# University of Pennsylvania Law Review

## And American Law Register

FOUNDED 1852

Published During the Academic Year by the University of Pennsylvania Law School, 34th and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS




## NOTES

CONFLICT OF LAWS—LIABILITY OF A TELEGRAPH COMPANY FOR NEGLIGENT TRANSMISSION OF A TELEGRAM—MENTAL SUFFERING.—From a recent decision in the Supreme Court of North Carolina[1] it would appear that a telegraph company having offices in the State must be especially watchful of the degree of care exercised in delivering its messages, or subject itself to substantial damages for mental anguish and suffering undergone by the addressee. A message delivered to the defendant company in Roanoke, Va., addressed to the plaintiff at Winston-Salem, N. C., announcing the death of a grandchild of the plaintiff, was duly transmitted by the defendant to its offices at Winston-Salem, but through the negligence of the defendant's agent at this latter place was not delivered to the plaintiff until two days after its receipt. As a result of this negligence, the plaintiff was prevented from attending the funeral of the deceased grandchild. Substantial damages were awarded the plaintiff despite the fact that the laws of Virginia do not permit recovery for mental suffering.

The right of the addressee to recover for the negligent trans-

[1] Penn. v. Western Union Tel. Co., 75 N. E. Rep. 16 (N. C., 1912).

mission of a telegram is recognized everywhere in America today,[2] although such is not the case in England.[3] The only question which bothers the Courts concerns the form of action under which such recovery may be had. Some few cases permit an action *ex contractu* only,[4] but probably the majority agree that an action *ex delicto* is also maintainable.[5] When the suit is in contract the well recognized principle that in the absence of any indication of a contrary intention, the validity, obligation and construction of the contract are, conformably to the presumed intentions of the parties, governed by the laws of the place of performance.[6] What constitutes the place of performance has been a puzzling question to the Courts, and as a result the many decisions are in hopeless conflict. Those Courts which hold that the place of performance is in the State in which the contract originates apply the law of that State in actions *ex contractu* for the recovery of damages for mental anguish,[7] while those which hold that the place of receipt of the telegram must be considered the true place of performance, apply the law of this latter place.[8] A penal statute permitting the recovery of a stipulated sum in addition to the actual damages proven is never enforced except in the State in which it has been enacted.[9] Nor will a contract valid in one State be enforced in another if such contract is clearly void under the law of the forum.[10]

So long, then, as an action against a telegraph company for negligent transmission of a telegram is considered *ex contractu*, or even *ex delicto* arising out of a contract relation,[11] there ought to be no great difficulty in determining the liability under the fa-

[2] Milliken v. Western Union Tel. Co., 110 N. Y. 403 (1888); Young v. Western Union Tel. Co., 107 N. C. 370 (1890); N. Y. Tel. Co. v. Dryburg, 35 Pa. St. 298 (1860).

[3] Playford v. United Kingdom Tel. Co., 10 B. &. S. 759 (1869); Dixon v. Renter's Tel. Co., 19 Moak's Rep. 313 (1877).

[4] Francis v. Telegraph Co., 58 Minn. 252 (1894).

[5] Cowan v. Western Union Tel. Co., 122 Iowa, 379 (1904) and cases cited therein.

[6] Story on Conflict of Laws, §280.

[7] Bryan v. Western Union Tel. Co., 133 N. C. 603 (1903), telegram sent from point in North Carolina to a point in South Carolina; action by addressee; law of North Carolina permitting recovery for mental anguish applied.

Western Union Tel. Co. v. Garrett, 46 Tex. Civ. App. 430 (1907); telegram sent from point in Missouri to point in Texas; action by sendee; delay occurred in Texas; law of Missouri denying recovery for mental anguish applied.

Reed v. Western Union Tel. Co., 135 Mo. 661 (1896).

[8] Western Union Tel. Co., v. Lacer, 93 S. W. Rep. 34 (Ky., 1906); telegram sent from point in Indiana to point in Kentucky; action by sendee; delay occurred in Indiana; law of Kentucky permitting recovery for mental anguish applied.

Western Union Tel. Co. v. Fuel, 51 So. Rep. 571 (Ala., 1910); telegram sent from point in Texas to point in Alabama; action by sender; law of Alabama permitting recovery for mental anguish applied.

North Packing & Provision Co. v. Western Union Tel. Co., 70 Ill. App. 275 (1897).

[9] Taylor v. Western Union Tel. Co., 95 Iowa 740 (1895).

[10] Shaw v. Postal Tel. Co., 79 Miss. 670 (1901).

[11] See discussion in Stone v. Postal Tel. Co., 76 Atl. Rep. 762 (R. I. 1910).

miliar rules of damages laid down in *Hadley* v. *Baxendale.*[12] The trouble arises only when the Courts go further and hold that such an action is purely *ex delicto*, and is absolutely independent of any contract relation.[13] It would seem that the tort ought to be considered as having its *situs* at the place where the failure or delay in transmission takes place, and recovery ought to be in accordance with the remedies of that jurisdiction. But it would be unfair to expect the plaintiff to determine the point on the defendant's line where the delay occurred, and it would certainly be unwise to permit the defendant company to show that the message was delayed at some specific point and thus make the plaintiff's right to recovery depend upon the laws of that place. And it can easily be contended that no act of negligence can be said to have occurred until there is a failure to put the message into the hands of the person to whom it is addressed. Guided by these reasons—variously expressed, however—the Courts with practical unanimity have held that it is wholly immaterial at what point along the line the delay may have occurred.[14] The only case in which the Court has departed from this doctrine seems to be *Western Union Tel. Co.* v. *Crenshaw,*[15] but even here too great weight ought not to be given to this part of the opinion, for it was probably unnecessary to the decision in the case.

