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NOTES

IS A FRANCHISE PROPERTY?

In 1884, in New York City, six gas companies operating under franchises obtained without charge, lawfully combined. In estimating the amount contributed by each, its franchise was considered, the combined value of all the franchises amounting to $7,781,000, and upon this new stock was issued. A statute, subsequently passed, provided that no gas company of New York City should charge said city more than 75 cents per 1000 feet; that the pressure of such gas should be not less than 1 in. nor more than 2½ in.; and that any corporation violating this Act should forfeit $1000 for each offense.

In considering the constitutionality of this Act in *Wilcox* v. *Consolidated Gas Co., decided January* 4, 1909, the United

States Supreme Court held that the penalties were so excessive that the gas companies were prevented from testing the validity of the Act for fear that if the decision should be adverse to them, their property would be entirely swept away by the penalties, and that the Act to this extent was unconstitutional as not giving equal protection of the laws;[1] and that the provision as to maintaining a certain pressure, which could not be done without renewing to a large extent the equipment of the gas companies and which would not allow an adequate return on the property at the rate specified, was unconstitutional as taking property without due process. However, as these two provisions were separable from the rest, and as it could be plainly seen that the Legislature would wish the remainder of the Act passed even without these unconstitutional provisions, it was declared constitutional to that extent.[2]

But by far the most important question considered was whether a company which has obtained a franchise without cost, may demand a return on that franchise as part of its property. As an original proposition, the lower court denied that a franchise is property;[3] but the Supreme Court says that "it cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation."

As to the real nature of a franchise there are different opinions. One high authority classes it as a species of intangible property.[4] A modern case holds that the right of franchise, when purchased, "constitutes property within the usual and common significance of that word."[5] As paying for the franchise could make no difference in its character after it was gained, this fact would seem to be immaterial in considering whether or not it is property. It has been held that a franchise is merely a characteristic of the corporeal property which is being used under the franchise; that the value of the property is increased by the franchise, and that a return should be had on this increased value.[6] Somewhat the same idea is expressed by a text writer to the effect that "franchises clearly have a

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[1] *Ex Parte* Young, 209 U. S. 123 (1908).

[2] See *Berea College* v. *Kentucky*, 211 U. S. 45 (1908), where the Act, as here, was considered divisible; and *Adair* v. *U. S.*, 208 U. S. 161 (1908), where the Act was considered indivisible.

[3] *Consolidated Gas Co.* v. *City of N. Y.*, 157 Fed. 849, at p. 873.

[4] "The Elements of Jurisprudence," by T. E. Holland, 9th ed., p. 200 (1900).

[5] *People* v. *O'Brien*, 111 N. Y., 1, at p. 40 (1888).

[6] *Water Dist.* v. *Water Co.*, 99 Maine, 377 (1905); *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, at p. 337 (1892).

value if the word value is used to signify the advantage derived from their possession, or, in other words, their utility." [7] The fallacy of considering franchises property was said by the lower court to be caused by "a failure to distinguish between productive and non-productive property. Land * * * may by industry and intelligence be made productive without a franchise; but no excellence in these desirable qualities can ultimately render a franchise productive without the use of money, chattels, and land in conjunction therewith;" and when joined, the franchise contributes nothing since "it has but authorized their [land, chattels, etc.] employment in a particular way and protected the owners while so employing them." Granted that it is non-productive, nevertheless it is property, and the law does protect non-productive property; such as, for instance, a trade-mark.

Considering the franchise as property, the economic question whether a return should be allowed upon it, remains. At this point the question whether the franchise was paid for or not, which was immaterial in considering whether it was property, becomes material. "Return can be expected only from investment and he that invests must part with something in the act of investing." [8] So where the franchise has cost nothing, no return should be allowed on it,[9] even though a different result should be arrived at where the corporation has paid for it. A suggestion in a recent case is that though the right to do the work which the corporation is allowed to do is a property right, which belongs to the state; the state puts this in the business and the company puts in its corporeal property and should get a return only on its corporeal property. The objection made to this is that the state has given over its right and does not retain it, and to say that it does is a mere fiction.[10]

The lower court had found that the value of the franchise had increased proportionately with the increase in the value of the other property; but the Supreme Court held that the value of the franchises is to be taken as of the time when they were transferred to the combined company, and cannot be considered as having advanced in value with a corresponding advance in the general business; because in view, among other things,

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[7] A Treatise on "The Law of Private Corporations," by V. Morawetz, 2nd ed., sec. 929.

