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NOTES.

CARRIERS—LOSS OF GOODS—NO DECLARATION OF VALUE—The rule that a common carrier may not relieve itself by contract from liability for loss or damage to goods due to its negligence is now generally accepted,[1] yet even with the courts professing to follow it there is a tendency to limit recovery against the carrier to the amount agreed upon between the carrier and the shipper as the value of the shipment, though loss occurs through the carrier's negligence.[2]

A recent case in the Supreme Court of Oklahoma[3] raises the question of the validity of contracts limiting liability for negligence. An express company accepted a trunk for transportation from a point in one state to a point in another, with notice from the shipper of the value of the contents, without requiring a written declaration of value and without issuing a receipt limiting the valuation of the

[1] Armstrong v. U. S. Express Co., 159 Pa. 640 (1894); Pierce v. Southern Pac. Co., 120 Cal. 156 (1898).

[2] Richmond v. Payne, 86 Va. 481 (1890); Smith v. American Express Co., 108 Mich. 572 (1895); Ulhman v. C. T. N. W. R. Co., 112 Wis. 150 (1902).

property in case of failure to deliver. The court held that the shipper was entitled to recover the reasonable value of the property lost.

The court said: "From the fact that the company had a tariff of rates approved by the Interstate Commerce Commission, notice of which was posted in its office, the law did not imply a contract of shipment at the minimum rate and at a released valuation. . . . The approved tariff authorized the company to enter into a contract of shipment by which its liability might be limited to the express valuation named in the contract of shipment, but when the company accepted the trunk for shipment, with notice from the shipper of the value of its contents and did not require an express declaration of value, then the law made a contract for the parties whereby the obligation was imposed upon the company to safely deliver the property within a reasonable time and placed the obligation on the shipper to pay the tariff rate according to the value of the property shipped."

It is clear that if a shipper requests and receives a certain service, he is bound thereby to pay the rate scheduled for that service, regardless of his knowledge of the rate or of any inconsistent contract made by the carrier with him.[4] It is usually said that the shipper has notice of the appropriate rate by reason of its being on file with the Commission. As a matter of fact, the shipper in such a case has no notice of any kind, but in order to insure that every shipper receiving the same service shall pay the same rate, and so prevent discrimination, the law binds each to pay the legal rate, regardless of notice or lack of notice.[5] Taking literally this misleading phrase, "presumed to have notice", it may seem logical to say if a shipper has notice of a rate by the filing of it, he also has notice of the grade of service, a limitation clause or what might be called an offer for a valuation agreement, provided that is filed. And so the Supreme Court of the United States in *Boston & Maine Railroad* v. *Hooker*[6] held that because the carrier has filed a regulation with the Interstate Commerce Commission as to how the agreed value shall be reached, the shipper is affected with constructive notice of the regulation and that therefore where he fails to declare a greater value he can be said to have agreed or represented that the goods are worth only a limited amount. And further, if this regulation as to the manner of valuation is unreasonable, the court holds that it cannot be declared invalid in a collateral proceeding, but must be directly attacked before the Interstate Commerce Commission.[7]

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[3] American Express Co. v. Merten, 141 Pac. Rep. 1169 (Okl. 1914).

[4] Gulf, Colorado, *etc.*, Ry. v. Hefly, 158 U. S. 98 (1895); Texas & Pacific Ry. v. Mugg, 202 U. S. 242 (1905).

[5] Chicago & Alton R. Co. v. Kirby, 225 U. S. 155 (1911).

[6] Boston & Maine Ry. v. Hooker, 34 Sup. Ct. Rep. 526 (1914).

[7] T. & P. Ry. Co. v. Abilene Cotton Oil Company, 204 U. S. 426 (1906); Clement v. T. & N. R. Co., 153 Fed. Rep. 979 (1907).

The issue then is what kind of service did the shipper receive. Since legally the only type of service is one with unlimited liability unless an agreement or statement of valuation is made by the shipper, he cannot be said to have requested,[8] or in fact to be entitled to limited service without the creation through constructive notice of an act on his part. Such a result as was reached in the Hooker case[9] is a radical and unjust extension of the doctrine. If followed out logically, it would allow common carriers to make use of an advantageous position to overreach their patrons. They might discard their present lengthy bills of lading, issue simple receipts and still bind the shipper without his knowledge by the mere filing of regulations with the Commission.

