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Note and Comment

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NOTE AND COMMENT

NEW TRIALS FOR TECHNICAL ERRORS.—A witness called to testify is presumed to be of good character. Hence no proof of it is necessary. But out of abundant caution this presumption is fortified by evidence. The witness is thus shown to be in fact exactly what the law presumes him to be. Result—the case is reversed for the commission of this grave and prejudicial error.—*Lockett* v. *State* (Ark. 1918), 207 S. W. 55.

No one but an American lawyer could treat the above statement seriously. Only an American court could announce so extraordinary a decision. In no other English speaking country would the people tolerate such a perversion of justice.

The case above cited was a remarkable one, in that it was first unanimously decided the other way. The court held that error in admitting evidence "to prove what the law would otherwise presume is harmless." This decision was based on a prior decision to the same effect. *Patrick* v. *State* (Ark. 1918), 204 S. W. 852. But on a rehearing the court unanimously reversed itself, and held that since the rule of evidence here violated was declared by statute, as was not the case in *Patrick* v. *State*, to refuse to hold the error prejudicial and reversible would be to nullify the statute.

The argument as to the statute is supported by no authority, and it is difficult to see how an error becomes any more prejudicial merely because the rule which is violated is found in the statute books instead of in the reports. Statutes often prohibit opinion evidence, but a reversal would hardly result from a drop of opinion in a cumulative ocean of facts.

The real cause of such a ruling as this is the medieval attitude of the American bar on matters of procedure. We think in terms of the age of Coke.

We use candles because they were used in the Inns of Court, ignorant of the fact that those Inns have blazed with electric lights for half a century.

Of the authorities relied on in the case under discussion, few are in point. Many were cases where such evidence was held to have been rightly excluded. Others were cases where other errors obviously prejudicial accompanied the erroneous admission of evidence, resulting in a reversal. *State* v. *Owens*, 109 Iowa 1, cited in the opinion, and *Brann* v. *Campbell*, 86 Ind. 516 and *Bank* v. *Blakeman*, 19 Okla. 106, cited in a text book which the opinion cites, seem to be the only authorities supporting the decision of the Arkansas court, and even these had already been discredited by *Patrick* v. *State*, (*supra*), because they did not involve a statutory rule, and *Patrick* v. *State* was expressly reaffirmed as sound. On the other hand *Green* v. *State* (Tex. Crim. Appeals), 12 S. W. 872, which was also cited in the same text book denounced the doctrine of reversible error in such cases. It clearly was not the force of authority but the instinct for technicality that brought about this decision. It is only an example of a tendency which manifests itself in a thousand ways.

The comfortable indifference of former times has been rudely shaken by the social renaissance ushered in by the great war, and nowhere will reform be more imperatively demanded than in judical administration. There can be no doubt that we are at least a generation behind Great Britain in our legal methods.

Fifteen years ago Mr. Wigmore sounded a warning, which apparently has not yet been generally heeded. Speaking of the American doctrine of granting new trials for error in applying the rules of evidence, he said: "The whole doctrine, no doubt, has its deepest roots in the inveterate and unconscious professional instinct, which grows to venerate unduly the rules that form its daily mental pabulum. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling. Added to this is the indirect result produced upon the ever-lurking animal instinct of gregarious human brutality, which takes the failures of criminal justice as its pretext and sates itself with cruel lynchings. * * * Some of the instances of its enforcement would seem incredible even in the justice of a tribe of African fetish-worshippers. * * * We shall some day awake to be convinced that a system of necessary rules of evidence can exist and be obeyed, without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial." 1 Wigmore on Evidence §21. We can only hope that the next fifteen years will show more progress in making procedure the servant of justice than the last fifteen have shown. E. R. S.

DAMAGES FOR FRIGHT AND THE PROOF OF PROXIMATE CAUSE.—If a recent case in the Iowa court *infra* is compared with a line of decisions in the equity courts in which nuisances productive of fear have been abated, some light may be thrown on the obscure interlacing of the two doctrines suggested by the caption of this note. In *Holdorf* v. *Holdorf*, (Iowa, 1918), 169

N. W. 737, the plaintiff testified at the trial that the defendant "came up toward me, and he did as if he was to strike me." He did not touch her, but she later suffered a miscarriage accompanied by severe pains and lacerations. *Held,* she may recover in an action of assault for resulting injuries—the act of the defendant being willful. This is the stock situation of recovery given where there is fright without physical impact but resulting in physical injury and might have been settled on the precedent of *Green* v. *Shoemaker and Co.,* 111 Md. 69, 8 MICH. LAW REV. 44; but the court prefers to lay stress on its own precedent of *Watson* v. *Dilts,* 116 Iowa 249, in which the willfulness of the tort is the foundation for the recovery rather than any trespass to the person proved by physical results.

