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NOTES.

EFFECT OF A CHANGE OF JUDICIAL DECISION AS TO THE CONSTITUTIONALITY OF A STATUTE.—Whether a decision of the highest court is "law," the equivalent of a statute, or whether it is merely evidence of the law, has long been a mooted question. This becomes important where a decision overrules a prior decision on the same question. Under the view that a decision is merely evidence of the law, the second decision must necessarily be given a retroactive effect, while under the other view it can have only a prospective effect and cannot disturb rights acquired or liabilities incurred under the first decision. Blackstone says that the court never makes law, but simply declares what it has always been and an overruled decision never was law at all.[1] These conflicting views arise where there is a change of judicial decision as to the common or unwritten law, as to the interpretation of a statute, or as to the constitutionality of a statute. Confining ourselves to the third class of cases, there would seem to be three situations, which might arise:

[1] I Bl. Comm., p. 70.

1. A statute is enacted, rights acquired or liabilities incurred thereunder, and subsequently the statute is declared unconstitutional.

2. A statute is enacted, declared constitutional by the court, rights acquired or liabilities incurred thereunder, and subsequently the statute is declared unconstitutional.

3. The converse of the second class, the statute first being declared unconstitutional and later constitutional.

As to the first situation there is little doubt, as it is almost universally held that a statute declared to be unconstitutional is null and void from the beginning. No rights or liabilities can be built up under it. The decision is dated back to the moment the statute was enacted. This would seem to be in accord with the view that a judicial decision is merely evidence of the law, but it has been denied that it conflicts with the opposite view.[2]

The second situation is of frequent occurrence and comprises the class of case represented by Gelpcke v. Dubuque.[3] In this case, which has given risen to a great amount of discussion, the Legislature of Iowa passed a law, authorizing the issue of a certain kind of municipal bonds. This statute was declared constitutional by the Supreme Court of Iowa. Certain bonds were then issued and came into the hands of the plaintiff. After this transaction, the Supreme Court of Iowa, overruling its former decision, held the statute unconstitutional. On an appeal from the Circuit Court of Iowa to the United States Supreme Court the plaintiff's bonds were held valid, despite the latest ruling of the Iowa Supreme Court. It has been suggested by some writers that the decision rests on a question of the conflict of State and Federal jurisdiction and does not involve the principle under discussion.[4] Others hold that the decision can only be upheld on the theory that a judicial decision is a "law," and that a decision interpreting or passing on the constitutionality of a statute becomes a part of the statute itself, and a subsequent overruling decision has the same effect on it as a repeal by the Legislature has on the statute itself. Rights acquired under the first decision will be protected.[5] One writer frankly admits that this is judicial legislation, but contends that the peculiar nature of our courts permits such an effect to be given to their decisions.[6]

Whatever may be said for this view in theory, the weight of authority is decidedly against it.[7] The strongest argument and perhaps the fundamental one against it appears in a Texas case, where

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[2] White, "Gelpcke v. Dubuque," p. 56.

[3] 1 Wall. 175.

[4] 4 Harvard Law Rev. 311; 14 Amer. Law Rev. 211.

[5] Hare's Amer. Const. Law, pp. 721-726; Patterson's Federal Restraints on State Action, pp. 146-147.

[6] White, "Gelpcke v. Dubuque," pp. 60-84.

[7] Ray v. Western Pennsylvania Co., 138 Pa. 576; Crigler v. Shepler, 79 Kan. 834; Swanson v. Ottumwa, 131 Ia. 540; King v. Phoenix Ins. Co., 195 Mo. 290.

it is said "Under the theory contended for, this court is called upon to hold that the decision of the Supreme Court of a state, although erroneously made, could give validity to a statute, which the Legislature had no power to enact and thereby deprive the citizens of the constitutional rights invaded by the statute," practically amounting to a change of the Constitution by the courts instead of by the people.[8] However, where contract rights are acquired before the overruling decision, this decision has been held to be a law within the meaning of the provision of the Constitution that no state shall pass any law impairing the obligation of contracts. Hence such contract rights cannot be disturbed. This so-called "exception" to the general rule originated in the United States Supreme Court,[9] but has since been distinctly repudiated by that court.[10] It is still followed in some States,[11] but the majority reject it on the ground that a judicial decision is not a law, or on the ground that even if it is a law it is not within the intent of the constitutional inhibition, which refers only to acts of the legislative power and not to the decisions of the judicial department.[12]