If, now, we adopt the rule stated above, it would seem that no recovery could be had in a State from which the message is sent, the *situs* of the tort being in the State in which delivery is to be made. *Walker* v. *Western Union Tel. Co.*,[16] however, holds exactly contra. The opinion is rather vague so far as the real reason for the decision arrived at is concerned, but apparently the action is considered *ex contractu* rather than *ex delicto* and recovery permitted under the law of contracts as stated earlier in this note.

Since it is pretty generally held that the addressee of a delayed telegram in an action of contract cannot recover damages for mental suffering, since it is presumed that this is not in contemplation of the parties as a probable result of the breach of the contract,[17] but can recover for such suffering in some States, if the action is in tort,[17] it ought to be of vital importance to know which kind of action should be brought or has been brought. A study of the cases, however, leaves one somewhat in the dark on this question, for in most of the decisions there is no definite reason given why the action should be treated as of one nature rather than the other. Indeed, in our principal case, in which the action was held to be *ex delicto*, the Court distinguishes others, apparently contra, on the sole ground that they were treated as actions *ex contractu* and different rules applied. The tendency in all, however, seems

[12] 9 Exch. 341 (1854).
[13] Balderston v. Western Union Tel. Co., 79 S. C. 160 (1907).
[14] Brown v. Western Union Tel. Co., 67 S. E. Rep. 146 (S. C., 1910).
[15] 125 S. W. Rep. 420 (Ark., 1910).
[16] 75 S. C. 512 (1906).
[17] Jones on Telegraph Companies, §480: but, see also §518.

to be to hold the telegraph companies to the greatest possible degree of care, and considering the valuable rights they enjoy at the hands of the public, this attitude is to be commended.

*H. W. W.*

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LEGAL ETHICS—QUESTIONS AND ANSWERS—We print herewith three more of the questions on legal ethics propounded to the New York County Lawyers' Association Committee on Professional Ethics, with the answers made thereto:

QUESTION:

Is an attorney justified in asking for five thousand dollars damages in a case where he knows his client would be perfectly satisfied with a settlement of a few hundred dollars and where there appears to be no just ground for demanding more than a few hundred dollars?

Is a lawyer guilty of moral turpitude who demands in settlement of a claim for damages an amount far in excess of what he believes to be a proper measure of damages?

ANSWER:

In the case suggested the Committee considered in the absence of a more detailed statement, that the demand should not exceed what, in the opinion of the attorney, would be a maximum proper recovery under the facts which he has reason to believe are the basis of his client's rights.

QUESTION:

May I have your opinion upon the professional ethics of the following situation:

Several years ago I received into my office as a student of law a young man who has since been admitted as a member of the Bar. I assisted him to the best of my ability in his preparations for admission, and commended him to the Character Committee. He was intimately familiar with the affairs of my office, and had my confidence. After his admission to the Bar, he left my office and became associated with another member of the Bar.

While he was a student in my office, I had a client who employed me in a professional capacity in numerous matters, among others the re-organization of a company, whose books he entrusted to my custody for the purpose. This client, at the time of the proposed re-organization, owed me considerable money in other matters in which I had been employed for him personally. I spent considerable time in planning the re-organization, but declined to advance any disbursements therefor. Finally, my client, without discharging any of the indebtedness to me for my services in respect to the said re-organization or for my personal services to him, demanded the return of the books of the corporation, which I declined to return unless some money should be paid to me on account of the debt. I have since been served with an order to show cause in the Supreme Court on an affidavit of my client sworn to before my former student as a notary public, in which the said former student appears as attorney of record for my client, directing me to show cause why I should not turn over the books of the Company to it.

I charged the company what I deemed a reasonable fee for the services rendered to it, all of which were rendered while the student was a clerk in my office. I assume that, as the student appears as attorney of record, he prepared the affidavit upon which the order to show cause was made, and in which the client swears that nothing whatever is due to me for legal services rendered. The student has also in a replying affidavit, made by himself, stated that he was not consulted when the client called on me, though he saw the client visit me on several occasions, but was never informed regarding the subject of the consultation. Notwithstanding this affidavit, he had charge of the filing of all of my papers, and had access to all of my correspondence, and was in a position to be generally familiar with the business of my office.

Is the conduct of the student as stated by me in appearing for my former client, under the circumstances, and taking the steps indicated, contrary to any principles of professional ethics?

ANSWER:

In the opinion of the Committee, it contravenes proper professional ethics for an attorney to accept a retainer against his former employer involving matters of which he might have obtained knowledge while in such employment, and by reason thereof.

QUESTION:

A lawyer is consulted by a client about an alleged claim of the client, and the client, upon being advised that the claim is, in the opinion of the lawyer, unfounded or not enforcible, then so conducts himself that the lawyer concluded that he has reasonable ground for believing that his client, disappointed at the advice, will commit acts of violence against a member of his family against whom the disappointed client asserted his fancied claim, and the attorney knows that the disappointed client has in the past carried out similar threats against the same individual, and the attorney concludes that the client intends to carry out his renewed threats, and the attorney knows the person threatened, members of his family and his counsel. Is the attorney under any professional duty which would either require him to, or preclude him from, communicating the threats, or disclosing them, or taking such steps as seem to him reasonably calculated to prevent the person who consults him from accomplishing his threatened purpose of violence?

ANSWER:

The Committee does not consider that the privilege of professional confidence extends to such threats. It is not, therefore, in its opinion, unprofessional for the attorney to give warning.