One of the best of the extra-judicial discussions of this oft-litigated question is the article by Professor Bohlen in 41 AMER. LAW REG. 141 on the "Right to Recover for Injury Resulting from Negligence Without Impact," which appeared shortly after the decision in *Dulieu* v. *White,* (1901), 2 K. B. 669, and approves of the doctrine there laid down. He has concluded that fright may be a link in the chain of causation leading to actionable physical injury but that fright or mental suffering alone was not legal damage at common law. "Material, tangible injury had to be shown before a recovery could be had in an action for negligence." See also the excellent note in 3 L. R. A. (N. S.) 49.

It is submitted that this doctrine though technically correct and often asserted in judicial utterances is doubtful in experience and surely not followed by the courts as a matter of fact. The common law has from an early day given a recovery for mental suffering where the proximate cause was clear, although the courts have veiled their real intent by branding these cases as exceptions or by saying that the recovery was really for something else. The action of assault where there is no physical impact recognizes a recovery for fright although only nominal damages are given. *Beach* v. *Hancock,* 27 N. H. 223. The trespass to the person here is nothing more than an apprehension of bodily injury, and where the fright was serious, substantial damages were recoverable. *Small* v. *Lonergan,* 81 Kan. 48, 25 L. R. A. (N. S.), 976. Even though courts have insisted on accompanying physical impact they have not required it in tort actions where the wrong was willful—on the theory, it seems, that aggravated compensatory damages were warranted in such cases. *Craker* v. *Ry.* (1875), 36 Wis. 657; *Spade* v. *Lynn,* (1897), 168 Mass. 285, a much quoted dictum. This is in effect giving a recovery for mental suffering alone under a clear cut exception. In the action for breach of contract of marriage, in which the feelings are manifestly the subject matter of the contract, the recovery for mental suffering is undisputed. Though called an exception it is more correctly a situation where the courts are convinced that the suffering is undoubtedly a proximate consequence of the breach. It was suggested in 8 MICH. LAW REV. 44. cf. *Ward* v. *West Jersey Ry.,* 65 N. J. L. 385—that the chief trouble of the courts, which has caused the bewildering contrariety of decisions, was largely a difficulty of proof of the proximate relation between the wrongful act alleged and the result complained of. The courts start with the proposition that there

is no recovery for mental suffering at common law, and when they begin to depart from this pronouncement, because of the social demand that manifest wrongs shall be redressed, they hold on to some well recognized cause of action at common law to which the recovery for mental suffering may be added. In other words they deny a recovery and allow it in the same breath where the demand for a recovery is imperative.

There are, indeed, numerous situations where a direct recovery is actually given through such indirect means. In the action of seduction the chief element of damage is mental suffering in the form of humiliation and parental anxiety and yet recovery has been based on the fiction of loss of service where that service was no more than serving a cup of tea. *Kendrick* v. *McCrary*, (1852), 11 Ga. 603 and the case therein cited. Here, too, as in the breach of contract of marriage, it is undeniable that the gist of the action, mental suffering, is the proximate consequence of the breach. Most of the jurisdictions have allowed a recovery where the fright has followed a violation of one of the constitutional rights of life, liberty, or property—such violation giving a right to an independent cause of action. Where the courts were convinced that a serious injury traceable to a certain cause or class of causes had in fact been occasioned by the mental suffering inflicted, they contrived a recovery by relying on or straining some recognized legal right or concocting some new right, the violation of which could be regarded as the proximate cause of the suffering; the damages for the suffering could thus be added into the verdict. The purpose, it would appear, was to allow recovery and at the same time to limit it to certain specified cases so as to shut out the possibility of fraudulent claims. In *Lesch* v. *Ry.*, 97 Minn. 503, the agents of the defendant while committing a trespass on the premises of plaintiff's husband, frightened the plaintiff. The court allowed her a recovery for the fright because it was accompanied by a willful invasion of her homestead; and created, it would seem, a new action to suit the case—'*trespass quare homesteadium fregit.*' Compensation was likewise allowed for the mental suffering endured consequent on the mutilation of the body of the plaintiff's deceased husband. Recovery was founded on the willful invasion of the plaintiff's right to the disposition of her husband's body—a right which is, to say the least, a much disputed one. The court realized that the usual difficulty of ascertaining the cause was absent in such a case. MITCHELL J. said: "That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument.' Nevertheless the court preferred to say that the violation of the right was the proximate cause of the suffering rather than the act of mutilation itself. *Larson* v. *Chase*, 47 Minn, 307. Similarly the court in the principal case needlessly introduced the element of willfulness as a reason for recovery. Then there are the troublesome telegraph cases, in which the plaintiff endures sorrow because unable to attend a funeral of a near or dear relative, through the neglect of the company to deliver or transmit promptly a telegram announcing the death. *Mentzer* v. *W. U. Tel. Co.*, 93 Ia. 752. The courts have struggled hard to find a legal hook in these cases. They have given the sendee a right *ex contractu* as a third party beneficiary