It is a settled rule that the normal shipment is with liability for the entire value of the goods.[10] Carriage with limited liability, is an exceptional service which exists only when the shipper by shipping on a certain agreed or represented valuation has estopped himself to assert a greater value. This point was decided in the case of *Hart* v. *Pennsylvania R. R.*[11] and has subsequently been followed in many jurisdictions.[12] And, it now represents the prevailing view. Nevertheless, in a few states, its soundness is questioned and a contrary rule established.[13]

The result of the Hart case[14] is to relieve the carrier from obligation to pay to the shipper the full value of the goods and that too, though the loss has happened through the carrier's negligence. Since the general rule forbidding the limitation of liability for negligence is well established, it is important to seek the reason for this conclusion. The Hart case and others in accord with it suggest estoppel as the foundation upon which they may be rested.[15] It is clear that where the shipper to secure a lower rate misrepresents the value and the carrier is misled by such misrepresentation, and loss occurs in consequence of the lower valuation, a case is presented to which the principle of estoppel applies. In the Hart case the carrier knew the true value of the goods shipped. Some cases, however, disclose

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[8] "There can be no limitation of liability without the assent of the shipper." Can. v. Texas & Pacific Ry. Co., 194 U. S. 42 (1903).

[9] Boston & Maine Ry. v. Hooker, *supra*, n. 6.

[10] The Majestic, 166 U. S. 375 (1896).

[11] Hart v. Pennsylvania R. R., 112 U. S. 375 (1896).

[12] Duntley v. Boston & Me., 66 N. H. 263 (1890); Smith v. American Express Co., 108 Mich. 572 (1896); Loeser v. Chicago, *etc.*, R. Co., 94 Wis. 571 (1896); Graves v. Adams Express Co., 176 Mass. 280 (1900); Georgia Southern Ry. Co. v. Johnson, 121 Ga. 231 (1904).

[13] Baughman v. Louisville R. R., 94 Ky. 150 (1893); Hughes v. P. R. R. Co., 202 Pa. 222 (1902).

[14] Hart v. Pa. R. R. Co., *supra*, n. 11.

[15] Hart v. Pa. R. R. Co., *supra*, n. 11; Graves v. Lake Shore R. R., 131 Mass. 33 (1881); Georgia Ry. Co. v. Johnson, *supra*, n. 13.

all these facts and are properly rested on estoppel.[16] Since estoppel arises only where there is a misrepresentation, it would seem that it can play no proper part when the carrier knows the true value of the goods shipped and is consequently not misled by the shipper's valuation. Estoppel, therefore, has a proper place only where the carrier does not know that the true value is misstated.

If the estoppel theory is unsound, the reason can apparently be rested only on the basis of contract. Here, again, if the carrier knows the true value of the goods shipped, it is not easy to understand on what theory to support the conclusion reached in the cases. Since the carrier and the shipper are both aware of the true value of the goods shipped, the placing of a lower valuation thereon is a patent effort to absolve the carrier from a portion of his liability. The courts agree that where the stipulation is in form a limitation of liability to a specified amount, such limitation will not be upheld in cases of negligence and why a different result should be reached because the parties with full knowledge of the facts decide upon an agreed valuation is one for which we cannot give a reason.

It is true that the cases have not turned on the question of the carrier's knowledge or ignorance of the true value.[17] Such ignorance or knowledge on the part of the carrier of the true value of the goods should constitute we believe, the decisive factor in determining the validity or invalidity of a stipulation as to agreed valuation where the loss occurs through negligence. The carrier's duty should be to ship only at the true value, where known, since attempted limitation of liability to a fixed sum is not permissible. If the courts sustain contracts of this kind entered into with full knowledge on both sides of the true value, simply because they take the form of agreed valuation, an important exception has developed to the general rule forbidding contracts by common carriers limiting liability for negligence.

Clearly, as a mode of protecting the carriers against false valuations and of liquidating the damages in advance, an agreed valuation commends itself to everyone. Since value is a matter of opinion where such agreed value is reasonably close to the true value, courts might hold the spirit of the rule forbidding limitation of liability for negligence is not violated by upholding such agreed valuation. Accordingly some cases have made the validity of the valuation depend solely on its approximating with reasonable accuracy the true value of the goods.[18]

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[16] Everett v. Southern Express Co., 46 Ga. 303 (1872); Oppenheimer v. U. S. Express Co., 69 Ill. 62 (1873).