[8] *Consol. Gas Co.* v. *City of N. Y., supra,* at p. 873.

[9] "Law of Railroad Rate Regulation," by Beale & Wyman, sec. 362 (1906).

[10] *Water Dist.* v. *Water Co., supra.*

of the recent legislation looking toward a lessening of the huge dividends given by the company, it cannot be said with certainty that the value of the franchise did increase.

The Burden of Proof in Self-Defence.

In the recent case of *Commonwealth* v. *Palmer*,[1] the Supreme Court of Pennsylvania reaffirmed the doctrine, that "if the evidence clearly establishes the killing by the prisoner purposely, with a deadly weapon, an illegal homicide of some kind is established and the burden then falls upon the prisoner, and not on the commonwealth, to show that it was excusable as an act of self-defence." This doctrine has been consistently followed in this state since enunciated by Agnew, J.,[2] and obtains in many other jurisdictions.[3] It must be admitted that the courts of this state are consistent in placing upon the accused the burden of proving by a fair preponderance of evidence that he did not act maliciously or wilfully as in insanity,[4] drunkenness [5] or self-defence,[6] so as to overcome the presumption of intent employed to establish a *prima facie* case.

It is admitted by all that the act and the intent are essential elements of the crime—and that these elements must concur. Malice aforethought or premeditation and deliberation are necessary for murder in the first degree.[7] The prosecution must prove these elements beyond a reasonable doubt before the accused can be convicted.[8] Because of the difficulty of proving the mind of man, a presumption has been raised [9] to assist the prosecution. This presumption has been declared one of law and not of fact. By means of this presumption, the presumption of innocence is overthrown.

Thayer,[10] Wigmore,[11] Cooley,[12] Mr. Justice Harlan,[13] Mr.

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[1] 222 Pa. 299.
[2] 58 Pa. 9 (1868); *Ortwein* v. *Com.*, 76 Pa. 414 (1847).
[3] M'Naghtin's Case, 2 Cl. and F. 199 (1843).
[4] *Com.* v. *Drum*, 58 Pa. 9.
[5] *Com.* v. *Honeyman*, Add. 147 (1793).
[6] *Com.* v. *Crouse*, 4 Clark, 298 (1846).
[7] *Com.* v. *Hagerty*, Lewis' Abridgment, 402 (1847).
[8] Lewis' "Abridgment of Criminal Law," 397.
[9] *O'Mara* v. *Com.*, 75 Pa. 425.
[10] Thayer on Evidence, 380, 381, 382.
[11] Wigmore on Evidence, sec. 2501.
[12] *People* v. *Garbutt*, 17 Mich. 9.
[13] *Davis* v. *U. S.*, 160 U. S. 469.

Justice Gray [14] and many others say this doctrine of the burden of proof in affirmative defences cannot be sustained on principle. Such expressions as "an illegal homicide," "murder," an "unlawful act" or a "crime" are not correct in legal terminology when applied to the prosecution's case alone. That the accused confesses to the elements of any such offence and then sets up an affirmative defence of insanity, or self-defence, is not true in fact or theory. The pleadings and the facts show a denial of one of the elements necessary to the crime.[15] The act was either lawful or unlawful and the intent either such as produced a crime or no crime. There is no middle ground. Once the crime is proven or admitted, mitigation or pardon alone are proper. Excuse and justification cannot enter where the crime is established, but are properly employed to show there was no crime by way of denial and not by way of avoidance.