to a contract by the terms of which the company is warned that suffering will follow a breach; and a right *ex delictu* has been found based on the company's public duty. But it should be noted that as the relatives are more distant from the plaintiff the courts are less inclined to rely on their creative faculties. Thus, where the plaintiff's sorrow was caused by reason of inability to attend his mother-in-law's funeral, recovery was denied, although the court did not admittedly base its opinion on the popular conception of this hypenated relationship. The case is of value as pointing out that the courts as a fact always look to see if there is a proximate cause before the legal hooks are used to help out the situation. *Rowell* v. *W. U. Tel. Co.*, 75 Tex. 26. The contrary view is comprehensively expressed in *W. U. Tel. Co.* v. *Choteau*, 28 Okla. 664.

An examination of a few of the illogical conclusions reached by the courts will point out what the courts have come to in trying to put artificial restrictions on this inevitable demand for recovery. In *Victorian Ry.* v. *Coultas*, L. R. 13 App. Cases, 222, the court refused to allow recovery for fright with physical result because there was no physical impact; i. e., the direct trespass to the person by the wrongful act was held to be a necessary hook to which the recovery for fright might be attached. In *Dulieu* v. *White* (*supra*), the court, disapproving of the *Victorian Ry.* case, held that the physical result was sufficient for the purpose though there was no physical impact. In *Mitchell* v. *Rochester Ry.*, 151 N. Y. 107, the court insisted that the previous impact was necessary and, by what seems to be a logical fallacy, concluded that physical result could under no circumstances be a legal consequence of fright or be used as a hook to which to tie recovery. The court starts with the basic assumption that there is no recovery for fright at common law therefore, "it is difficult to understand how a defendant would be liable for its consequences." The argument is: fright as a cause of action is zero, but *ex nihilo nihil fit* (Cf. LUCRETIUS, DE RERUM NATURAE, 150, 205), zero can only produce zero, therefore the consequences of fright are zero, Q. E. D. This, too, even when the consequences have been plainly proved in court. *Dulieu* v. *White* fortunately disclosed the incorrectness of such a conclusion and specifically rebutted the *Mitchell* case which had been urged by counsel. The principal case, in disregard of *Dulieu* v. *White*, fell victim to this logic. The action was for damages for the consequences of fright and there is nothing in the case to show that the plaintiff was asking for a recovery for the fright causing the miscarriage. Yet the court went to the trouble of finding out first that fright caused by a willful act was recoverable. If right justified recovery so did its consequences, and the objection of the *Mitchell* case could not hold. But would it not have been more correct for the court to have said simply that fright can be a link in the chain of causation. Indeed, Bohlen explained *Wilkinson* v. *Downton* not on the theory of willfulness but on the principle that "the defendant intended to create a fright so severe as to be obviously calculated to cause serious physical results." Here again it is evident that the trouble has been caused by the failure to take a proper attitude on the question of proximate cause.