[17] Reference thereto has frequently been made. Southern Express Co. v. Everett, 37 Ga. 688 (1868); Baughman v. Louisville R. R., 94 Ky. 150 (1893). In some cases it has been distinctly repudiated as an essential element. Douglas Co. v. Minn. Transfer Ry. Co., 62 Minn. 281 (1895), where the decision is made to turn on the fairness of the valuation.

[18] Murphy v. Wells, Fargo & Co., 108 N. W. Rep. 1070 (Minn. 1904); Nashville Ry. Co. v. Heikens, 79 S. W. Rep. 103 (Tenn. 1904).

The further question arises as to whether the provision of the Carmack Amendment to the Interstate Commerce Act[19] has the effect of changing the rule laid down in the Hart case.[20] The cases hold very generally, however, that the Carmack Amendment does n t deprive the carrier of the right to make a fair contract with the shipper, fixing an agreed valuation upon the goods to be transported.[21]

G. W. K.

CORPORATIONS—POWER TO ACT AS ACCOMMODATING INDORSER—In Pennsylvania, for the first time, the precise question whether a corporation will be liable on its endorsement of a promissory note when such endorsement was for accommodation, and the paper passes into the hands of a *bona fide* purchaser for value before maturity without notice of the character of the endorsement, has been passed on by the Supreme Court, and decided in the affirmative. The Court took the position that a corporation having either express or implied power to issue negotiable paper is presumed to act within the scope of that authority and that therefore there was nothing to put the holder on notice that the endorsement was irregular, and consequently he is entitled to recover.[1]

The first question to be considered is when the power to issue negotiable paper may be implied, and on this point there is an interesting difference of judicial opinion between the courts of England and those of the United States, the latter being far more lenient. In England a corporation has not, as one of the mere incidents of its existence, the power to make notes, accept bills of exchange, *etc.* The rule is that unless the nature of the business in which a corporation is engaged raises a necessary implication of the existence of such a power, it does not exist, and it seems that a corporation whose business does not require the issuing of negotiable paper under ordinary circumstances has no implied authority to issue such a paper under any circumstances whatever. The reason for the rule as stated by Chief Justice Erle in *Bateman* v. *Mid Wales Railway Company*[2] is this: "The bill of exchange is a cause of action by itself, which binds the acceptor in the hands of any endorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or invalid according as the original consideration between the parties was good or bad,—or whether in the case of a corporation,

[19] Act of Feb. 4, 1887, c. 104, §20, 24 Stat. 386, U. S. Comp. St. 1901, as amended by Act of June 29, 1906, c. 3591, §7, 34 Stat. 593, U. S. Comp. St. Supp. 1911.

[20] Hart v. Penna. R. R., *supra*, n. 11.

[21] Albert Bernard v. Adams Express Co., 205 Mass. 254 (1910); Adams Express Co. v. Croninger, 226 U. S. 491 (1912).

[1] Cox and Sons Co. v. Northampton Banking Co., 245 Pa. 418 (1914).

[2] L. R. 1 C. P. 499 (Eng. 1866).

the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated. Some bills might be given for a consideration which was valid, as work done for the company, and others as a security for money obtained on a loan beyond their borrowing powers. It would be a precarious thing to hold that, in respect of the former, the corporation might be sued by the endorsee, in the latter, not." This ground appears somewhat narrow and technical but the sentiment of the English courts has apparently been that it was necessary to draw the line somewhere and that this was a convenient place. Accordingly it has been held in England that the right to issue negotiable paper cannot be implied from the business of a railway company,[3] a gas company,[4] or a water works company,[5] but such a power has been allowed a financial company.[6] The English Companies Act, 1862, however, left any company formed under its provisions at liberty to assume the power to issue negotiable paper in its memorandum or articles of association.[7] In the United States, as noted above, the courts are far more prone to imply this power than in England, the theory being that the issuing of negotiable paper is merely a means of accomplishing the chartered purposes of a corporation. The power has been implied from that of borrowing money,[8] acquiring property,[9] or from that of making contracts generally.[10] This broad ground is that every corporation has the power, even though not expressly granted, of making contracts to effectuate any of the purposes of its creation, and that the power to contract inevitably involves the power to create a debt, which in turn gives rise to the power to issue negotiable paper. Although technically this appears somewhat less accurate than the English theory, it is submitted that it is calculated in a much greater degree to effectuate the purposes for which corporations are formed. Accordingly the courts of the various states have held that railroad,[11] mining,[12] and manufacturing corporations [13] of any description may issue negotiable paper without having the power to do so expressly granted in their charters.