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PRINCIPAL AND SURETY—REMEDIES OF SURETY—CONTRIBUTION—In *Harris* v. *Jones*,[1] the maker of a promissory note applied to the defendant, Jones, to sign the note as surety. Jones refused to do so until the plaintiff Harris had first indorsed the note. Judgment being entered on the note Harris paid the payee in full and then brought suit against Jones for contribution. The Court held that as to the payee, Harris, and Jones were co-sureties, but as between themselves, the relationship of principal and surety existed, thus barring the former from any re-imbursement.

It is well settled that the right of a co-surety to enforce contribution does not depend upon contract[2], but upon the equity of the case. Contribution originally was enforceable only in courts of equity, but in later times courts of law assumed jurisdiction on the ground of an implied promise on the part of each joint-debtor or surety to contribute his share to make up the loss.[3] This right of contribution, which arises under the rule in equity apart from agreement between the co-sureties, may be varied by such agreement.[4] The relation in which co-sureties on a bill stand to the holder of the bill, has no bearing on the relation in which they

[1] 136 N. W. Rep. 1080 (North Dakota, 1912).
[2] Lansdale v. Cox, 7 T. B. Mon. 401 (1828).
[3] Deering v. Earl of Winchelsea, 2 B. & P. 270 (1800); Powers v. Nash, 37 Me. 322 (1853).
[4] Swan v. Wall, 1 Chancery Reports, 534 (1641).

stand to each other. Co-sureties' liability towards one another is in reality an application of the old maxim that equality is equity. That the true relationship between the signers of the paper may be shown by parol evidence is practically universally acknowledged.[5] As a result, when it is shown that the second indorser was in the position of a supplemental surety, the nature of the relationship is one of contractual rather than of equitable rights.[6]

A supplemental surety's engagement extends to the other sureties' responsibility as well as to that of the maker. As between himself and the other sureties there is no mutuality.[7] His undertaking is to pay only in default of the principal and subsequent indorsers, since he incurs risk to the benefit of all the prior parties.[8] He is only a surety for a surety and as such is not liable to an action for contribution.[9]

Should the supplemental surety be called upon for payment by the creditor, he is entitled to his rights of subrogation.[10] He can recover from a surety, as well as from the principal, as all prior parties are principals to him.[11]

Thus it may be seen that the liability of co-sureties for contribution is an ancient right growing from an equitable principle to give equal justice to persons similarly situated,[12] while a supplemental surety's rights are contractual and place him on an entirely different footing than the other sureties.

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[5] Craythorne v. Swinburne, 14 Ves. 160 (1807), Easterly v. Barber, 66 N. Y. 433 (1876); Haddock v. Haddock, 192 N. Y. 439 (1908).

[6] Craythorne v. Swinburne, 14 Ves. 160 (1807); Lord Eldon: "Whether it depends upon a principle of equity or is founded in contract, it is clear, a person may by contract take himself out of the reach of the principle or the implied contract. That, after the principle of equity has been universally acknowledged, then persons acting under circumstances to which it applies, may properly be said to act under the head of contract, implied from the universality of that principle. ..... But whether this stands upon contract or a principle of equity, it is clear that a party may take care by his engagement that he shall be bound only to a certain extent. ..... If, therefore, by his contract a party may exempt himself from the liability or that extent of liability in which without a special engagement he would be involved, it seems to follow that he may by special engagement contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a surety, or only if the other does not pay; that is, as surety for the surety, not as co-surety with him."

[7] Monson v. Drakeley, 40 Conn. 563 (1873).

[8] Turner v. Danis, 2 Esp. N. P. C. 478 (1796).

[9] Cutler v. Emery, 37 N. H. 567 (1859); per the Court: "The principle on which one surety is regarded as liable as a principal to another surety is that a state of facts is shown to the Court from which it appears positively or by fair and reasonable inference that such surety intended to stand in the character of principal as to the subsequent signers."

[10] Sherman v. Black, 49 Vt. 198 (1876).

[11] Whitehouse v. Harison, 42 N. H. 3 (1860).

[12] Eisley v. Horr, 42 Neb. 3 (1894); Hartwell v. Smith, 15 Ohio, 200 (1864); per the Court: "This is a right arising from equity rather than from contract (except in so far as its universal recognition may make it an implied stipulation) and rests upon the ground that where the parties stand *in equali jure*, equity which delights in equality, will require that the discharge from the common obligation which inures to the equal benefit of all, shall be obtained at their equal expense."

Questions such as are raised in the principal case invariably depend largely upon the presence or absence of a number of facts apparently unimportant, but which considered as a whole are the turning points of the decision. The decision in the present case shows how closely the Courts will adhere to the fundamental principles and early doctrines of the common law, while at the same time keeping in accord with the Negotiable Instruments Act.[13]

*W. A. W.*

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RIGHT TO CORPORATE DIVIDENDS—LIFE TENANT AND REMAINDERMAN—Two recent cases in Connecticut[1] and Massachusetts[2] illustrate the application of the rule that cash dividends, however large, are income and go to the life-tenant, while stock dividends, however made, are capital and go to the remainderman.[3] The corpus of the trust estate in each case consisted of shares in the same corporation, and both questions arose from the same dividend declaration. In neither case was the language of the testator sufficiently explicit of itself to govern the distribution. The D., L. & W. R. R. Co., a Pennsylvania corporation, invested part of its surplus earnings by subscribing for and taking the stock of the Lackawanna R. R. Co., a New Jersey corporation, whose line formed a cut-off between two points on the road of the Pennsylvania company, and so materially shortened its track. The Pennsylvania Company took a perpetual lease of the railroad and all other property of the New Jersey company, agreeing to pay by way of rental four per cent. per annum on the capital stock of the latter corporation. The D., L. & W. R. R. Co. then declared an extra dividend of thirty-five per cent. to its own shareholders payable in the stock of the Lackawanna R. R. Co.[4]

Both Courts decided that this dividend, although payable in the form of stock, in reality represented income, had all the characteristics of a cash dividend, and therefore belonged to the life-tenant. A true stock dividend, said the Massachusetts Court, does not diminish the property of the company, but by it each new share in the increased capital stock represents a smaller fractional interest in the total amount of the corporate property; on the other hand, a cash dividend out of profits diminishes the property of the company by exactly the amount so distributed, but does not lessen the fractional interest in the capital represented by each share. The Connecticut Court said that the stock thus distributed

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[13] R. C. 1905, Section 6366, 6370.