While it is eminently proper that the intent should be presumed to establish a *prima facie* case for the prosecution, the law does not then say that the acts were unlawful or constituted a crime unless the accused admits them. Ordinarily, an act is judged only when all the evidence is in and the accused has submitted his confession or defence; and it is for the jury to decide the character of the act from all the evidence.[16]

If the presumption of intent is one of law, then no amount of evidence in direct denial should be able to overthrow [17] it and the question of intent ceases to be an essential element of the crime. But if the presumption is one of fact, presumed in law, then such presumption should be as any other fact, to answer its proper purpose—to establish a *prima facie* case—but no more. The jury should then pass upon it, together with all the other facts and a reasonable doubt as to the existence of the intent should be a reasonable doubt as to the existence of any crime.[18] The burden of proof should remain on the prosecution throughout, while the necessity for the production of evidence may vary.

However, for a century or more this rule has obtained in some form in this state. Numerous jusrisdictions have adopted it in insanity and a less number in self-defence. The facility of proving the facts and circumstances of self-defence will justify the distinction made in some jurisdictions between it

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[14] *Com.* v. *Pomeroy,* Wharton on Homicide (2nd ed.), 753.

[15] *Dove* v. *State,* 3 Heiskill (Tenn.), 366 (1872).

[16] *Bunn* v. *State,* 62 N. J. L. 666 (1898).

[17] Thayer on Evidence, 380.

[18] *Plummer* v. *State,* 135 Ind. 308 (1893).

and insanity. Judicial experience, public policy and history may well justify this doctrine,[19] but principle and theory for its existence can hardly be found.

CONCLUSIVENESS OF JUDGMENT AGAINST A SURETY IN A SUIT BETWEEN PRINCIPAL AND SURETY.

In *United States Fidelity and Guaranty Company* v. *Haggart*,[1] it was decided that a judgment obtained by the United States against a marshal and the Guaranty Company as sureties on his bond for the proper performance of his duties and those of his deputies, is conclusive evidence of the default of the deputies, in a suit by the Guaranty Company against the administratrix of the marshal's estate.

The Guaranty Company had paid the judgment of the first suit and then sued the marshal's estate (the marshal having died since the judgment) for reimbursement. The administratrix in defence found that the Guaranty Company was surety for the deputy that defaulted, on this deputy's bond to the marshal, but the only evidence that the administratrix offered of the fact of the deputy's default was the judgment in the action brought by the United States.

In holding the judgment to be conclusive evidence the Court cites two classes of cases to sustain the decision.

The first class contains cases in which the parties to the action were co-defendants in the former action, the judgment of which is sought to be put in evidence, and the point now in controversy between them was necessarily adjudicated in the prior action.[2]

In such a case the defendant in the second suit, having once contested the point, is forbidden to raise it again.

The second class of cases are those in which the parties have not been joined in the former suit, yet the judgment of that suit is evidence of the facts there adjudicated in a suit between them.

This situation may arise in two ways:

I. Where a surety is sued by the creditor and pays the judgment. The surety then sues the principal for reimbursement and puts in evidence the judgment by the creditor against him.

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[19] Wharton on Homicide (3rd ed.), 550; Wigmore on Evidence, 2501; *Davis* v. *U. S.*, 160 U. S. 469.

[1] 163 Federal, 801 (1908), C. C. A.

[2] *Lloyd* v. *Barr*, 11 Pa. 41 (1849); compare *McMahon* v. *Geiger*, 73 Mo. 145 (1880).

In such cases it has been held that if the principal was not notified of the former suit, then the judgment in that action is only *prima facie* evidence against him in the suit by the surety.[3] But if the principal does have notice, then the former judgment is conclusive against him.[4] The reason given is that "when a person is responsible over to another, either by operation of law or express contract and he is duly notified of the pendency of the suit and requested to take upon himself the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case * * * the judgment * * * will be conclusive evidence against him." [5] Whether notice, then, to the principal is important in determining the value of the evidence of the judgment depends on a question of procedure, *i. e.*, whether or not on notice being given the principal can defend.

II. Where the creditor after getting judgment against the principal, but not being able to get satisfaction of the judgment, sues the surety and offers the judgment against the principal as evidence of the facts there proved.