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[3] Bateman v. Mid-Wales Ry. Co., *supra*, n. 2.

[4] Bramah v. Roberts, 3 Bing. N. C. 963 (Eng. 1837).

[5] Neale v. Turton, 4 Bing. 149 (Eng. 1827); Broughton v. Manchester Water Works Co., 3 Barn. & Adol. 1 (Eng. 1819).

[6] *In re* Land Credit Company of Ireland, L. R. 4 Ch. 460 (Eng. 1869).

[7] Peruvian Railways Co. v. Thames and Mersey Marine Insurance Co., L. R. 2 Ch. 617 (Eng. 1867).

[8] Richards v. Merrimack & Connecticut River R. R. Co., 44 N. H. 127 (1862).

[9] Meade v. Keeler, 24 Barb. 20 (N. Y. 1857).

[10] Watt's Appeal, 78 Pa. St. 370 (1875).

[11] Lucas v. Pitney, 27 N. J. L. 221 (1858); R. R. Co. v. Howard, 7 Wall. 412 (U. S. 1868).

[12] Mees v. Rossie Lead Mining Co., 5 Hill 137 (N. Y. 1843).

The next question to be considered is whether a corporation can be bound by its signature on the note of another person for the accommodation of the latter. Subject to the exceptions mentioned *infra,* the rule is well established that the corporation is not bound, and the reason is that the directors are authorized by the stockholders to do business for corporate purposes, but are not authorized to use the corporation to perform acts of friendship for others. Accordingly the general rule is that the accommodation endorsement, signature or guaranty of a corporation is illegal and cannot be enforced.[14] But, in accord with the principal case an exception is made in the case of *bona fide* holders,[15] provided that the corporation in question had the power, express or implied, to issue negotiable notes. The reason as stated by Judge Hoar of the Supreme Judicial Court of Massachusetts[16] follows: "The doctrine of *ultra vires* has been carried much farther in England than the courts of this country have been disposed to extend it, but with just limitations, the principle cannot be questioned, that the limitations to the authority, powers and liability of a corporation are to be found in the act creating it. And it no doubt follows that when powers are conferred and defined by statute, everyone dealing with the corporation is presumed to know the extent of those powers. But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other party, the doctrine of *ultra vires* does not apply." But if the note were given by a corporation which was prohibited by its charter from so doing, or by one in which the power to give notes could not be implied, it would be void in the hands of the payee and all subsequent holders because all persons dealing with a corporation are bound to take notice of its chartered powers.[17]

It is interesting to note that notwithstanding the general rule on the subject, which is in accord with that laid down in the principal case, there is no rule of public policy which prohibits an accommodation endorsement of commercial paper by a corporation. Consequently, if such an endorsement is made with the knowledge and consent of all the directors and stockholders, and creditors' rights are not affected, the endorsement is valid and enforceable.[18]

J. W. L.

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[13] Monument National Bank v. Globe Works, 101 Mass. 57 (1869); *cf.* Timberlake v. Order of Golden Cross, 208 Mass. 422 (1911).

[14] 3 Cook on Corporations (6th Ed.) 2683; Culver v. Reno Real Estate Co., 91 Pa. 367 (1879); Park Hotel Co. v. Fourth National Bank, 86 Fed. Rep. 742 (1898).

[15] Bird v. Daggett, 97 Mass. 494 (1867); National Bank of Commerce v. Sancho Packing Co., 186 Fed. Rep. 260 (1911).

[16] Monument National Bank v. Globe Works, *supra,* n. 13.

[17] Elliott Nat. Bank v. Western, *etc.,* R. Co., 2 Lea 676 (Tenn. 1879).

[18] Murphy v. Arkansas, *etc.,* Co., 97 Fed. Rep. 723 (1899); Martin v. Niagara, *etc.,* Co., 122 N. Y. 165 (1890); *cf.* Goss & Co. v. Goss, 147 App. Div. 698 (N. Y. 1911).