On principle it would seem that the same result should be reached in the third class of cases, as that is simply the converse of the second. For, if no vested right can be acquired under a statute erroneously declared constitutional, no vested right to escape liability or punishment should be acquired under a statute erroneously declared unconstitutional. The same fatal objection applies, namely, that it is setting the decision of the court above the Constitution. There seems to be few cases falling within this class. The situation, however, has been squarely raised in a recent Iowa case.[13] A statute was passed making it a crime to take orders for liquor within the state. The Supreme Court of Iowa declared this statute unconstitutional. After this decision the defendant took orders for liquor. Subsequently, the Supreme Court reversed itself and declared the statute constitutional. The defendant was indicted and convicted on the theory that the second decision had a retrospective effect. On appeal the conviction was unanimously reversed. Five of the six judges evade the question under discussion and decide the case on principles which will hardly bear examination. The sixth, however, meets the question squarely and holds "that a change of judicial decision involving the constitutionality of an act or construing an act of Legislature, should, like, an act emanating from the law-making power, be given a prospective rather than a retrospective operation." Also "decisions of courts construing statutes or declaring them unconsti-

[8] Storrie v. Cortes, 90 Texas, 283, per Brown, J.

[9] Douglass v. County of Pike, 101 U. S. 677.

[10] Central Land Co. v. Laidley, 159 U. S. 103.

[11] Haskett v. Maxey, 134 Ind. 182; Lewis v. Symes, 61 Ohio St. 471; Falconer v. Simmons, 51 W. Va. 172.

[12] See cases cited note 7, *supra*.

[13] State v. O'Neil, 126 N. W. (Ia.) 454.

tutional are as much a part of the law of the land as are legislative enactments. They become part of the body of the law itself and are not merely the evidences thereof as are decisions relating to the unwritten or common law." The cases, which fall within this section, seem to be as a whole, opposed to this view.[14] Since no contract is involved, the exception rule cannot be pleaded as a defence to the decision. The fact that it was a criminal case undoubtedly had a potent influence on the result. Natural justice is certainly upheld by the decision, for no one can doubt that it is a hard law which punishes a man for doing an act, which was expressly declared to be legal at the time he committed it. It is probably for this reason that the criminal cases involving this point have been decided on the theory that the decision makes the law,[15] although in principle there seems to be no reason for making the exception. Another reason advanced in support of these criminal cases is that the second decision is a violation of the Constitution, which prohibits the passage of any *ex post facto* law. An *ex post facto* law is one which makes an act innocent when done a crime. It would seem that the same objections lie against this argument as lie against the argument that an overruling decision is a law impairing the obligation of contracts.

A. S. S., Jr.

DONATIO MORTIS CAUSA.—In the recent case of Scott v. Union & Planters' Bank and Trust Co., *et al.*,[1] decided by the Supreme Court of Tennessee, it was sought by the complainant to have established, by a decree of the court, two gifts, alleged to have been made under circumstances which constitute a valid gift in prospect of death. The validity of the gifts was attacked principally on the ground of insufficient delivery. In the opinion, which granted the prayer of the bill, the court takes up and discusses the question of what is a sufficient delivery in *donatio mortis causa*. The conclusion reached may best be stated in the language of the court: "An examination of the modern cases all show, while courts will scrutinize with care the evidence upon which gifts *causa mortis* are sought to be sustained, and will require in every case clear and convincing proof, yet when it is once ascertained that it is the intention of the donor to make such a gift, and all is done which is possible under the circumstances in the matter of delivery, the gift will be sustained." Throughout the opinion and in the cases cited, the intention of the donor is emphasized as the pivotal point and criterion in the determination of what should be deemed a delivery in law so as to

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[14] Pierce v. Pierce, 46 Ind. 86; Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56.

[15] State v. Bell, 136 N. C. 674; State v. Fulton, 149 N. C. 485. See also Boyd v. State, 53 Ala. 608.