[1] Trust Co. v. Taintor, 83 Atl. Rep. 697 (Conn., 1912).

[2] Gray v. Hemenway, 98 N. E. Rep. 789 (Mass., 1912).

[3] For a full discussion of the various rules governing the distribution of corporate dividends, see note in University of Pennsylvania Law Review, Vol. 60, page 130 (1911–12).

[4] "Resolved, that an extra dividend of 35 per cent on the capital stock of the company be and is hereby declared payable by the distribution of the stock of the Lackawanna Railroad Company of New Jersey ....."

ceased to be a part of the surplus assets of the corporation and passed from its control and ownership: that such a distribution had all of the characteristics of a cash dividend: that the remainderman had failed to meet the burden placed upon him of showing that the rule giving cash dividends to the life tenant should not apply in this instance and that their decision, therefore, was for the latter.[5]

Such were the positive holdings of the two Courts; it is of interest to examine the contentions of the remaindermen, and consider whether, if upheld, they would have discharged the burden referred to above. It was argued in the Connecticut Court that the real transaction underlying the acquisition of Lackawanna stock and the dividend declaration by the D., L. & W. was the perpetual obligation of the latter road to pay four per cent. annual rental to the former for their short cut; that this obligation imposed a liability on the D., L. & W. stock to the amount of the rental, and brought the case within *Bishop* v. *Bishop*.[6] The Court said, however, that in the present case, the stock being purchased, the company incurred no liability from the fact of its distribution, and that it would be necessary to assume facts outside of the record to impose such liability in this instance. The intimation of the Court then is, that if these shares in fact represented an obligation of the company they would go to the remainderman, being not a part of surplus assets, but a charge on those assets.

Counsel contended in the Massachusetts case that this dividend was simply a profit resulting from natural increases in value and fortunate investment, and therefore belonged to the corpus of the estate on the ground that increase and income are not synonymous.[7] The Court conceded the principle, but refused to apply it.

In both Courts, the point was raised that the road's transaction in effect amounted to a capitalization of its surplus, as it was invested in permanent improvements intended and calculated to obtain for it a shorter line by reason of the Lackawanna cut; that therefore, as between owners of successive stock interests, this surplus had become so associated with the working capital that it could not be separated therefrom, and should go to the remainderman. Each Court refused to adopt this view, holding that the

[5] A corporation has no power to make a dividend from its capital stock except in liquidation, and therefore dividends are presumptively of profits; since the right to dividends is in him who has the beneficial interest at the time of declaration, *prima facie* all dividends should go to the life tenant, and the burden of proving otherwise be on the remainderman. See 1 Thompson on Corps, §2193.

[6] 81 Conn. 509 (1909). In this case, the Adams Express Co. declared a dividend in the form of bonds secured by assets of the Company set apart for their payment, but for which the Company directly assumed the liability of payment. Held, that such bonds belonged to the corpus of the estate.

[7] Smith v. Hooper, 95 Md. 16 (1902) in which trustees by investments in stock and realty enormously increased the corpus of the estate. Held, that the life tenant was entitled to the income from the whole estate, but not to the increase in the corpus above the original fund.

purchase of shares of the other road was none the ess an investment because an added advantage besides a fair income accrued as a result. The Connecticut Court referred to *Smith* v. *Dana*,[8] where the facts were much stronger for the proposition that the distribution was of capital, and yet the remainderman failed. The Court in that case reasoned that "capital" used in its correct sense referred to those resources contributed directly or indirectly by shareholders as the financial basis for the prosecution of the business, and which form the foundation for the issuing of capital stock. Such resources are dedicated to the obligations of the corporation, and are removed from the discretion of the directors except in liquidation.[9] Directors may either put earnings back into the property, give a cash dividend to stockholders, or declare a stock dividend by transferring surplus to capital. In the last instance, the surplus so treated is irrevocably beyond their control; but in the first instance, since it was originally in their discretion whether to distribute the earnings to the stockholders or not, it is only fair that they should be allowed to give back where they have taken away. That is, the position of the Connecticut Court is that accumulated profits put back into permanent improvements may be set free and distributed as cash dividends. The Massachusetts Court in the principal case expressed no opinion on this point, but a previous decision[10] indicates that they would in all probability adopt the same view. An English case[11] looks in the same direction, and it is submitted that the Connecticut doctrine represents the more liberal tendency of the law in treating such situations.

As pointed out in the note already referred to,[12] this doctrine that all stock dividends shall go to the remainderman and all cash dividends to the life tenant has developed, from a rule of thumb to be applied alike in all states of facts, to an inquiry into the substance of each transaction. It is submitted that this development is correct in principle and equity. The subject of the controversy in each case is the capital of the trust estate, and not the capital of the corporation, and by the above method the intention of the testator, which must be the ruling factor ultimately,[13] is more fully realized. When a man leaves stock in trust for A to take the income, he does not intend that the receipt of that income shall be dependant upon the form in which the directors may elect to clothe their dividend declarations. The inquiry must be to ascertain when dividends in reality represent capital and when income to

[8] 77 Conn. 543 (1905). In this case surplus earnings of a corporation had been put into a plant, fixtures, etc.; on account of competition, it became advisable to sell such property, and a dividend consisting of funds so realized was declared. Held, that the life tenant was entitled.