EVIDENCE—TRAILING BY BLOODHOUNDS—The method of trailing criminals by bloodhounds has given rise to the interesting question as to the admissibility of such a transaction as a means of identifying the perpetrator of a crime. Notwithstanding the antiquity of the practice,[1] the subject apparently did not come before the courts until quite recently. In what appears to be the earliest reported decision,[2] evidence of the trailing of a suspected murderer by a bloodhound was admitted without much discussion. Shortly afterwards, it was held that "It is a matter of common knowledge and therefore a matter of which courts will take judicial notice that bloodhounds are possessed of a high degree of intelligence and acuteness of scent, and may be trained to follow human tracks with considerable certainty and success, if put upon a recent trail."[3]

Although most authorities[4] are in favor of the admission of "Bloodhound evidence" when certain conditions precedent have been satisfied, its dangerous character has been universally recognized. Thus, in the leading case of *Pedigo* v. *Commonwealth*,[5] in which the court admitted such evidence, it is stated in the majority opinion that "It is well known that the exercise of a mysterious power not possessed by human beings begets in the minds of many people a superstitious awe like that inspired by the bleeding of a corpse at the touch of the supposed murderer, and that they see in such an exhibition a direct interposition of divine providence in aid of human justice. The very name by which the animal is called has a direct tendency to enhance the impressiveness of the performance, and it would be dangerous in the extreme to permit the introduction of such testimony in a criminal case under conditions which did not fully justify its consideration as a circumstance tending to connect the accused with the crime."

While there are conflicts of opinion regarding the preliminary elements requisite to the admissibility of "bloodhound evidence" it is clear that those courts which permit its introduction are seeking merely to establish a proper foundation and to provide adequate safeguards therefor.[6] Preliminary to the admission of such testimony,

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[1] "Bloodhounds, or as they are sometimes termed, sleuthhounds, have been employed since the times of the Romans in pursuing and hunting human beings, and a small variety, known as the Cuban bloodhound, was used to track fugutive negroes in slaveholding times." Encyclopædia Britannica (11th Ed.) Vol. VIII, p. 378.

[2] Hodge v. State, 98 Ala. 10 (1893).

[3] State v. Tall, 3 Ohio N. P. 125 (1896).

[4] Davis v. State, 47 Fla. 26 (1904); Pedigo v. Commonwealth, 103 Ky. 41 (1898); State v. Rasco, 238 Mo. 535 (1911); Parker v. State, 46 Tex. Crim. 461 (1904); Underhill, "Criminal Evidence" §374 (a).

[5] *Supra*, n. 4.

[6] Duffy, J., in dissenting opinion to Pedigo v. Commonwealth, *supra*, n. 4, said: "It is true that the majority opinion so restricts such proof and requires so many conditions precedent, that, if the opinion in question should

the bloodhound in question must be shown to have been trained to follow human beings by their tracks and scent and to have been tested, on other occasions, as to its accuracy and acuteness.[7] It must appear that the person in control of the dog and who is testifying about him is reliable.[8] Also, the dog must have been placed upon the trail at a point where the circumstances tend clearly to show that the guilty person has been and has made the trail.[9] Some authorities require that the pedigree of the dog be proved.[10] As a general rule, the facts as to the tracking by a bloodhound will not be admitted, unless corroborated by measurements of the footprints or by some other evidence concerning the identity of the accused.[11]

The case of *Brott* v. *State*[12] has been regarded as contrary to the weight of authority.[13] Whether or not the court's opinion, which disapproved of the rule existing in most states, is *dictum*,[14] it is, nevertheless, "forcible and calculated to excite great caution, if not entire distrust."[15] The court criticises the common belief as to the capacity of bloodhounds as a "delusion which abundant actual experience has failed to dissipate." The effect of the admission is vividly pictured as follows: "If such evidence were held to be legal evidence, it would, standing alone, sustain a conviction, and courts in this golden age of enlightenment, would now and again be under the humiliating necessity of adjudging that some citizen be deprived of his property, his liberty, or his life, because, forsooth, within twenty-

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be strictly adhered to, no great injustice would very often result from evidence admitted under the ruling in question."

[7] State v. Adams, 85 Kan. 435 (1911).

[8] State v. Rasco, *supra*, n. 4. It cannot be shown on cross-examination that other dogs owned by the same man were unreliable. Simpson v. State, 111 Ala. 6 (1896). But a witness may compare the dog in question with other dogs he has seen perform, in order to show his qualification to have an opinion as to when a dog has been properly trained. Gallant v. State, 167 Ala. 60 (1910).

[9] State v. Moore, 129 N. C. 494 (1901).

[10] State v. Hunter, 143 N. C. 607 (1907); State v. Dickerson, 77 Ohio, 34 (1907); *contra*, Spears v. State, 92 Miss. 166 (1908); Chamberlayne, "Modern Law of Evidence," Vol. 3, 1760. In the only civil case, in which the question has arisen, it was held that in an action for unlawful search for stolen goods, evidence that bloodhounds trailed to the plaintiff's house was admitted solely for the purpose of mitigating damages, by showing want of actual malice. It was held, however, that it was error to admit testimony laudatory of the pedigree, training and usefulness of the dogs in question. McClung v. Brenton, 123 Ia. 368 (1904).