The law courts have a lesson to learn from the common sense attitude of

the American equity courts which have enjoined the erection of hospitals as nuisances because of the consequent fear of contagion produced in the minds of the residents, whose comfortable enjoyment of the premises was thus curtailed. And though the fear was only a subjective one, wholly unwarranted by science, the courts have not withheld the injunction. In *Everett* v. *Paschall*, 61 Wash. 47, where the complainants said they feared infection from a tuberculosis hospital, the court said: "The question is not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and the conduct of men. Such fears are actual and must be recognized by the courts as other emotions of the human mind." To prove the actuality of the fear the court cited the treatises of pscychologists. The case does not stand alone but is supported by a group of American decisions cited therein. The English courts, however, have followed a decision of Lord Hardwicke in 3 Atk. 750, that "the fears of mankind, though they may be reasonable ones, will not create a nuisance." This is repudiated by the Washington court. Though there is no question of damages in the injunction cases, they are pertinent in our inquiry since they show that the court took mental disturbance into account as an element of legal injury where the proximate cause was clear and the injury was undoubted.

Just so soon as the courts drop their theorizing about the existence or non-existence of a right to recover at common law for mental suffering and look at the problem in the light of the actuality of the cause and the consequence, then all trouble arising from arbitrariness and needless pursuit of fiction will be obviated. At one time there was even doubt whether damages for mental suffering were recoverable even though accompanied by physical impact. But as soon as the courts realized that the suffering actually existed they began to allow recovery—as Lord Wensleydale said in *Lynch* v. *Knight*, 9 H. L. Cas. 577: "where a material damage occurs and is connected with it, it is impossible a jury in estimating it should altogether overlook the feelings of the party interested." In *Merill* v. *Los Angeles Gas Co. etc.*, 158 Cal. 499, 513, the court allowed recovery for mental worry caused by disfigurement of the plaintiff's face so as to make him feel that he would be a source of ridicule to his fellows. The court said: "The whole matter possesses more academic than practical significance. * * * At the suggestion of defendant's counsel, the jury is instructed to disregard all elements of mental suffering except that arising solely from physical pain. Can the jury do it? Will the jury do it? It is mere self-stultification to believe that it will do other than to make up its verdict under the rule, which while not one of law, is one of well nigh universal conduct,—the rule of 'Put yourself in his place.'" However, it has been indicated that the proximate cause is equally evident and with equal force a fact before the mind of the jury where there is no accompanying physical impact. In such cases the courts have actually allowed a recovery although the true nature of the action was hidden behind a recovery for something else. In Massachusetts there must be physical impact but in *Driscoll* v. *Gaffey*, 207 Mass. 102, there was no more than a scintilla of evidence of injury from without. This case was forcefully

criticized by the court in *Spearman* v. *McCrary*, 4 Ala. App. 473, 482; "the rule of non-liability which is claimed to exist in such a case does not involve the denial of the right to be compensated in damages for an injury caused by fright, but merely has the effect of making the right to recover such damages dependent upon the existence of a feature of wrongful occurrence which confessedly may be quite trivial and amount to no more than a merely technical breach of duty, resulting in no appreciable harm to him, besides being in itself a thing the existence of which may often be shown by evidence even more readily fabricated and less easy to refute than that in reference to the injury attributable to mental fright or shock." The same criticism would apply against the case which said that "dust in the eyes" would be sufficient physical impact. *Porter* v. *Lackawanna Ry.*, 73 N. J. L. 405. In a word, have not the courts actually allowed recovery for fright in the cases of nominal physical impact and the cases of willful or intentional fright? The courts have admitted that "wounding a man's feelings is as much actual damage as breaking his limbs." *Head* v. *Ga. Pac. Ry.*, 79 Ga. 358; and that "it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation." *Douglas* v. *Stakes*, 149 Ky. 506, 509. Since, as the court says in *Spearman* v. *McCrary* (*supra*), "we know of no legal reason for denying that any agency is the proximate cause of a given result when it is as a matter of fact," then why not throw aside fictions and regard mental suffering standing alone as a legal wrong on which an action for damages may be based. But see *St. Louis Etc. Ry.*, v. *Taylor*, 84 Ark. 42. A. J. L.

IMPLIED CONDITION INVOLVING IMPOSSIBILITY OF PERFORMANCE.—Early in 1914 the defendants contracted to sell to the plaintiffs a quantity of Finland birch timber. The practice was to send the timber direct by sea from Finnish ports. Before any timber was delivered the war broke out and the presence of German warships in the Baltic made the direct shipment by water impossible. The contract contained no war, *force majeure* or suspension provision. *Held*, that the contract was not dissolved, and the defendants were liable for damages for non-delivery of the timber. *Blackburn Robbin Co., Lim.* v. *Allen & Sons, Lim.* (1918) 87 L. J. K. B. 1085.