[1] 130 S. W. 757.

make a valid gift. The amount and kind of delivery for gifts *inter vivos* and *mortis causa* are treated as being identical. Interpreting the language of the opinion in the light of the facts, the case is not authority for the proposition that any expression of intention to give by the donor, unaccompanied by an overt act of an attempt at actual delivery, would be a sufficient delivery to sustain a *donatio mortis causa;* yet the treatment of this class of gifts as requiring the same kind of delivery as gifts *inter vivos* would, it seems, if the analogy is followed closely, lead to such a holding. It is submitted that the distinction between gifts *inter vivos* and gifts *mortis causa* should be constantly kept in mind, and that the peculiarity of this class of gifts, owing to its origin in notions of equity, and its present conflict, which is more than apparent, with the statutes of wills—all these things should unite to give gifts *causa mortis* a field to themselves to which they should be closely confined by the law, and in which their operation should be free from the influence of principles governing *inter vivos* transactions.

The validity of a gift made in prospect of death was first recognized in England in Drury v. Smith in 1717.[2] Since that time the courts of England and America have, with a varied degree of hesitancy, adopted and applied the doctrine announced in that case. It is to-day too deeply rooted in our law to give any argument against its wisdom, founded upon the facts of its origin, much weight. However, to throw a light to guide in the application of the doctrine, and to determine what rules should govern, it may be profitable to recall, briefly, the causes which gave rise to *donatio mortis causa.*

The validity of this class of gifts was first recognized in the Roman law, and it is generally admitted that they owed their existence there to the stringent severity of the civil law in respect to wills.[3] Under the code of Justinian a will or testament was required to be in writing and signed and sealed by the testator in the presence of seven witnesses, who had to subscribe their names and affix their seals. In order to make, take under, or be a witness to a testament, the person was required to have the *testamenti factio*, a term implying such a participation in the law of private Roman citizens as to exclude over half the inhabitants for one cause or another.[4] The necessity and technical manner of naming heirs who were to take under or whom the testator wished to disinherit in a testament, and other matters of form which were rigidly enforced, made it practically impossible for anyone not learned in the law to draft a will. Thus many persons were not qualified to make wills and those who were so qualified, but who were overtaken by a sudden illness, were prevented from disposing of their property according to their desires. In an effort to remedy this situation, to some extent at least, the practice of declaring valid oral gifts made in prospect of death

[2] 1 P. Wms. 404.

[3] Headley v. Kirby, 18 Pa. 326.

[4] Institutes of Justinian, Lib. II, Tit. X, 6 D. XXVIII. 1, 22.-2.

and properly witnessed arose. But the Roman law guarded these gifts by the strictest forms of evidence. That it was fraud and perjury which that law sought to keep down in this class of gifts by strict requirements, both substantive and evidenciary, would appear from the nature of the requirements themselves.[5]

From the foregoing at least two things may be deduced which may be useful in determining what circumstances constitute, and what forms of evidence should be required to prove a gift made in prospect of death to-day: First, that they were in their inception recognized as an exception to the law of wills; and, second, that all the substantive and evidenciary requirements of the Roman law were calculated to negative fraud and perjury.

The law of England and America has never been as stringent and exacting in its requirements in reference to wills as was the Roman law.[6] In the absence, therefore, of many of the causes which gave rise to this class of gifts, and in the absence of any urgent need for it, the doctrine has been established in our law. We have the effect without the cause, and although it may have such intrinsic merit as to justify its perpetuation, yet it appears that it should be closely confined to its original scope, and that the same safeguards should be thrown around it to protect it from abuse through fraud and perjury.[7] The policy which gives a statute precedence over the common law of a subject which it purports to cover, demands that this class of gifts, which is an exception to the spirit of the statutes governing the disposition of property by wills in practically all jurisdictions in this country, be closely construed so as not to further infringe upon those statutes.

An examination of the cases reveals uniformity in the substantive requirements of gifts made in expectation of death. Personalty alone can be the subject of such a gift.[8] It is agreed that the donor must be overtaken by an illness of such a serious nature as to put him in expectation of death.[9] He must clearly show the intent to give. The gift must take effect presently and is *ipso facto* revoked by the donor's survival.[10] And, whether as an intrinsic element of the transaction or as a matter of evidence is disputed, it is required that there be a delivery by the donor to the donee or to some third person as agent of the donee to complete the delivery to the donee.[11] It has been in construing what constitutes a valid delivery that the courts

[5] Institutes of Justinian, Lib. II, Tit. VII, 1 D. XXXIX. 6, 35, 2, 4.