[11] Cases cited in n. 5; *contra*, State v. Hall, *supra*, n. 3; *dictum* in State v. Freeman, 146 N. C. 615 (1908).

[12] 70 Neb. 395 (1903).

[13] Wigmore on Evidence, Vol. 5, p. 22.

[14] The opinion states: "The conduct of the dogs was, perhaps, rightly received in connection with an admission made by Brott, as evidence tending to prove that he committed the crime charged." The court added that such evidence was incompetent to prove independent crimes to which the admission did not relate.

[15] Price, J., in State v. Dickerson, *supra*, n. 10.

four or forty hours after the commission of a crime, a certain dog indicated by his conduct that he believed the scent of some microscopic particles supposed to have been dropped by the perpetrator of the crime, was identical, or closely resembled, the scent of the person who had been accused and put upon trial."

In the recent case of *People* v. *Pfanschmidt*,[16] the question as to the competency of "bloodhound evidence" again arose and was decided in the negative. The facts of the case are unique. A bloodhound was given the scent from a horse track, made thirty hours before, at the scene of the murder of which the defendant was accused. It took up the trail for a short distance and was then carried in an automobile until within short distances of crossroads where it was allowed to get out and again pick up the scent. The hound trailed to the defendant's buggy standing outside his stable, then went to his house and finally returned to the stable where he lay down behind a particular horse belonging to the defendant. The court in rejecting this evidence said: "Neither court nor jury can have any means of knowing why the dog does one thing or another in following in one direction instead of in another; that must be left to his instinct without knowing upon what it is based. The information obtainable on this subject scientific, legal, or otherwise, is not of such a character as to furnish any satisfactory basis or reason for the admission of this class of evidence."

Although the court reached the conclusion that "testimony as to the trailing of either man or animal should never be admitted in any case," it was greatly influenced by the fact that many of the various precautionary prerequisites of admissibility, which have been previously stated, had not been satisfied. The opinion cannot be cited as being flatly contrary to the sound rule which has been followed practically universally,[17] since the court was obviously controlled by considerations which concerned the weight rather than the admissibility of the evidence in question.

A. L. L.

HUSBAND AND WIFE—FRAUD ON MARITAL RIGHTS—There is little question that at common law a woman cannot on the eve of or in contemplation of marriage dispose of her property without the knowledge of her intended spouse so as to deprive him of his legal interest in it, because such a conveyance would be a fraud on his marital rights.[1] The reason for the rule is clear: since the husband was entitled to all his wife's personalty and to the rents, issues and profits from her realty during coverture and to curtesy after her death, a conveyance by the wife made just before marriage would rob him

[16] 104 N. E. Rep. 804 (Ill., 1914).

[17] Except in Brott v. State, *supra*, n. 12.

[1] Strathmore v. Bowes, 1 V. 22 (Eng. 1789); Downes v. Jennings, 32 Beav. 290 (Eng. 1863).

of valuable rights which should vest in him immediately upon the marriage. These rights in his wife's property were to compensate him for the liability which the law imposed on him for his wife's ante-nuptial debts, and any disposition by the prospective wife which intentionally deprived him, without his knowledge or consent, of valuable rights which he was entitled to expect to acquire at marriage, was clearly a fraud on his marital rights. Similarly, a conveyance of realty by a husband on the eve of marriage would be a fraud on the marital rights of the wife, because it would deprive her of her dower rights.[2] The essence of the fraud in these cases is found in the deprivation of one spouse of rights which would come into existence at marriage, and in the making a disposal of property just before and in contemplation of marriage which the law would not allow to be made at any time after marriage.