In such a case it has been said that the prior judgment is *prima facie* evidence, irrespective of notice,[6] or even if it is admitted that no notice was given.[7]

On the other hand such a judgment has been held conclusive evidence even though the surety was given no notice.[8] Some courts have said that the judgment is no evidence at all,[9] even if the surety had notice and the principal conducted the former suit as the agent of the surety.[10]

As in the first class of cases, whether or not notice should be important, should, it is submitted, depend on whether the person notified can demand to be made a party.[11]

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[3] *Snider* v. *Greathouse*, 16 Ark. 72 (1885).

[4] *Hare* v. *Grant*, 77 N. C. 203 (1877); *Konitzky* v. *Meyer*, 49 N. Y. 571, the judgment here being a foreign one.

[5] *Littleton* v. *Richardson*, 34 N. H. 179, 187 (1856).

[6] *Beauchaine* v. *McKinnon*, 55 Minn. 318 (1893).

[7] *City of Lowell* v. *Parker*, 10 Metc. (Mass.), 315 (1845).

[8] *Masser* v. *Strickland*, 17 S. & R. 354 (1828); *Tracy* v. *Goodwin*, 87 Mass. 809 (1862).

[9] *Pico* v. *Webster*, 14 Cal. 202 (1859); *Lucas* v. *Governor*, 6 Ala. 826 (1844).

[10] *Jackson* v. *Griswold*, 4 Hill (N. Y.), 522 (1842).

[11] See *Ex parte Young*, L. R. 17 Ch. Div. 668 (1881). It was argued that the surety was not bound by the judgment against the

The cases that hold that the evidence of the former judgment is conclusive must do so on the ground that the principal and sureties are privies. The cases that hold that the judgment is no evidence at all deny that there is any privity. Those that hold the middle ground, namely that the judgment is *prima facie* evidence, seem hard to sustain on principle, as is admitted even by those courts that adopt it.[12]

In the civil law it seems that the principal and surety are privies,[13] for the "obligation of the surety being dependent upon that of the principal debtor, the surety is regarded as the same party with the principal, with respect to whatever is decided for or against him."

But in the common law where the surety contracts with the creditor and is bound only by the terms of his contract without regard to the stipulations of his principal, it seems just that a different conclusion should be reached, and if the surety has not actually defended the first judgment or at least had the chance to do so, the doctrine of *res inter alios acta* should apply.

THE ADMISSION OF STATEMENTS OF PAIN AND SUFFERING.

The danger of admitting statements which were originally made by another than him who testifies, and also the objection that there was no opportunity for cross-examination, are the salient reasons for excluding hearsay evidence.[1] The rigidity of this rule was felt in many instances. To palliate its effects, certain exceptions sprung up. Necessity was the reason which permitted the admission of dying declarations,[2] pedigree,[3] declarations relating to matters of public or general interest, declarations against interest by persons since deceased,[4] declarations

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principal since under the Judicature Act the surety could not demand to be made a party, since he is not liable over to the principal. So it was held that even with notice to the surety the judgment is no evidence.

[12] *Beauchaine* v. *McKinnon,* 55 Minn. 318; see also *Lucas* v. *Governor,* 6 Ala. 829.

[13] Cowen, J., in *Douglass* v. *Howland,* 24 Wend. 53; and see Gibson, C. J., in *Masser* v. *Strickland,* 17 S. & R. 359.

[1] See Thayer's Preliminary Treatise on Evidence, 520-523, for another theory of its origin and growth.

[2] *People* v. *Corey,* 157 N. Y. 332 (1898).

[3] *Fulkerson* v. *Holmes,* 117 U. S. 389 (1885).

[4] *Halvorsen* v. *Moon & Keer Lumber Co.,* 87 Minn. 18 (1902).

made in the course of duty or business,[5] and account books.[6] Then, too, the convenience of the matter has let down the bars to a certain line of evidence, as public documents.[7] Another class of testimony is admitted because it, better than any other, depicts the true state of affairs sought to be brought before the jury: *res gestae* and declarations bearing upon the physical or mental condition of the declarant. These two kinds of evidence are separate and distinct and should not be confused, as is often done in discussing either. It is our purpose to consider briefly the latter of these two—the various expressions of pain which may arise and how far they are admissible.