[9] 1 Thompson on Corps. §1060.

[10] Hemenway v. Hemenway, 181 Mass. 406 (1902).

[11] Bouch v. Sproule, 12 App. Cas. 385 (Eng., 1887).

[12] University of Pennsylvania Law Review, Vol. 60, p. 130 (1911–12).

[13] Gibbons v. Mahon, 136 U. S. 549 (1890).

the trust estate; the two comparatively simple principal cases illustrate one method of attacking the problem, and indicate several of the difficulties which must necessarily arise in more complex states of fact.

*S. A.*

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STATUTE OF FRAUDS—REAL ESTATE—DELIVERY OF THE MEMORANDUM—*Lowther* v. *Potter*[1] was a suit for the specific performance of a contract for the sale of certain real estate. The contract itself appears to have been oral, but two deeds were to be prepared for different portions of the premises, and were in fact made, but never delivered. The deeds did not contain a recital that they were made in pursuance of a previous contract. Defendant demurred to the bill on the ground that the contract was not in writing, and that there was no written memorandum or note thereof signed by the defendants or by their authorized agent, as required by law.[2] Plaintiff relied upon the undelivered deeds as a sufficient memorandum or note in writing of the contract to take the case out of the statute. The question therefore, in its last analysis is whether an undelivered deed is a sufficient note or memorandum of an oral contract for the sale of real estate to satisfy the statute of frauds. The Court held that under the circumstances of the case, the statute was not satisfied, and the demurrer was sustained.

There is considerable conflict of authority on the question whether an undelivered deed will satisfy the statute of frauds. In certain jurisdictions, there are definite decisions to the effect that "a deed drawn and executed with the knowledge of both parties with a view to the consummation of the contract of sale, which in itself, and of itself, embodies the substance, though not all the details or particulars of the contract, naming the parties, expressing the consideration, and describing the lands, though not delivered and its delivery postponed until the happening of a future event, is a note or memorandum of the contract sufficient to satisfy the words, the spirit, and the purpose of the statute of frauds."[3] In the jurisdictions upholding this view, however, an undelivered deed is only regarded as meeting the requirements of the statute where it is in fact a note or memorandum of the contract, referring specifically to its terms and conditions. If the deed is silent as to the terms of the contract, in pursuance of which it is made, it is no evidence in writing of such contract.[4]

The weight of authority, however, appears to support the pro-

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[1] 129 Fed. 196 (Ky., 1912).

[2] Kentucky statutes, Section 420. The Kentucky statute is substantially the same as the English Statute of Frauds.

[3] Jenkins v. Harrison, 66 Ala. 345 (1880), affirmed in Johnson v. Jones, 85 Ala. 286 (1887); see also Bowles v. Woodson, 6 Grattan, 78 (Va., 1849), and McGee v. Blankenship, 95 N. C. 563, at p. 569 (1886).

[4] Kopp et al. v. Reiter et al., 146 Ill. 437 (1893).

position that an undelivered deed will not of itself constitute a memorandum of the contract which will satisfy the statute of frauds, whether or not the terms of the contract be recited in the deed. The case most frequently cited in support of this rule is *Parker* v. *Parker*.[5] In that case, it was urged that if the instrument was not valid as a deed, it might be considered as a memorandum in writing, signed by the party agreeing to convey the real estate described, and thus authorize a decree in equity to make a conveyance. But the Court held that to make it operative as a memorandum, it must have been executed and delivered to the plaintiff or someone in his behalf. Although the alleged memorandum was in fact a *deed*, the statement is general: that *any note or memorandum* of an oral contract must have been delivered to satisfy the statute. So in *Comer* v. *Baldwin*,[6] the Court held that "to render a written contract to convey land operative, it is just as essential that the contract or memorandum of the contract required by the statute of frauds be delivered, as that a deed be delivered in order to convey the title."

In any event, it seems clear that if the alleged note or memorandum be an *undelivered deed*, it is generally regarded as not sufficient to satisfy the statute, regardless of whether there be a recital of the contract in the deed or not.[7] The argument is that an instrument intended by the parties to act as a deed, and not as a memorandum of a contract of sale, being inoperative for want of delivery as a deed should not be made to perform service as a memorandum.[8]

In the decision of the principal case, the Court distinguishes the memorandum or note of a contract for the sale of real estate from the contract itself. The contract, it is admitted must be delivered,[9] but the Court intimates that the note or memorandum containing a recital of the terms of the contract need not be delivered.[10] Applying this rule to the case of a deed, Judge Cochran says: "It seems to me that it follows therefrom that a deed which contains a recital that it is made in pursuance to a previous contract of sale, takes the case out of the statute, but I am equally convinced that such a deed which contains no such recital, which is the case here, does not, and that notwithstanding it sets forth the terms upon which it is being made."

The Court thus holds that an undelivered deed, notwithstanding it sets forth the terms upon which the contract is made,

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[5] 67 Mass. 409 (1854).

[6] 16 Minn. 172 (1870); see also Wier v. Batdorf, 24 Neb. 83 (1888).

[7] Overman and Brown v. Kerr, 17 Ia. 485 (1864); Cagger v. Lansing 43 N. Y. 550 (1871), reversing 57 Barb. 421; Thomas v. Sowards, 25 Wis. 631 (1870), but see Campbell v. Thomas, 42 Wis. 437 (1877); Popp v. Swanke, 68 Wis. 364, at p. 370 (1887); Freeland v. Charnley et al. 80 Ind. 132 (1881); Swain v. Burnette, 89 Cal. 564 (1891); Day v. Lacasse, 85 Me. 242 (1892); Morrow v. Moore, 98 Me. 373 (1903).