The doctrine of implied conditions has been brought before the English courts more prominently since the outbreak of the war than ever before, by reason of the many causes of impossibility of performance produced by the war. On the whole it is clear that the courts of England have not allowed themselves to be drawn away from established rules in spite of the great pressure of the war emergency, thus exhibiting in a striking way the judicial poise which has always been characteristic of British judges.

The leading recent case was *Krell* v. *Henry* [1903] 2 K. B. 740, which held that a contract for hiring a flat on Pall Mall for the two days on which it was announced that the coronation procession would pass along Pall Mall, was subject to the implied condition that the procession should take place, though nothing was said about it in the contract. The language of that case

was rather broad, basing the dissolution of the contract on impossibility of performance due to the "non-existence of the state of things assumed by both contracting parties as the foundation of the contract," whether this state of things was mentioned in the contract or not. The cases arising out of the war have not tended to enlarge that language. In *Horlock* v. *Beal* [1916] 1 A. C. 486, the House of Lords applied the rule to the case of a seaman's contract of service, where the ship and crew were interned in a German port, and held that the contract was dissolved. In *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Peteoleum Products Co.* [1916] 2 A. C. 397, it was held that the requisition of a ship by the government for war purposes did not put an end to a five years' contract for the use of the ship, though LORDS HALDANE and ATKINSON dissented and LORD LOREBURN said he would be of a different opinion if it were established (as events doubtless did establish) that the ship would be used by the government for substantially the remainder of the five years, for in such an event the contracting parties would have been so placed "that as sensible men they would have said, 'if that happens, of course it is all over between us.'" In *Shipton, Anderson & Co.* v. *Harrison Brothers & Co.* [1915] 3 K. B. 676, a contract for the sale of specific wheat was held to be dissolved by implied condition when the wheat was requisitioned by the government. In *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1918) 87 L. J. K. B. 370, a contract for the construction of certain reservoirs was stopped and the plant and materials sold by order of the Minister of Munitions, and it was held by the House of Lords, on very full consideration, that the impossibility of performance created by law excused the contractor from performance.

In the principal case the court was unable to say that the continuance of the normal mode of shipping timber from Finland was a matter which both parties contemplated as necessary for the fulfillment of the contract. The buyers were not interested in the means or the route by which the sellers should make delivery, and it appeared that they were in fact unaware how the timber was to be shipped or whether it might not be already held in stock in England. The rule was doubtless properly applied. It is a rule which must be applied with caution, for "if it be extended too far," as said by MCCARDIE, J., in giving judgment in the court below, "it may tend to sap the foundations of contract law as they now exist." E. R. S.

DEEDS TO TAKE EFFECT UPON DEATH OF GRANTOR.—That instruments in form of wills may be effective as deeds of conveyance is clear. If a present interest is passed and execution is complete (which includes delivery), the instrument must take effect as a deed. On the other hand, if no interest is to vest until or after death of the maker and there has been no complete execution as a deed, the instrument, if operative at all, must take effect as a will. Difficulties arise when there is a fully executed deed, which, however, is to be postponed in its complete operation until the death of the grantor.

Where the grantor delivers the deed to a third party to be handed by him to the grantee on the grantor's death there is substantial agreement among

the courts that such instrument is not ineffective as an attempted testamentary disposition. The cases of *Felt* v. *Felt,* 155 Mich. 237; and *O'Brien* v. *O'Brien,* 19 N. D. 713, cited by Professor Tiffany in 14 COL. L. REV. 404, as holding the other way are explained on the ground that there had been no delivery of the deeds. The chief differences of opinion in this class of cases has been as to the time when and the extent to which such deeds divest the grantor of ownership. See 16 MICH. LAW REV. 586, where the matter is discussed.

The real difficulty arises when the grantor inserts into the deed a provision in substance that "this deed shall take effect upon the death of the grantor." In a number of cases it has been held that such provision makes the deed an attempted testamentary disposition and as such void for lack of proper execution. *Turner* v. *Scott,* 51 Pa. 126; *Sperber* v. *Balster,* 66 Ga. 317 (*Cf. White* v. *Hopkins,* 80 Ga. 154); *Pinkham* v. *Pinkham,* 55 Neb. 729; *Bigley* v. *Souvey,* 45 Mich. 370; *Shaull* v. *Shaull,* (Iowa) 160 N. W. 36. The leading American case appears to be *Turner* v. *Scott, supra,* which seems to depend not a little upon the slender foundation of *Habergham* v. *Vincent,* 2 Ves. Jr. 204.