There are three sorts of expressions: (1) those describing a past condition of pain; (2) a statement, perhaps in the form of a complaint, describing a present physical condition; (3) an involuntary shriek, groan or grimace. Then, too, the time of utterance often becomes an important element, whether made *ante litem motam* or *post litem motam*. The person to whom the statement is made likewise is a factor in the reckoning. Simple narrations of past sufferings, whether made to laymen [8] or to physicians for treatment, are by the better law always excluded.[9]

When we turn to a statement describing present bodily condition, we enter disputed territory. Where the declaration is made unfeignedly it should be received, regardless of the person to whom it was made.[10]

The reason for such admittance is that it is the natural impulse for one laboring under great bodily anguish to give vent to his sufferings to bystanders, and that such hearers can better describe his actual condition at that time when he may really have been in a semi-consciousness, than he himself when called upon the witness stand.

Such statements have been admitted in the majority of jurisdictions.[11] Other courts have limited their admission to expressions made to medical men on the theory that the physician is better equipped to detect a malingerer, and to say whether a bodily condition is simulated.[12]

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[5] *Nichols* v. *Webb*, 8 Wheat. 326 (1823).
[6] *Poole* v. *Dicas*, 1 Bing. (N. C.), 649 (1834).
[7] *Whitehouse* v. *Bickford*, 29 N. H. 471 (1854).
[8] *McCeney* v. *Duvall*, 21 Md. 166 (1863).
[9] *Emerson* v. *Lowell Gas Co.*, 6 Allen, 146 (1863).
[10] *Kennedy* v. *Brown*, 25 Me. 46 (1845).
[11] *Oliver* v. *R. Co.*, 65 S. C. 1 (1902); *Keyes* v. *Ceday Falls*, 107 Ia. 16 (1899).
[12] *Brusch* v. *R. Co.*, 52 Minn. 512 (1893).

The question of the time of utterance may come up in jurisdictions following the majority rule as well as those accepting the minority. If the purpose of the statements was for diagnosis and treatment, it would seem that they should be admitted, even though made *post litem motam*,[13] or after suit has been begun or during trial,[14] for nothing conduces to veracity so much as the fact that upon the diagnosis made, the physician will prescribe treatment. The weight of all such statements is for the jury.[15] The objection that an utterance is *post litem motam* was formerly confined entirely to matters of pedigree, or to matters of public or general interest.[16]

When, however, the statements are made simply to fit the physician to testify, the better rule seems to be that such evidence should be excluded.[17]

If the evidence consists in a groan, a shriek of pain, or involuntary grimace, the almost uniform law is that it should be admitted irrespective of whether it was made to a physician or layman.[18] The question under discussion was involved in the recent case of *Kienninger* v. *Interurban Street Railway Company*.[19] The court reversed the decision of the lower court in a suit for personal damages, on the ground that the husband of the plaintiff was permitted to testify to declarations made by the plaintiff as to the condition of her health and as to injuries from which it is claimed she suffered; and also that a physician was permitted to testify to declarations of the plaintiff of the same character which were made several months after the accident.

The extreme brevity of the report makes it uncertain what the nature of the statements were—whether merely narrative or specious expressions of an existing condition. If they were made to a physician to receive treatment, they were clearly wrongfully excluded. Statements, though made a considerable time after the injury, if indicative of a relative bodily condition at the time of declaration, are admissible.[20]

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[13] *Sturgeon* v. *Sand Beach*, 107 Mich. 496 (1895); *Rowland* v. *Philadelphia R. Co.*, 63 Conn. 415 (1893).

[14] *Morriss* v. *Haverhill*, 65 N. H. 89 (1889); *Fleming* v. *Springfield*, 154 Mass. 520 (1891).

[15] *Hagenlacher* v. *R. R.*, 99 N. Y. 136 (1885).

[16] 1 Greenlief (15 ed.), sec. 102.

[17] *Pennsylvania Co.* v. *Files*, 65 Ohio, 403 (1901).

[18] *Bacon* v. *Charlton*, 7 Cush. 581 (1862).

[19] 113 N. Y. Supp. 96 (1909).

[20] *Western Travelers Assoc.* v. *Munson*, 1 L. R. A. (N. S.) 1069 (Neb. 1905).