[6] The formalities attendant upon the execution of a will differ in many of the States in this country, and for this reason the statutes of the jurisdiction must be consulted. In the main they follow the Eng. Statute of Wills.

[7] Keepers v. Fidelity Title & Deposit Co. (N. J. Err. and App.), 56 N. J. L. (27 Vroom) 302, approving sentiment expressed in Ridden v. Thrall, 125 N. Y. 572.

[8] *In re* Hall's Estate, 38 N. Y. Supp. 1135 (N. Y., 1896).

[9] Gourley v. Linsenbigler, 56 Pa. 166 (1868).

[10] Hassell v. Basket, 107 U. S. 602.

[11] Ward v. Turner, 1 Dick. 170.

have differed in opinion. As in the principal case, many jurisdictions place these gifts on the same footing in respect to delivery as gifts *inter vivos*.[12] Others will hold a delivery valid in gifts *mortis causa* which would not be valid *inter vivos*, and a court of equity will compel the donor's executor to complete the gift.[13] It would seem that the latter is the correct view since the object of delivery in the two cases is entirely different. In the case of a gift *inter vivos* a complete transmutation of possession is necessary to give the donee any rights whatever in the subject of gift which he can enforce either at law or in equity. Without it the transaction amounts to nothing more than an expression of the donor's intention to give. On the other hand, the purpose of delivery in gifts *mortis causa* is, since death has eliminated the witness against whose estate the alleged gift is sought to be enforced, to prevent fraud and perjury on the part of the person claiming as donee. And the same extenuating circumstances which gave rise to gifts *mortis causa* should, it seems, come to the aid of an incomplete *inter vivos* delivery to make it a valid delivery in gifts *mortis causa*. A sudden and serious illness which prevents a man from executing a will may also prevent him from making manual delivery of objects far distant from his sick bed, or from executing the power of attorney necessary to transfer a chose in action *inter vivos*. And if he has done all within his power in the midst of extreme circumstances, and has shown his desire to make the gift by such an overt act as would be as capable of proof as a manual delivery would have been capable of proof, then it seems that the law which respects his desire in permitting him to make such a gift under any circumstances in exception to a statute of wills, should also respect that manifest desire by helping to complete the delivery. Adopting this view, a constructive or symbolic delivery, such as the handing over of a key to a chest or strong-box in which the subject of gift is deposited, or the handing over of a certificate of stock or a certificate of deposit without a power of attorney executed by the donor to the donee, which is in many jurisdictions necessary to transfer them *inter vivos*, with words of present gift, should constitute a valid delivery for a gift *mortis causa;* for it seems that these acts are as capable of clear proof and as effective in preventing fraud and perjury as a manual delivery of the subject of gift would be.

If this conclusion be accepted and if the reason supporting it be sound, it must be conceded that the pivotal point of a valid or invalid delivery in gifts *mortis causa* is not alone the proof of the intention of the donor. It strikes at the nature of that proof, and is the efficiency of the overt act evidencing that intention to negative fraud and perjury. Delivery is therefore an evidenciary requirement in this class of gifts, while it is a substantive requirement in gifts *inter vivos*, and the two should not be confused.

J. F. S.

[12] Pennington v. Gittings, 2 G. & J. 208 (Md.); Grymes v. Howe, 49 N. Y. 17.

[13] Veal v. Veal, 27 Beav. 303.

INJURIES RESULTING FROM FRIGHT OCCASIONED BY AN INVASION OF THE PRIVACY OF A DWELLING HOUSE.—With the great extension of the law of tort during recent years, the plaintiff is to-day allowed a recovery in many cases which, a few years ago, would hardly have been considered as conferring any right of action. This sort of legal growth is well illustrated in the case of Bouillon v. Laclede Gaslight Co.[1] recently decided. The facts were as follows:

The plaintiff, a married woman, occupied a flat in an apartment house, and was sick in bed in charge of a nurse. A collector of the defendant company presented himself at the door of the flat, which seems to have been in close proximity to the plaintiff's bedroom, and demanded admittance in order to read the gas meter. The nurse, who had opened the door, informed him that they did not use gas, that there was no meter in the apartment, that the plaintiff was very ill and that he, the collector, could not come in. The latter then used loud and profane language and tried to force his way into the flat, but finally desisted and went away. Shortly after this occurrence, the plaintiff became much worse and suffered a miscarriage, directly traceable, as shown by the testimony, to the fright occasioned by the conduct of the defendant's agent. A suit for damages was brought and a verdict for the plaintiff was finally had, after a reversal of the judgment of the trial court.