[8] Wilson v. Winters, 108 Tenn. 398 (1902).

[9] Newburger v. Adams, 92 Ky. 26 (1897).

[10] See Alford v. Wilson, 95 Ky. 506 (1894).

does not satisfy the statute, unless it contain a recital that it is made in pursuance of a previous contract. The deed in this case did not contain such a recital; and the decision, that the undelivered deed did not satisfy the statute, is undoubtedly correct under the general rule. The qualification however—"unless it contain a recital that it is made in pursuance of a previous contract"—though it is only dictum in the case, may, if it is followed, prevent Kentucky from falling in line with the trend of authority, under which it appears that without qualification an undelivered deed is not a sufficient note or memorandum of a contract for the sale of real estate, to satisfy the statute of frauds.

*H. A. L.*

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WITNESSES—PHYSICIAN'S PRIVILEGE—A recent decision in Wisconsin, *State* v. *Law*,[1] holds that a statute[2] requiring that testimony be given in all cases brought under its law regarding abortion[3] in effect abrogates the statutory privilege of secrecy accorded to medical practicioners[4] and renders physicians called in to treat a woman suffering from the effects of an abortion competent to testify in a criminal prosecution against the person charged with having committed the offense.

The case, therefore, is one more decision upon the disputed question as to the extent of the privilege of legal secrecy accorded to communications between a physician and his patient. The privilege itself is of purely statutory origin. Its existence was not recognized by the common law, and the rule laid down by Lord Mansfield in the Duchess of Kingston's trial[5] has never been questioned either in England[6] or America.[7] This principle of the common law has, however, been changed by statutes in more than half the jurisdictions in the United States,[8] on the ground that it was prejudicial to the best interests of society to allow this disclosure of such confidential information. Many of these statutes, however, like the one enacted in Pennsylvania,[9] expressly limit the privilege to civil cases; although where no such limitation is expressed, the majority of the Courts grant it in criminal cases as

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[1] 136 N. W. Rep., 803 (1912).
[2] St. 1898, Section 4078, amended by Laws 1905, c. 149.
[3] St. 1898, Section 4352.
[4] St. 1898, Section 4075, amended by Laws 1901, c. 322.
[5] 20 How. St. Tr. 573 (1776), Mansfield, L. C. J. "If a surgeon were voluntarily to reveal these secrets he would be guilty of a breach of honor . . . but to give that information in a Court of justice . . . which he is bound to do, will never be imputed to him as any indiscretion whatever."
[6] Russell v. Jackson, 9 Hare, 387 (1851); also *dicta* by Jessel, M. R. in Wheeler v. LeMarchant, L. R. 17 Ch. Div. 675 (1881).
[7] Campan v. North, 39 Mich. 606 (1878); Steagald v. Steagald, 22 Tex. App. 464 (1886); Banigan v. Banigan, 26 R. I. 454 (1904).
[8] For a summary of the various Statutes, see Wigmore: Evidence, Vol. IV, Section 2380 and notes.
[9] Act June 18, 1895, P. L. 195.

well[10]—a doctrine which often results in a mockery of justice where the physician himself has taken part in the criminal transaction or has acted on behalf of the victim of a crime.[11]

While some decisions are contra,[12] the better rule is that the burden of proof is on the claimant of the privilege to establish the facts necessary to create it.[13] Of course, the rule of privilege forbids disclosure only by those persons to whom the confidence was extended, and does not apply[14] to third parties who may have overheard the communication, unless they are agents of the physician.[15] The privilege also only applies to those who are professional physicians or surgeons in the usual meaning of the term. Hence communications made to a veterinary surgeon,[16] or to a dentist,[17] or to an apothecary[18] are not within the statute. To be privileged, the communication must also be made to a person in his professional character; and therefore a consultation with a physician made for a purpose other than obtaining medical treatment is not privileged;[19] nor is a communication made when the professional relation does not exist,[20] nor is the result of an autopsy.[21]

It has been held that in criminal cases, a communication made to a physician invited by the opponent for purposes of inspection is not privileged, since it is not generally made in order to obtain curative treatment and also because it is impossible to imply a confidence on the part of the communicating person when no invitation has been extended.[22] In civil cases, however, it is settled that the privilege may be invoked even by a patient who has been

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[10] Wigmore: Evidence, Vol. IV, Section 2385. The decision in the principal case seems *contra* in effect, though the Court said that they left the question still open.

[11] As in Aspy v. Botkins, 160 Ind. 170 (1903) where the plaintiff was held privileged to withhold the testimony of other physicians attending her for illness caused by the defendant's malpractice. The New York rule is *contra*, People v. Harris, 136 N. Y. 423 (1893).

[12] Masonic M. B. Ass'n v. Bech, 77 Ind. 203 (1881); Munz v. R. R. Co. 70 Pac. Rep. 852 (Utah 1902).

[13] Wheeler v. State, 158 Ind. 687 (1902); Green v. Ry. Co., 171 N. Y. 201 (1902).

[14] Springer v. Bryam, 137 Ind. 15 (1894).

[15] Raymond v. R. R. Co., 65 Ia. 152 (1884); Renihan v. Dennin, 103 N. Y. 573 (1886).

[16] Hendershot v. Tel. Co., 106 Ia. 529 (1894).