The rejection of the evidence of the husband is not surprising, for an anomaly exists in New York on this point. The courts in that state have gone to the extent of holding that no expressions of pain made to a bystander will be admitted; that they must all be made to a physician for the purpose of treatment.[21] This view is the outcrop of a mistaken conception [22] of the Massachusetts court in *Barber* v. *Merriam*.[23] The rule there enunciated, which excluded statements of pain except such as are made to a physician, was meant to apply, as appears on analysis of the decision, only to statements of past conditions and symptoms. The New York courts, on the other hand, have applied it since that date to all statements of pain. However, screams, groans, shrieks and like signs of agony are received in that state through the testimony of non-professional men.[24] The reason assigned for this exception is that they are the spontaneous and natural outbursts of pain, which cannot easily be simulated. Why cannot a groan be feigned as readily as a statement of pain? It would seem that the danger of spuriousness is just as great in the one case as the other. Is not the more plausible rule that adopted by the majority of jurisdictions, that all expressions of present pain, whether in groans, shrieks or coherent and intelligible words, are admissible, and that the test of the genuineness of such evidence is left to the jury?

Is a Promise to Perform Some Future Act a Statement of Fact?

In order to rescind a contract on the ground that it was induced by a fraudulent representation, it is necessary to show not only that the representation was false, but that it was in regard to a material fact.[1] The same is true where the remedy sought is an action of deceit.[2] As might be expected, considerable difference of opinion exists as to where the boundary line must be drawn between that which is fact and that which is not, and a great deal of discussion has hedged about the question of whether or not a promise is a representation of a

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[21] *Reed* v. *Railway Co.*, 45 N. Y. 578 (1871); *Broyles* v. *Piscock*, Ga. 643 (1896).

[22] Wigmore, III, 2209.

[23] 11 Allen, 332 (1865).

[24] *Roche* v. *Rail Co.*, 105 N. Y. 294 (1887).

[1] Pollock on Contracts (Williston's Ed.), 687.

[2] Pollock on Torts (8th Ed.), 283.

fact. It may be said that the general rule is that a promise to perform some act in the future will not, if broken, amount to fraud; provided there is present at the time an intention to perform such act.[3]

The recent case of *Mutual Reserve Life Insurance Company* v. *Seidel,* 113 Southwestern Reporter 945, decided in the Court of Civil Appeals in Texas, recognizes the general rule above stated, but holds that there is an exception recognized in Texas to the effect that if at the time the promise was made it was the intention of the party making it to disregard it, and it was only made to deceive and entrap the other party, then such promise in case the refusal to perform took place would amount to such actual fraud as would justify the rescession of the contract induced by such promise. In that case the plaintiff was induced by the defendant's agent to give a note for the first premium on a life insurance policy, on the promise by said agent that in case plaintiff did not accept the policy, the note should be returned. Plaintiff rejected the policy, but in the meantime defendant's agent had negotiated the note. The jury found that at the time the promise was given there was no intention of performance, and the defendant was held liable to plaintiff for the amount of the note. The court apparently went on the theory that although the promise was not a representation of a fact, yet having been made without any intention of performance, it was such palpable fraud as to entitle plaintiff to relief. In support of the court's decision, a previous Texas case[4] was cited, in which it was said "that the representations related to matters and things to be performed in the future cuts no figure whatever." To the same effect is a much quoted Connecticut case.[5]

There are, however, a number of cases which hold that a promise is not a statement of fact, and refuse to make exception recognized in the cases just cited. It was early laid down by Mr. Chief Justice Brian that "the thought of man shall not be tried, for the devil himself knoweth not the thought of man."[6] In a later English case,[7] it was said that "a representation that something will be done in the future cannot be true or false at the moment it is made; although it may be called a representation, it is a contract or promise." In Illinois, it has been held that "even if at the time the promises were made, it was not

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[3] Pollock on Contracts (Williston's Ed.), 689, and cases cited.

[4] *Collinson* v. *Jefferies,* 21 Tex. Civ. App. 653.

[5] *Ayres* v. *French,* 41 Conn. 142.