The facts set forth in the above summary of the case show the conduct of the defendant's servant to have been utterly unwarranted and indefensible, and to say that the plaintiff, who through the mental shock received therefrom suffered so seriously physically, could not have recovered, would have seemed hard indeed. No judge or jury, considering the matter from a merely moral standpoint, without reference to the technical rules of law would hesitate to award a woman substantial damages, who had passed through such an experience. But law, as has many times been pointed out, is not morals, and in consequence, is it possible to uphold the verdict given in the case under discussion?

While the general opinion seems to be that damages cannot be recovered for mere fright suffered through the defendant's negligence, a much closer question is presented where physical injury has followed that fright. Courts have held opposite views upon this point, but probably the more usual one is that no recovery is possible in the case of mere negligence[2] where there has been no physical impact. But it would seem that a different question is presented where in the place of being merely negligent, the defendant has acted with a wanton disregard of the plaintiff's rights, and has wilfully intended some sort of harm or fright to the latter. As was said in Spade v. Lynn & B. R. Co.,[3] in denying the right to recover—the

[1] 129 S. W. 401 (1910).
[2] Mitchell v. Rochester R. Co., 151 N. Y. 107 (1896).
[3] 168 Mass. 285 (1897).

case being one where the mere negligence of the defendant had resulted in plaintiff's physical injury through fright * * *. "It is hardly necessary to add that this decision does not reach those classes of action where an intention to cause mental distress or hurt the feelings, is shown * * * Nor do we include cases of acts done with gross recklessness or carelessness, showing utter indifference to such consequences when they should have been in the actor's mind."

Admitting, then, that many courts are prone to allow recovery in this class of case where physical injury results from fright following wanton reckless conduct on the part of the defendant, can the award in the present case be upheld?

It has always been a fundamental rule of law that to ground an action some legal right of the plaintiff's must have been invaded. And yet what right was invaded in this case? Evidently it was not her right to the peaceful enjoyment of real property, for from the report, the apartment does not seem to have been in her name. Yet without having title she could not well found an action of trespass *quare clausum fregit,* and recover consequential damages for her personal suffering. Nor was her right to personal security violated. The court distinctly states that there was no assault on the plaintiff, and without an assault an action would hardly have lain under the strict rules of the old pleading. And yet to a modern mind it seems but just that she should be compensated.

What, then, is the result in a case of this sort? While the desire to do justice is strong, the court is hampered by legal rules. It says consequently that the defendant was a trespasser, and continues that "the defendant is not to escape responsibility, for as a trespasser in her home he should respond for all the consequences traceable to his wrong as the proximate cause thereof." Do they not class him as a trespasser and allow this action in order to fix on him a responsibility which he would otherwise escape? Is he really a technical trespasser here in the sense of strict pleading any more than the defendant in Newell v. Whitcher,[4] was a trespasser when he entered his servant's bedroom? Yet the court in that case considered him as such "under the circumstances of the case" and allowed the action of trespass *q. c. f.* to be brought by the servant. Many other instances of this sort could be cited,[5] [6] where the court apparently feeling that there was a right and yet not possibly a legal right of the plaintiff's invaded, has looked around for some foundation upon which to permit an action for damages for injuries resulting from fright due to the invasion of this "right."

Does not this mean then, in the final analysis, that common justice recognizes in such circumstances that the inmates of a dwelling are entitled to protection from intrusion, and that such protection

[4] 53 Vt. 589 (1881).
[5] Watson v. Dilts, 116 Ia. 249 (1902).
[6] Brounback v. Frailey, 78 Ill. App. 262 (1898).

is as much due to all the members of the family, as to the owner of the premises? If this is the true doctrine of these cases, it probably will not be long before the courts will yield to the feelings of the community, and instead of searching for means to bring this new basis of action within the old forms, will admit freely that, as was said by the learned judge in his opinion in this case, "The privacy of the home enjoys the sanctity of the law," and will find a direct method of enforcing this right to privacy.

G. K. H.