In quite a number of jurisdictions deeds with provisions postponing complete operation until the grantor's death have been upheld as deeds of conveyance. *Abney* v. *Moore,* 106 Ala. 131; *Bunch* v. *Nicks,* 50 Ark. 367; *Latimer* v. *Latimer,* 174 Ill. 418; *Kelly* v. *Shimer,* 152 Ind. 290; *Abbott* v. *Holway,* 72 Me. 298; *Lauck* v. *Logan,* 45 W. Va. 251. There is no common ground on which these cases proceed. Perhaps the general view is that the deed operates as a conveyance *in praesenti,* with a life estate reserved somehow to the grantor. The bold attitude of the Maine court as displayed in *Abbott* v. *Holway, supra,* is refreshing. The provision in the deed there in question was: "This deed is not to take effect and operate as a conveyance until my decease." In an action of waste against the grantor's representative for cutting trees after the delivery of the deed the court held that the deed might operate "as the parties intended, and carry an estate to commence *in futuro* without the necessity of resorting to any subterfuges under which the estate thus created to commence *in futuro,* may be regarded as existing only by way of remainder or by virtue of some undisputed covenant to stand seized."

Why should not a deed be operative to convey an estate in fee simple or any other estate upon the death of the grantor, just as well as to create such an estate the first of next July? Of course no strings can be kept on such deed, it must be beyond the legal (as distinguished from the physical) power and control of the maker, in other words, it must have been delivered. Any such reservation would either negative delivery, and there would be no deed at all, or the instrument would be ambulatory, a quality attached to testamentary dispositions. To be sure, under the common law conveyances it was definitely established that estates of freehold could not be created to commence *in futuro.* "It has long been settled that, according to the common law, a limitation of an estate of freehold to commence *in futuro* is void." *Savill* v. *Bethell,* [1902] 2 Ch. 523, 540, citing *Buckler's Case,* 2 Co. Rep. 55a; *Barwick's Case,* 5 Co. Rep. 93b; *Roe* v. *Tranmer,* Willes 682, 2 Wils. 75. It was, however, possible to create uses, no matter how large the estate there-

in, *in futuro,* and when the Statute of Uses made the modes of creating uses effective as conveyances there was available a ready means of accomplishing what under common law modes of conveyancing had been impossible. *Savill* v. *Bethell, supra; Murray* v. *Kerney,* 115 Md. 514. The transaction giving rise to the future use of course had to be complete. If, for instance, the use was to arise out of a covenant to stand seized it is obvious that the covenant must have been sealed and delivered, in other words, it must have appeared that there was a completed legal act. And all such necessary steps must have been taken in the lifetime of the covenantor; if it should appear that it was his intention that no legal act should be consummated until after his death, obviously the whole transaction would fail.

Almost all deeds of conveyance take effect or can take effect under the Statute of Uses, and ordinarily courts show the greatest liberality in upholding deeds in order to accomplish what the parties intended, whatever may be the form. Thus in *Roe* v. *Tranmer, supra,* a deed in form a common law release was upheld as a covenant to stand seized; in *Havens* v. *Sea Shore Land Co.,* 47 N. J. Eq. 365, a deed with the words "remise, release, and quit claim" was given effect as a bargain and sale; in *Murray* v. *Kerney, supra,* an instrument that looked like an attempted will was upheld as a covenant to stand seised. Independently of the Statute of Uses a deed may effect the creation of a freehold *in futuro,* the statute of the state wherein lies the land being construed as making such result possible. The Maine statute provides that "a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it, or all his interest in it, by a deed," etc. It was under this statute that *Abbott* v. *Holway, supra,* was decided. See also *Wilson* v. *Carrico,* 140 Ind. 533; *Ferguson* v. *Mason,* 60 Wis. 377; *Miller* v. *Miller,* 91 Kans. 1.