When, however, the husband attempts to dispose of his personal property just before marriage, an essentially different problem is presented, and the rule declaring void the conveyances previously considered should have no application. A wife on marriage receives in her husband's personalty no such interest as in his realty or as he in all her property, real and personal. True, she is entitled to support during coverture, to alimony in case of a divorce, and, if she survive him, to a widow's share in the personal property of which he dies possessed; but these rights cannot be considered as rights in his property which she would acquire upon marriage, and hence a transfer by him before marriage cannot be a fraud on her because it deprives her of no rights which she would otherwise acquire.[3]

The various Married Women's Property Acts passed during the last century have, it is submitted, practically abrogated the doctrine of ante-nuptial conveyances in fraud of the husband's marital rights as far as personal property is concerned, because under these acts a husband acquires in his wife's property no greater rights than she in his, and since either can freely dispose of his or her personal property after marriage,[4] either should be able to do so before. There are no English cases on this point since the passage of the Married Women's Act in 1882, but it is taken for granted by text writers that this is the result of that act.[5] This doctrine has not been accepted by all the States in this country, because in some cases it has been held that a woman cannot, even after the passage of these acts, transfer her property just before marriage without knowledge of her prospective husband.[6] A recent case which recognizes this principle and

[2] Leach v. Duvall, 8 Bush. 201 (Ky. 1871); Collins v. Collins, 98 Md. 473 (1904); Hach v. Rollins, 158 Mo. 182 (1900).

[3] M'Keogh v. M'Keogh, I. R. 4 Eq. 338 (Ireland, 1870).

[4] Robertson v. Robertson, 147 Ala. 311 (1906); Crofut v. Layton, 68 Conn. 91 (1896).

[5] 2 Vaizey on Settlements 1585; 1 Leading Cases in Equity 645; 2 Pom. Eq. Juris. §920.

[6] Duncan's App., 43 Pa. 67 (1862); Baker v. Jordan, 73 N. C. 145 (1875). *Contra:* Butler v. Butler, 21 Kan. 521 (1879); 7 N. D. 475 (1898).

draws a distinction between conveyances before and after marriage is *Windolph* v. *Girard Trust Co.*,[1] where a deed by a married woman of her separate estate to trustees to hold for her for life and at her death to distribute among certain beneficiaries, was held valid although its effect was to deprive the husband of the share to which he would have been entitled had she died possessed of this property. Justice Mestrezat, in discussing the rights of a wife in her separate property, held: "She may sell her personal property, give it away, or make any other disposition of it she desires during her life and he cannot complain, for the all-sufficient reason that he has no interest in the property. She is the owner and has absolute control over it and hence in disposing of it during life she infringes no property or other right of her husband. He does not sustain the relation of creditor to his wife. If she does not die vested of it, he can never acquire any interest in the property. It is manifest, therefore, that having no right or interest in the property as husband, there are no marital rights of which he can be defrauded by his wife's disposal of the property during life by gift or otherwise. . . . The present case is not a secret voluntary conveyance of her property by a party in contemplation of marriage without the consent of her husband. That was declared to be a fraud upon the marital rights of the other party, and, of course, avoided the transfer of the property as to him."

It is submitted that this decision is correct on its facts, but that the distinction which the court attempted to draw between transfers before and after marriage is unsound. The arguments advanced to support the disposition after marriage apply with equal force to a disposition before marriage; in neither case should the transfer be set aside, because in neither case is there any right which is injured.

T. R. Jr.

WILLS—DEPENDENT RELATIVE REVOCATION—The interesting question of dependent relative revocation was brought up in a recent Pennsylvania decision.[1] In that case the testator, believing that his estate would be rather small deemed the residue a suitable gift for his executors and so willed, but later, having ascertained that after the payment of debts and legacies, there would be a residue of more than $150,000, he wrote a codicil, within thirty days of his death, in which he bequeathed the residue to a charity, adding these words: "In order to carry out the foregoing bequest, clause No. 29 of my will, giving the residue to my executors is hereby abrogated." The executors contended that the revocation was dependent upon the fulfillment of the bequest, but the court took the view of the heirs that where a bequest with revocation of inconsistent be-

[1] 245 Pa. 349 (1914).

[1] Melville's Estate, 245 Pa. 318 (1914).

quests attached, fails not through any defect in the instrument itself, but through the incapacity of the devisee or legatee to take, through some statutory disability as mortmain acts, *etc.*, the doctrine of dependent relative revocation does not apply and the decedent is intestate as to that portion of his property.

