law, Section 190. "If real property is devised to a woman, or a pecuniary or other provision is made for her by Will in lieu of her dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband, but she is not entitled to both." Section 200.

While dower continues to be favored by the law, the right to both dower and the benefit of a testamentary provision must yield to the intention of the testator, when it is expressly stated or clearly implied. When the intent to limit is clear, the widow is put to her election: when there is reasonable doubt she takes both dower and the provision. (*Matter of Gordon,* 172 N. Y. 25.) The widow must elect within one year after the death of her husband. (*Akin v. Kellog,* 119 N. Y. 441.) She is deemed to have elected to take the devise or pecuniary provision unless, within the year, she enters upon the lands assigned to her for her dower, or commences an action for her dower. Real Prop. Law, Section 201. The widow is not put to her election unless there are express words of exclusion or "a clear incompatibility arising on the face of the Will, between a claim of dower and a claim to the benefit given by the Will." (*Konvalinka v. Schlegel,* 104 N. Y. 125.) If these are not present, the presumption is that the provision is intended as a bounty. (*Lasher v. Lasher,* 13 Barb. 106.)

The principal case reverses the decision in 81 Misc. 558, characterized by the New York Law Journal of March 9th, as "a progressive, common sense decision." The Law Journal of that date quotes from a previous article "Our Antiquated Law of Dower," saying: "The law of dower of this State, both statutory and case, is sorely in need of revision to conform with modern conditions." Attention is called to the New Jersey decision of *Moore v. Moore,* 92 Atl. 948, wherein the Vice-Chancellor says: "The older English decisions, based upon the policy of saving the dower, if possible, and for that purpose resorting to 'numberless refinements and distinctions,' have not been followed in New Jersey."

It does seem ultra-conservative to say a widow's right to dower is not barred by a provision of money "in lieu and stead of every other claim and pretension on his estate." So held in *Larrabee v. Van Alstyne,* 1 Johns. 306. Again, in *Konvalinka v. Schlegel,* supra, "It may be reasonably inferred that the testator really intended the provision for his wife to be exclusive of any other interest, but as it is not written in the Will, we are not permitted to yield any force to the suggestion. It is a question of legal interpretation which has been settled."

The case is thoroughly in accord with the decisions of this State. Though "there is enough in the Will to produce hesitation and reflection," yet there is not that "clear repugnancy, that manifest in-

tention which is alone sufficient, in the absence of express words, to drive the widow to her election." (*Matter of Frayer*, 92 N. Y. 239.)

REAL PROPERTY—INJURY THERETO—WHEN FULL AMOUNT OF DAMAGE RECOVERABLE BY LIFE TENANT. One who negligently causes damage to an estate is liable for the full amount to the life-tenant. The life-tenant, if the amount recovered is not apportioned, will be compelled to furnish security for the remainderman. (*Rogers v. Atlantic, Gulf & Pacific Company*, New York Court of Appeals, New York Law Journal, Jan. 28, 1915.)

Waste is an injury to the estate by one not having an unqualified title but in rightful possession. Trespass is an injury to the estate by one having no claim whatever, 40 Cyc. 498. The Court seems correct, therefore, in doubting that waste is involved in the main case. The theory that a life-tenant is answerable to a remainderman for waste committed by a stranger has been invoked in order to permit the life-tenant to recover the full amount of the damage against the wrong-doer. (*Baker v. Hart*, 123 N. Y. 470; 35 N. E. 948; 12 L. R. A. 60; *Dix v. Jaquay*, 94 A. D. 554; 88 N. Y. S. 228; *Cook v. Champlain T. Co.*, 1 Denio 91.) In most jurisdictions, until life-tenant has made satisfaction to remainderman, he can only recover for injury to his possession. (*Wood v. Griffin*, 46 N. H. 230; *Contra, Dix v. Jaquay*, supra.) While New York seems to be in the minority, there are in some cases many practical reasons to sustain its viewpoint. (See *Dix. v Jaquay*, 94 A. D. at pps. 556 and 557.) The principal case holds that the life-tenant is to hold the reversionary interest in trust and to give security therefor to the remainderman. For other reasons such would not be the holding in a recovery by the life tenant on a policy of fire insurance. (*Harrison v. Pepper*, 166 Mass. 288; 44 N. E. 222.) However, the action by the life-tenant against the wrongdoer in the principal case bars one by the remainderman against the wrongdoer, which right the remainderman would have by Statute in New York. (*Dix v. Jaquay*, supra.) The Court in the principal case refuses to rest its decision on the ground that the life tenant is liable for the negligence of strangers to the remainderman. It accepts the theory that a life tenant may recover the full amount of damage to the whole

estate, but on the ground that the wrongdoer should not be able to set up the title of a third party who is a stranger to him. But ought not the plaintiff show a liability from himself to the remainderman, if he desires to recover the damage to the whole estate? The Court argues by analogy to cases of bailees. The remainderman has but one cause of action, and that is against the wrongdoer. This may be barred by an action by the life-tenant against the wrongdoer. It seems possible, therefore, in some cases, that an injustice may be suffered by the remainderman.