Any dispositive instrument to be fully operative only on the maker's death certainly bears one of the ear-marks of a will. In view of the foregoing, however, it seems clear that such fact cannot in itself be controlling. Where the circumstances disclose a completed legal act so far as the maker is concerned, with no express or implied power of revocation, such instrument would seem prima facie to be no testamentary disposition and the fact that complete operation is postponed until death should not be a sufficient circumstance to give the instrument an ambulatory character, a necessary quality of wills, *ex hypothesi* the instrument is complete and final as far as the maker is concerned and therefore cannot be ambulatory. When a court says, as did the Illinois court in *O'Brien* v. *O'Brien,* 121 N. E. 243, that "To constitute delivery it must clearly appear that it was the grantor's intention that the deed should pass title at the time and that he should lose control over the same," an element that has no place in delivery is made an essential part thereof.

"A will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is *in its own nature* ambulatory and revocable during his life." JARMAN ON WILLS, (6th ed.) 27. Relatively slight circumstances added to the postponement of full operation until death may be sufficient to show a testamentary interest, in which case the instrument would of course be revocable despite apparent delivery. See

Thorold v. *Thorold*, 1 Phil. 1; *Fielding* v. *Walshaw*, 27 W. R. 492; *Ison* v. *Halcomb*, 136 Ky. 523. In *Fletcher* v. *Fletcher*, 4 Hare Ch. 67, Vice-Chancellor Wigram said: "The third question is whether the plaintiff is precluded from relief in this court, on the ground suggested, that this is a testamentary paper * * * I have read the cases cited as to the instrument being testamentary * * * I certainly was not prepared to find that the cases had gone so far as they have upon the subject. Those cases, however, are very distinguishable from the one before me. This is not a case where there is a general power of revocation reserved—a general power to dispose by will notwithstanding the execution of the instrument. In the cases referred to there has been a general revocation—or something like a revocation—of the party's right to deal with the property, notwithstanding the instrument; and the courts have held, that in such cases the instrument being one which was not to have effect until the death of the party—or rather, I would say, to use the language of Sir John Nicholl in one of the cases in which, until the death of the party, the instrument itself was not consummated—until then no conclusive effect could be given to it. If that does not occur, the instrument is not to be considered as testamentary." R. W. A.

TERMINATION OF A CONTINUING GUARANTY.—Several persons jointly and severally guaranteed to a bank the present and future obligations of a customer, stipulating that "the bank may grant extensions without lessening the liability" of the guarantors, that "this shall be a continuing guaranty, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guaranty," and that "this guaranty shall not be affected by the death of the undersigned." One of the guarantors died and his executor wrote a letter "revoking the guaranty." Thereafter, the bank took renewals of the obligations then current and made fresh advances. What are the rights of the bank against the surviving guarantors and the executor of the deceased?

This question was presented to the Supreme Court of Alberta in *Northern Crown Bank* v. *Woodcrafts Ltd. et al.*, 11 Alberta L. R. 1. It was held that the executor's notice terminated the guaranty as to him, so that he was not liable for the fresh advances afterward made, but that, by reason of the provision authorizing extensions, he was not discharged, in respect of advances already made, by the renewals subsequently taken; and it was held that the notice in no way affected the liability of the surviving guarantors. No authority was cited except upon the last point. The executor and the surviving guarantors appealed to the Privy Council, whose judgment is reported under the name of *Egbert* v. *National Crown Bank*, [1918] A. C. 903. The judgment of the lower court was affirmed, but the opinion, by Lord Dunedin, squarely places the decision upon the ground that by the terms of the guaranty it was to remain in full force as to all of the guarantors "until there is notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place." No authorities were cited.

So far as concerns the liability of the surviving guarantors, the decision is clearly right. The Privy Council's position, which is simply strict construction of the revocation clause, is unquestionably sound thus far, that this clause does not reserve to each the power to revoke for all. Such reservation might, of course, be made, but it can hardly be construed out of this or any equally general stipulation, the interpretation naturally being confined to giving to each that power which is necessary for his own protection. Neither does the lower court's position, that the executor released himself, lead indirectly and through the general equities of suretyship to the release of the others, for each has, by hypothesis, stipulated for just this sort of discharge of his fellows. The case is clearly distinguishable from that of discharge of a cosurety by act of the creditor. *Beckett* v. *Addyman*, 9 Q. B. D. 783.