[17] People v. DeFrance, 104 Mich. 563 (1875); Howe v. Regensburg, 132 N. Y., Supp. 873 (1911). The conclusion reached in State v. Bech, 21 R. I. 288 (1898) is *contra*, and, it is submitted, better, in view of the present requirements and station of the dental profession.

[18] Brown v. R. R. Co., 66 Mo. 597 (1877).

[19] Hoyt v. Hoyt, 112 N. Y., 443 (1889); Burndell's Will, 102 Wis. 45 (1880).

[20] Herries v. Waterloo, 114 Ia. 374 (1901); Patterson v. Cole, 67 Kan. 441 (1903).

[21] Harrison v. Ry. Co., 46 Col. 156 (1897).

[22] Freel v. R. R. Co., 97 Col. 40 (1892); People v. Glover, 71 Mich. 303 (1888). The justice of this doctrine is at least questionable; where the accused is inspected against his will the effect may easily be to force or induce him to incriminate himself as was the case in People v. Glover, *ubi supra*.

treated against his will.[23] The privilege, moreover, is intended and expressly declared by most statutes to protect only communications which are made in order to obtain the benefit of the professional relation,[24] and the tendency of most jurisdictions is to admit all other statements relevant to the case even though the patient may have honestly believed, at the time they were made, that they were necessary to aid the physician and would be included by the privilege.[25] As to just what matters are necessary and therefore protected, the physician must generally be the judge,u nless, of course, it is in matters apparent even to the ordinary observer.[26] It would seem, of course, that these decisions should be made by the Court in its function of passing on the admissibility of evidence, but, practically speaking, this would be very difficult and in many cases impossible, since judges are not trained in the science of medicine. The term "communications," to which the privilege applies, is generally held to cover all data obtained by the physician from the patient which is necessary to enable the former to prescribe.[27] It therefore includes the results[28] of exhibition and inspection, and all written statements, as well as verbal utterances; and it is immaterial whether or not the patient himself is aware of the specific data discovered. It is, however, very important to note that it is only the tenor of the communication which is privileged; and the fact that a communication has been made, as well as the number and dates of consultations are not protected by the statute.[29] The distinction is of importance when the question involved is whether or not a person was in good health at a certain time or during a specific period, since the fact that a person did not enjoy the best of health may be shown by proving that a physician was consulted frequently at the time, or during, the period in question.

The right to claim the privilege belongs, of course, to the patient, not to the physician; and the latter cannot invoke it if the

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[23] Sup. K. of P. v. Meyer, 198 U. S. 508 (1905); Keist v. Chich. R. R. Co., 110 Ia. 32 (1899); but cf. Nesbit v. People, 119 Colo. 441 (1892), examination by a physician ordered by the plaintiff and agreed to by the defendant held not privileged.

[24] Wigmore: Evidence, Vol. IV, Section 2383 (b).

[25] Harriman v. Stowe, 57 Mo. 93 (1874); Green v. R. R. Co., 171 N. Y. 201 (1902); *contra* Raymond v. R. R. Co., 65 Ia. 152 (1884). It would seem more equitable to hold that the real test should be the patient's belief of what he deemed necessary and therefore confidentially disclosed.

[26] State v. Kennedy, 177 Mo. 98 (1903).

[27] It would appear, accordingly, that the fact of insanity discovered by a physician called in to prescribe for another reason should not be privileged, but the cases do not so hold.

[28] Wigmore: Evidence, Vol. IV, Section 2384. The reason is that the invitation to prescribe necessarily assumes that the physician will require all the data he can obtain upon which to base his prescription. It has, accordingly, been logically decided in Aspy v. Botkins, 160 Ind. 170 (1902), that an X-ray photograph taken by a physician in the course of treatment is inadmissible.

[29] Briesenmeister v. Supreme Lodge, 81 Mich. 525 (1890); Patten v. Ins. Ass., 133 N. Y. 450 (1892); Price v. Standard L. & A. Ins. Co., 95 N. W. 1118 (Minn. 1903), *contra* McGowan v. Supreme Court, 104 Wis. 186 (1899).

former abandons it.[30] While in practice it is generally the physician who declines to answer, it is nevertheless true that the claim of privilege should be formally made by the patient himself. Even after the death of the patient, the privilege may be claimed by the heir or representative of the deceased as his personal successor;[31] though it cannot be invoked by an assignee of a contractual interest.[32] Where the litigation is over the question as to which party is the rightful successor of the deceased, it would seem that the privilege could not be invoked at all. This question, however, has not yet been raised. Naturally, the privilege can be waived,[33] and, unless required by statute, the waiver need not be made in express language. It may also be waived by a contract made before the litigation commenced.[34] As an ordinary rule of evidence, it is, of course, true that a failure to object to the witness' answer at the proper time is a waiver of all exception thereto. The Courts have taken a very narrow and questionable view in regard to what conduct will be regarded as a waiver by implication.[35] Certainly bringing a suit for damages for personal injuries should be regarded as waiving the privilege, since the gist of the action turns on the extent and gravity of the injury itself; and it would certainly appear only logical to hold that a party's own testimony as to his physical condition should be regarded as a waiver of privilege in regard to medical testimony concerning the same condition. These propositions seem self-evident; and yet the cases do not so hold,[36] thus permitting a plaintiff falsely to claim that a physician has treated him for a certain injury and then, by claiming the privilege, to prevent the physician's truthful disclosure of the fact that the patient was not really injured at all. It has also been held most illogically, that a waiver of the privilege at one trial will not prevent the right to claim it again at a later trial upon the same conditions;[37] and practically all the cases hold that calling one or more physicians to testify as to one's physical condition is not a waiver of the privilege in regard to the testimony of other

[30] Burgess v. Sims Drug Co., 114 Ia. 275 (1901).