[6] Y. B., 7 Ed. IV, f. 2, pl. 2.

[7] Mellish, L. J., in *Beattie* v. *Ld. Ebury,* 7 Ch. App. Cas. 804.

intended to comply with them, it was but an unexecuted intention, which has never been held of itself to constitute fraud." [8]

There are, however, on the contrary, a great number of cases which hold that a promise to perform an act in the future is a statement of fact. Perhaps the best known of these is that in which Bowen, L. J., said: "The state of a man's mind is as much a matter of fact as the state of his digestion." [9] In a comparatively recent case,[10] it was said that when one man makes a promise to another as an inducement for a change of position on the part of the latter, he, if not expressly, impliedly avers that he has an existing intent to fulfil his promise, and such implied averment of existing intent is a matter of fact, and, if false and fraudulent, is a fraudulent representation.

It would seem that the latter line of cases represent the better view. The difficulties encountered by adhering to the rule that a promise is not a statement of fact are well illustrated in the Illinois case,[11] where strict adherence to the rule worked great injustice, and in the Texas case, where, although a just result is reached, yet it is inconsistent with the rule that a false representation must be one of fact. On the other hand, treating a promise to perform some act in the future as a statement of intention, and treating intention as an existing fact, it follows that if, at the time the promise was made, there was an intention to perform, subsequent non-performance would not constitute fraud, while, on the other hand, if, at the time the promise was made, no such intention existed, there would be a false representation of a material fact, sufficient as a basis for giving the injured plaintiff relief, thus reaching a result sound in morals as well as in law.

THE EFFECT UPON THE LIABILITY OF A GUARANTOR OF A CHANGE IN THE PERSONNEL OF THE OBLIGEE OR OF THE PRINCIPAL DEBTOR.

It is a well settled rule of suretyship that the liability of a guarantor or surety cannot be extended by implication or otherwise—beyond the actual terms of his engagement. It does not matter if the proposed alteration would result in his benefit, for he has the right to stand upon the very terms of his agreement. In the language of Lord Ellenborough, "the

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[8] *Gage* v. *Lewis,* 68 Ill. 604.

[9] *Edginton* v. *Fitzmaurice,* 29 Ch. Div. 459.

[10] *Rogers, et al.,* v. *Virginia-Carolina Chemical Co.,* 149 Fed. Rep. 1.

[11] *Gage* v. *Lewis,* 68 Ill. 604.

claim against a surety is *strictissimi juris*." In accord, it is the general rule that a guaranty when addressed to a particular person can only be acted upon and enforced by such party.[1] A guaranty for goods to be sold to a firm has been held not to cover advances made to one member of the partnership.[2] If a guaranty is made to a partnership and one of the partners dies;[3] or if there is a change in the membership of the firm in any other way the guaranty will not cover any subsequent advances. "A, B, and C were partners in banking and their particular articles of partnership provided that if any one of the partners died the legal representative of such one might take his place in the business. D guaranteed all sums, not exceeding £2,000, which should afterwards become due to A, B, and C from E. A died and his representative became a member of the firm. *Held*: D was not liable for any advances made to E after the death of A."[4] The reason for the rule is that, "a man may very well agree to make good such advances, knowing that one of the partners, on whose prudence he relies, will not agree to advance money improvidently."[5] Similarly, if a letter of credit is directed to an individual, it will not support an action for advances made by a firm of which the individual addressed is a member or may subsequently become a member, for the writer cannot be held to have consented to advances made by the firm.[6]

All the above cases deal with the effect upon the liability of the guarantor of a change in the personnel of the obligee. The same results are found in the case where the personnel of the principal debtor is changed. The sureties on a bond conditioned that the principal shall pay for all purchases made by him from the obligee are not liable for purchases made from the obligee by a partnership of which the principal is or subsequently becomes a member.[7] In this case the Court said, "While they (the sureties) might be willing to be sureties for Delano, it does not follow that they can be bound or

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[1] *Taylor* v. *Wetmore*, 10 Ohio, 490; *Smith* v. *Montgomery*, 3 Tex. 199; *Sollee* v. *Mengee*, 1 Bailey Law (S. C.), 620.