The case of the executor, however, upon which the courts differed so radically, is not equally clear. The Privy Council's construction of the revocation clause, as requiring unanimous action, is extreme. The result is harsh upon a guarantor who wishes to withdraw, but cannot secure the concurrence of all his brethren, and puts it in the power of the principal to collude with one guarantor against the rest. Again, it is objectionable to hold the estate of a deceased surety indefinitely under a contingent liability for future advances. *Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Gay* v. *Ward*, 67 Conn. 147. We may assume that these considerations are not of sufficient weight to invalidate a specific provision in a guaranty requiring unanimous action, but, when we have to construe a stipulation as general in its terms as that before the court, we should resolve the doubt against the harsh and impolitic interpretation. It is submitted that the Privy Council's position is erroneous. It should be noted, however, that it cannot be relegated to the limbo of *obiter dicta*, though it goes beyond the case presented on appeal, for it supports the decision on the executor's liability for renewals, and is the only thing in the opinion which does support that decision. It must also be admitted that there is, apparently, no clear authority against it, though some support for the lower court's release of the executor from the fresh advances can be found. *Coulthart* v. *Clementson*, *supra*; *Beckwith* v. *Addyman*, *supra*; *Harris* v. *Fawcett*, 15 Eq. 311, 8 Ch. App. 866; *Ashby* v. *Day*, 54 L. T. 408; *Slagle* v. *Forney's Exr.*, 15 Atl. 427.

Assuming that the lower court was right in its construction of the guaranty as reserving to the executor the power to terminate the guaranty as to himself, so that he was not liable for the fresh advances, a nice question remains as to whether he should have been held liable for the prior advances subsequently renewed. This, too, resolves itself into a problem in construction. It would seem that, as a general rule, the revocation of a continuing guaranty, whether by notice or by death, has the effect of destroying its continuing character and converting it into a simple guaranty of the then obligations of the principal. From this it follows that a subsequent renewal of these obligations constitutes an extension of time, with the usual result. *Gay* v. *Ward*, *supra*; *National Eagle Bank* v. *Hunt*, 16 R. I. 148. Compare *Williams* v. *Reynolds*, 11 La. 230; *Wise* v. *Miller*, 45 Oh. St. 388. In our case, however, extensions were explicitly authorized by the guaranty and, if this authoriza-

tion survived the notice of revocation, the renewals are, of course, binding. We may assume that such an authorization might by explicit stipulation be made perpetual, though this would be open to some objections on the score of policy. Assuming this, the question comes to one of construction of the two clauses, the one authorizing extensions, the other reserving a power of revocation. Does the latter overreach the former, or does it not? The phraseology of this particular instrument is not significant, and there is little or nothing to vary the question as to how, in general, clauses of this type should be construed. One would like to limit the over-technical doctrine of discharge by extension of time, denying its application in any case from which it can be fairly excluded, as it can here by liberal interpretation of the extension clause. And one can argue that, in a continuing guaranty, such an extension clause is mere surplusage if it applies only to extensions preceding revocation. On the other hand, it may be said that the fault with the rule on discharge by extension is simply that it is too rigid, and that the remedy is not to arbitrarily exclude it from any case but to reform it by requiring negligence or bad faith on the part of the creditor and injury to the surety; but that here the stipulations either authorize all extensions or, being revoked, authorize none. It may be argued that, if this extension clause is not revocable by each upon notice, it is not revocable at all, for the revocation clause does not contemplate more than one kind of revocation; but, if the extension clause is irrevocable, this constitutes an unwholesome state of affairs. It is harsh upon the guarantors. It is objectionable in its effect upon the administration of the estates of deceased guarantors. It puts it in the power of the principal and creditor to make the guaranty a permanent foundation of credit over which, at the expense of the sureties, current business might be conducted indefinitely. The authorities upon this problem are as nicely balanced as the arguments. The decision of the Supreme Court of Alberta in our case, sustaining the extension clause, cannot be said to have been reversed by the Privy Council, for the latter simply carried farther the strict construction of the revocation clause. On the other hand, in a case practically identical with ours, though involving implied power of revocation by death and notice, the Supreme Court of Rhode Island held that the extension clause was revoked. *National Eagle Bank* v. *Hunt, supra.*

Possibly there is intermediate ground between these positions. We might hold that power of revocation by notice was here waived, as to extensions, and that power of revocation could be waived altogether, but that a perpetual continuing guaranty, either for new advances or for extensions, is contrary to public policy and cannot be tolerated, and that in cases where it is necessary, upon a bill filed for that purpose, a continuing guaranty can be wound up and discharged by decree of court. We find no more direct authority for such a proceeding than the familiar suits for exoneration, and, more remotely related, the whole body of equitable interference in the suretyship relation. But is that not enough? E. N. D.