The doctrine of dependent relative revocation is an attempt on the part of disappointed legatees to make a condition intended out of a reason given, in order to secure to the testator his elusive "second choice." It operates on two theories in different lines of cases. The narrower and more legitimate application of the doctrine is to declare a revocation void if based on facts which the testator believed to be true, but which are in fact false and which were not within the personal knowledge of the testator.[2] The plaintiffs, the executors, in the Melville case[3] rested on the broader view of the doctrine that in every case where there is a reason given for a revocation and that reason fails, the revocation should be void, on the theory that the revocation was conditional upon the carrying out of the whole purpose of the testator. In England, the courts have gone so far on this theory as to hold that when a man revokes an old will, knowing he has no other, but with the intention of making another, the revocation will be considered conditional upon the execution of a new will.[4] Under practically the same circumstances in a comparatively recent case in Pennsylvania, the court would not listen to evidence tending to show that the revocation was to depend on the making of a new will and the result of such revocation was clearly shown by the court: "She intentionally destroyed the will, declaring that she meant to make another. She knew what she was doing and the effect of it and she did it *animo revocandi* with intention to produce that effect."[5]

There are two important restrictions on the working of this doctrine, which, if worked out to their logical conclusion, would limit the doctrine to cases of mistake. The first is that the facts from which the condition is implied must be apparent on the face of

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[2] Campbell v. French, 3 Ves. Jr. 321 (Eng. 1797).

[3] *Supra*, n. 1.

[4] Winsor v. Pratt, 2 Brod. & B. 650 (Eng. 1821); Dixon v. Solicitor of the Treasury, 21 T. L. J. 145 (Eng. 1904); as to setting up original terms when still decipherable, although covered by unattested alterations, see *In re* Knapen's Will, 75 Vt. 146 (1903).

[5] Emenuker's Estate, 218 Pa. 369 (1907), in which the new will was to be an exact duplicate of the old, except that it was to contain bequests of one dollar to each of testatrix's children, since she was advised that was essential to the validity of the will. A Georgia case would limit the doctrine to cases of equivocal acts which may or may not constitute a revocation, in which case there is no revocation unless a new will is made, but the case holds that if the will is once revoked, it cannot again be revived, no matter what the intention of the testator may have been as to making a new mill or setting up an unattested one. McIntyre v. McIntyre, 120 Ga. 671 (1904).

the will and cannot be proved by facts *dehors* the instrument.[6] This is no more than saying that the court can take into consideration only what the testator has declared in statutory form to alter his other expressions so declared. Why not go a step further and say that a revocation shall not be conditional unless the testator has said and said in statutory form, that it should be conditional? The second limitation is that the doctrine cannot apply when the facts on which the revocation was based were peculiarly within the personal knowledge of the testator.[7] This amounts to an admission that testators may assign as reasons for a revocation facts which they know to be false. And there is the inherent weakness of the whole doctrine of dependent relative revocation. There is no denying the fact that testators are deceitful. Many a worthy charity has been saved from bankruptcy by the political rivalry of testator and legatee, yet in revoking the bequest rashly made to his friend of former years, the testator will invariably say, "Having at last been brought to see things in their true light, and realizing that these worldly goods which I have accumulated are not mine to dispose of as I will, but that they are a noble trust, *etc.*, it is my unpleasant duty, in order to carry out this bequest to this charity to revoke the bequest to my friend." One can hardly say that the revocation was dependent upon the carrying out of the bequest. The revocation was the important thing and not the bequest. The Melville case[8] is practically the same, except that the testator had loftier motives. As courts have time and again argued, there is no proof that decedent would not have preferred intestacy to the carrying out of the revoked will or codicil.[9]

As a matter of fact, all jurisdictions agree that on the facts of the Melville case, the doctrine should not apply, but it is impossible to see how that is held consistently with other cases in jurisdictions where the doctrine applies even where there is no element of mistake. After all, when it is possible for a man to make a revocation conditional in terms[10] there seems to be no excuse for implying one where he does not declare the condition to exist.[11]

J. F. H.

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[6] Dunham v. Averill, 45 Conn. 61 (1877); Anderson v. Williams, 104 N. E. Rep. 659 (Ill. 1914).

[7] Hayes v. Hayes, 21 N. J. Eq. 265 (1870).

[8] *Supra*, n. 1.

[9] Dickinson v. Swatman, 4 Sw. & Tr. 205 (Eng. 1860), which has been criticised in England, but followed almost everywhere else.

[10] *In re* Hamilton's Estate, 74 Pa. 69 (1873); *in re* Stamm's Will, 94 N. Y. Supp. 588 (1905), bequest conditioned on legatees' presenting no claims against estate.

[11] See 49 U. OF P. L. R. 21 (1901) for a review and analysis of the leading cases on this subject. An important case since decided is Anderson v. Williams, *supra*, n. 6, in which testator reduced fee to spendthrift trust. Court refused to rule that on death of husband, on whose account the trust was made, the revocation was void.