[2] *Cremer* v. *Higginson*, 1 Mason, 323.

[3] *Pemberton* v. *Oakes*, 4 Russell, 154.

[4] *Hawkins* v. *N. O. Printing Co.*, 29 La. App. 134; *Holland* v. *Teed*, 7 Hare, 50.

[5] *Cosgrave Brewing Co.* v. *Starrs*, 5 Ont. (Canada) 189; *Spiers* v. *Houston*, 4 Bligh (9 N. R.), 515.

[6] *Sollee* v. *Mengee* (*supra*).

[7] *Parham Sewing Machine Co.* v. *Brock*, 113 Mass. 194.

have consented to be bound, for the acts of any one whom Delano may have taken into partnership."[8] A wrote to B as follows: "Any thing you can do for the bearer, Major S. M. Neil, whom I introduce as my friend, will be done for me, he being a merchant in Clinton. P. S. If you should accept for Mr. Neil for $1,000, I will be bound by this note." On the strength of this B guaranteed two drafts of Hartley and Neil. *Held:* A was not liable for such guaranty. A, "might have been willing to become surety for Neil, and not for Hartley and Neil. The engagement was personal as to Neil."[9]

Again, if a guaranty is made for goods advanced to an individual and they are advanced to the firm of which the individual named is a member, there is no liability. A gave B a guaranty for goods to be purchased by C to the extent of £200. C took D as a partner and B sold goods to C and D on the credit of the guaranty. *Held*: A not liable as surety.[10]

The further question that presents itself is whether or not you can introduce parol evidence to show that the face of the guaranty does not express the intent of the parties. In the case of *The Michigan State Bank* v. *Pecko,*[11] the guaranty commenced, "C. C. Trowbridge, Esq., President, Detroit, Michigan," and there was no further evidence of the party addressed. Money was advanced on the guaranty by the Michigan State Bank, of which Trowbridge was president. *Held,* It may be shown by parol that the guaranty was intended for the bank. The Court applied the common law rule governing simple contracts to the contract of guaranty, "which is that they may be sued upon either in the name of the nominal or the real party * * * and in the present case the letter being addressed to the person as president, and showing him to be president of the plaintiff bank and of no other institution, renders it certain that it was intended for the plaintiff's benefit."[12] In the case of *Smith* v. *Montgomery,*[13] a guaranty was on its face addressed to "Col. Smith and Pilgrim" but on its back it was addressed to Smith only. Smith

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[8] *White Sewing Machine Co.* v. *Hines,* 61 Mich. 423; *Ins. Co.* v. *Scott,* 81 Ky. 540, *accord.*

[9] *Bell* v. *Norwood,* 7 La. (4 Curry) 95.

[10] *Shaw* v. *Vandusen,* 5 Up. Cam. (Q. B.) 353; *Gas Co.* v. *Ely,* 39 Barb. 174.

[11] 28 Vt. 200.

[12] *Drummond* v. *Prestman,* 12 Wheat. 515; *Wadsworth* v. *Allen,* 8 Gratt. 174, *accord.*

[13] 3 Tex. 199.

alone sold the goods. *Held,* The guarantor is not liable. The face of the guaranty only could be considered and not the address on the back. As there was no ambiguity about the guaranty, parol evidence could not be received to vary it. In the recent case of *Lamm* v. *Colcord,*[14] the issue in the above cases came directly before the court. The guaranty read, "Lamm and Co., Chicago, Ill. Dear Sir: You can extend credit to O. C. Scoresby to the amount of $400 and I will stand good for the same. C. F. Colcord." Goods were advanced to Scoresby Tailoring Co. *Held,* Defendant is not liable in the absence of proof that O. C. Scoresby solely comprised the Scoresby Tailoring Co. This duty, the court said, is upon the plaintiff. Thus the court intimates that such evidence could be introduced and if it were shown that O. C. Scoresby and the Scoresby Tailoring Co. were one and the same person then an action would lie in the name of the latter.[12]

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[14] 98 Pac. 355 (Sup. Ct. of Okla., Nov. 12, 1908).