[31] Davis v. Supreme Lodge, 165 N. Y., 159 (1900). Physician's death certificate registered with the Board of Health excluded as privileged.

[32] Edginton v. Mut. Life Ins. Co., 67 N. Y. 185 (1876) is *contra;* but its reasoning cannot be sustained.

[33] G. R. & I. R. Co. v. Martin, 41 Mich. 667 (1879); Blair v. Ry Co., 89 Mo. 337 (1886).

[34] Adrevens v. Mutual R. F. L. Ass'n, 34 Fed. 870 (1888); Keller v. Ins. Co., 95 Mo. App. 627 (1902).

[35] See cases in Wigmore: Evidence, Vol. IV, Section 2389 and a very able criticism of the illogical attitude of the Courts in this matter.

[36] Williams v. Johnson, 112 Ind. 273 (1887); Green v. Nebegamaeir, 113 Wis. 508 (1890); McConnell v. Osage, 80 Ia. 293 (1890).

[37] Burgess v. Sims Drug Co., 114 Ia. 275 (1901); Grattan v. Ins. Co., 92 N. Y. 274 (1887). This decision was later overruled in Morris v. N. Y. etc., Ry. Co., 148 N. Y. 88 (1898).

physicians about precisely the same condition.[38] Some Courts[39] have even held that the heir or representative of the deceased is not entitled to waive the privilege, but these decisions cannot be supported; and the majority opinion is the other way.[40] The decisions, however, do hold that the privilege is waived by sending a physician's certificate as part of the proofs of death;[41] or by calling a physician as witness and examining him as to one's physical condition;[42] and it has also been held that requesting a physician to attest one's will is by implication a waiver of privilege regarding all testimony concerning the validity of the instrument.[43]

In view of the present illogical state of the law upon the subject, it is not surprising to find that the wisdom of granting this privilege at all is to-day very much in dispute. A very able plea setting forth the desirability of the privilege from the medical point of view is found in an address made by Dr. Baird before the Georgia Bar Association;[44] and some of the English judges[45] have favored the enactment of some statute according it to British practitioners. Its desirability has, on the other hand, been gravely doubted by an able New York judge,[46] who said, "The statute, as we feel obliged to construe it, will work considerable mischief . . ., but the remedy is with the legislature and not with the Courts." Moreover, it is openly and logically assailed by Prof. Wigmore,[47] who points out, *inter alia*, that "In actions for personal injury[48] the permission to claim the privilege is a burlesque upon

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[38] Penn. Mut. Life Ins. Co. v. Wiler, 100 Ind. 92 (1884); Met. St. Ry. Co. v. Jacobi, 50 C. C. A. 619 (1902); Baxter v. Cedar Rapids, 103 Ia. 599 (1897). These decisions, while possibly logical enough in their technical reasoning, certainly reach a conclusion which outrages ordinary common sense.

[39] Flint's Est., 100 Cal. 391 (1893); Loder v. Whelfley, 111 N. Y. 239 (1888).

[40] Fraser v. Jennison, 42 Mich. 206 (1879); Winters v. Winters, 102 Ia. 53 (1897); Morris v. Morris, 119 Ind. 343 (1889). The same courts *ante*[39] which deny the heir or representative the right to waive the privilege admit his right to claim it; and these decisions in California and New York seem to overlook the fundamental foundations upon which the privilege rests.

[41] Nelson v. Ins. Co., 110 Ia. 600 (1900); Buffalo L. T. & S. D. Co. v. Knights T. & M. M. A. Ass'n, 126 N. Y. 450 (1891).

[42] Lissal v. Crocker Est. Co., 119 Col. 442 (1897); Sovereign Camp v. Grandon, 64 Neb. 39 (1902).

[43] Mullin's Est., 110 Cal. 252 (1895). Physician's testimony as to testator's sanity admitted since he was a witness to the will.

[44] 16 Ga. Bar Ass. Rep., pp. 83–88 (1899).

[45] Taylor on Evidence, 10th Ed. Vol. I, p. 647; see also Brougham J., in Greenough v. Caskell, 1 My. & K. 103 (1833).

[46] Earl J. in Renihan v. Dennin, 103 N. Y. 573 (1886).

[47] IV Wigmore: Evidence, Sections 2380 and 2389.

[48] It seems inconsistent indeed to find that the jurisdictions which extend the privilege of professional secrecy to the furthest limits in regard to medical communications are those which insist upon the absolute common-law power of the Court, in cases of tort for injury to the person, to require the plaintiff to submit his person to an examination by experts. See Lane v. Spokane Falls R. R. Co., 57 Pac. Rep. 367 (Wash. 1899). This right is strongly denied in U. P. R. Co. v. Botsford, 141 U. S., 250 (1890).

logic and justice." Prof. Wigmore further points out that most of the litigation in which the privilege is invoked is of this character, or over life insurance policies and testamentary capacity; and that there is no reason whatever, in any of these actions, to conceal the facts, except to perpetrate a wrong upon the opponent.

With the exception of venereal diseases, physical abnormalities and troubles peculiar to women, it is probably only an ultra-sensitive person who makes the slightest attempt to conceal the nature of an illness or injury; and the above mentioned disorders are rarely of any legal importance except in divorce suits when the testimony is taken only before a referee and not made public. It would seem better, therefore, on grounds of public policy, either so to draft a statute as to grant legal secrecy only to communications made in regard to the physical applications mentioned *ante*, and then only when sought publicly in open Court, or else to abolish the privilege entirely. It should not be the policy of the law to shield a few highly sensitive individuals with a statute which arms the vast majority of litigants with a weapon for which their sole use is to obstruct or defeat the ends of justice.

*P. C. M., Jr.*