TORT—INJURIES TO REAL PROPERTY SITUATE WITHOUT THE STATE—CODE OF CIVIL PROCEDURE, SECTION 982A. The complaint alleged that plaintiff's assignors owned a milling plant situate in the State of Kansas and that on the 13th day of August, 1882, defendant wantonly set fire to the milling plant and wholly destroyed the buildings and machinery. Defendant demurred on the ground that the court had no jurisdiction of the subject of the action. HELD, that section 982A of the Code of Civil Procedure gave the court jurisdiction in actions to recover damages for injuries to real property situate without the State; and that such statute affected the mode of procedure only, and applied to all actions commenced after it became operative, irrespective of the time when the cause of action arose. (*Jacobus v. Colgate*, 165 App. Div. 227.)

"Actions are deemed transitory where the transactions on which they are founded might have taken place anywhere; but are local, where their cause is in its nature, necessarily local." (Marshall, C. J., in *Livingston v. Jefferson*, 1 Brock. 203.) In general all personal actions are transitory; while actions which seek to recover real property, or damages for injury to such property are local. (*Bouv. Dict.*) At the common law it was generally held that a court had no jurisdiction of an action for damages for injuries to real estate lying without the State in which the action was brought. (*Allin v. Conn. River Lumber Co.*, 150 Mass. 560; *Eachus v. Illinois and M. Canal*, 17 Ill. 534; *Niles v. Howe*, 57 Vt. 388; *Bettys v. Milwaukee & S. P. Ry. Co.*, 37 Wis. 323; *Contra, Little v. Chicago, S. P. etc. Co.*, (Minn.) 33 L. R. A. 423; *Holmes v. Barclay*, 4 La. Ann. 63.) New York prior to the enactment of section 982A

(1913) accorded with the weight of common law authority that a local tort must ordinarily be sued on in the jurisdiction where the wrong occurred, although it had criticised the rule with some severity in relation to actions brought for injuries to real estate situate without the State. (*Wattes Admrs. v. Kinney,* 6 Hill 82; *Brisbane v. Pennsylvania R. R. Co.,* 205 N. Y. 431; and see *Dodge v. Colby,* 108 N. Y. 445; *Cragin v. Lovell,* 88 N. Y. 258.) Section 982A (in effect Sept. 1913) allows an action to be maintained in the courts of this State to recover damages for injuries to real estate situate without the State, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the State. In the absence of words of exclusion, a statute which relates to the form of procedure or the mode of attaining or defending rights, is applicable to proceedings pending or subsequently commenced. (*Matter of Davis,* 149 N. Y. 539.) The section in question being assumed to be purely remedial applies to all actions subsequently commenced irrespective of the time when the cause of action arose. (*Jimeson v. Pierce,* 78 App. Div. 9; *People v. Green,* 201 N. Y. 172.)

WILLS—JOINT AND MUTUAL—PROOF OF AGREEMENT FROM INSTRUMENT ITSELF. Husband and wife executed a joint will containing reciprocal provisions and various expressions importing a mutual will. There was no evidence outside the instrument itself to show an agreement. The wife died first and the instrument was proved as her will, the husband accepting the benefits thereof. The husband subsequently made a large gift to one of the remaindermen under the joint will, which the other remaindermen, plaintiffs herein, claimed was made from property received from the wife; and about a year before his death made an individual will containing slightly different provisions from the joint will in question. The action was brought to enforce the provisions of the joint will. HELD, that the language of the instrument itself was sufficient to show an agreement to make mutual wills; that upon the survivor accepting its benefits, it became irrevocable as to him and enforcible in equity against his estate; that the will did not bind the survivor's own property until his death, but as to the property received from his

co-testator he was trustee for the remaindermen; and if the gift herein was made with property received from his wife, or was made to defeat the ends of the mutual will, equity would impose a trust upon it. (*Rastetter et al v. Hoenninger, as Ex., et all,* New York Court of Appeals, February, 1915.)

A joint will may be proved as the will of either of the makers (*Matter of Diez,* 50 N. Y. 88), or successively as the will of both (*Gerbrich v. Freitag,* 213 Ill. 552.) Mutual wills may be revoked by either party during the life of both (*Frazier v. Patterson,* 243 Ill. 80.) Some statements of the rule add "upon notice to the other party," but the death of the first leaving a different will seems sufficient notice (*Stone v. Hoskins,* Probate Division, 1905, p. 194.) Upon the death of one party and acceptance by survivor of the benefits, the mutual will becomes irrevocable as to him and enforcible in equity after his death (*Frazier v. Patterson,* supra; *Bower v. Daniel,* 198 Mo. 289.) If survivor leaves a new will revoking the mutual will, the new will cannot be denied probate, and the proper procedure is to impose a trust upon the executors and devisees under the later will to carry out the provisions of the mutual will (*Allen v. Bromberg,* 147 Ala. 317). As the mutual will binds the survivor's property only from his death (*Allen v. Bromberg,* supra), it follows that during his life he may do as he pleases with his own property, save that equity will not permit a gift for the purpose of defeating his agreement. As to the principal of the estate received from his co-testator, he is rightly a trustee for the remaindermen. In the principal case, granting the will a mutual one, the decision appears sound on all these points.

As to the method of proving the agreement necessary for a mutual will, the principal case modifies what was thought to be the New York rule on the point. In *Edson v. Parsons,* 155 N. Y. 555, the Court, it is true, merely held the judgment of the trial court was supported by the evidence, but various expressions in the opinion seemed to intimate that proof of the agreement *aliunde* the instrument itself was necessary. The case under discussion holds squarely that the agreement can be proved from the will without the aid of extrinsic evidence. The modification is a reasonable one and is in accord with the doctrine held in some of the other States. (*Bower v. Daniel,* supra.)