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RECENT CASE NOTES

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RECENT CASE NOTES

ADMINISTRATIVE LAW—ACT OF STATE—DEFENCE FOR ACTS WITHIN KING'S DOMINION.—The plaintiff, a citizen of the United States, was arrested for drilling revolutionary troops in Ireland. The defendant, the officer making the arrest, seized and detained the plaintiff's money. His act was ratified by the Chief Secretary for Ireland as an officer of the Crown. On being released from jail, the plaintiff sued the officer for conversion. The defendant alleged that the plaintiff was an alien and pleaded that the seizure was an Act of State. *Held*, that the defence of Act of State was invalid as to acts committed in the King's Dominions on a bare averment that the plaintiff was an alien. *Johnstone v. Pedlar* (1921, H. L.) 37 T. L. R. 870.

In England, an act injurious to the person or property of an alien, committed abroad by a representative of the Crown, and either previously authorized or later ratified by the Crown, becomes an Act of State and may not be reviewed by a municipal court. See Moore, *Act of State in English Law* (1906) 93; Borchard, *Diplomatic Protection of Citizens Abroad* (1915) 174; *Buron v. Denman* (1848) 2 Exch. 167. The principal case has decided for the first time the application of the doctrine to an alien within the United Kingdom. The result was predicted by Moore, *op. cit.* 95. Aliens within the boundaries of a country are now generally entitled to the same civil protection as citizens. *Yick Wo v. Hopkins* (1886) 118 U. S. 366, 6 Sup. Ct. 1064; *cf. Halsey v. Lowenfeld* [1916, C. A.] 2 K. B. 707. Courts refrain, however, from passing on the political acts of their own government. See COMMENTS (1918) 27 YALE LAW JOURNAL, 813. The Supreme Court of the United States refused to review the ratified expulsion of a Chinese from the Philippines by the Governor General on the theory that it was the exercise of a political privilege and became an Act of State. *Tiaco v. Forbes* (1913) 228 U. S. 549, 33 Sup. Ct. 585. The expulsion of an alien, having been within the power of the Philippine Congress, was as much a political act as if it had been authorized by the Federal Congress. It did not require commission abroad to be an Act of State, as it apparently does under the English doctrine. Nor is the American theory limited in its application to aliens. *The Wiggins Case* (1867) 3 Ct. Cl. 412, 423 (relieving officers of liability from suit by citizens); *Paquete Habana* (1902) 189 U. S. 453, 465, 23 Sup. Ct. 593, 594 (relieving officers of liability for wrongful capture of foreign fishing smacks); see *O'Reilly v. Brooke* (1908) 209 U. S. 45, 28 Sup. Ct. 439 (relieving military governor of Cuba from suit); *cf. Cook v. Sprigg* [1899, P. C.] A. C. 572. Moreover, it merges into the doctrine of non-suability of the State, peculiar to Anglo-American law, when the State adopts as its own the act of the officer; both State and officer being thus relieved of municipal legal liability. Any doctrine relieving the public authorities from liabilities for injuries should be limited as far as possible. For this reason the British Court's refusal in the instant case to extend the Act of State doctrine is to be commended.

AGENCY—UNDISCLOSED PRINCIPAL—RIGHT TO ENFORCE A CONTRACT UNDER SEAL.—The plaintiff, an undisclosed principal, sought specific performance of a contract under seal to make a lease. The lower court sustained the defendant's demurrer. *Held*, that the demurrer should be overruled since there was a cause of action. *Lagumis v. Gerard* (1921, N. Y. Sup. Ct.) 65 N. Y. L. JOUR. 143 (Sept. 20, 1921).

The prevailing common-law rule in this country is that the doctrine that an

undisclosed principal may sue and be sued does not apply to contracts under seal. *Gill v. Atlanta, B. & A. Ry.* (1920) 24 Ga. App. 780, 102 S. E. 457; *Briggs v. Partridge* (1876) 64 N. Y. 357. And this rule is rather illogically observed in many states although the private seal has been abolished by statute. *Donner v. Whitecotton* (1919) 201 Mo. App. 443, 212 S. W. 378. It is generally held in the construction of such statutes that the mere formality of the seal is abolished and that the law in regard to contracts under seal is unaffected. *Donner v. Whitecotton, supra*; *contra, Efta v. Swanson* (1911) 115 Minn. 373, 132 N. W. 335; see also (1919) 29 YALE LAW JOURNAL, 229. Thus, merely because the word "seal" or the letters "L. S." appear opposite the signatures of the parties to an instrument, the principal may either escape the responsibilities of the contract or be denied the advantages of it. Such a distinction is without foundation in view of the fact that the seal has lost its ancient formality and has become what is too often an unobserved part of printed forms of agreements. In point of justice the principal and the party with whom the agent has contracted should be given relief as much upon contracts in this form as upon simple contracts. See Ames, *Undisclosed Principal—His Rights and Liabilities* (1909) 18 YALE LAW JOURNAL, 443. The decision in the principal case is progressive, if not revolutionary, since it boldly casts aside the common-law rule without the aid of statute, the private seal never having been abolished in New York. N. Y. Cons. Laws, 1909, ch. 27, sec. 44. And it is still regarded as presumptive evidence of consideration upon an executory contract. N. Y. C. C. P. ch. 9, sec. 840. The court has deliberately overthrown an ancient rule when every reason for it is gone and every reason against it is present. See, Crane, *The Magic of the Private Seal* (1915) 15 COL. L. REV. 24.

BILLS AND NOTES—DRAWEE BANK'S PRIVILEGE TO CHARGE BACK CHECKS DRAWN BY ONE DEPOSITOR IN FAVOR OF ANOTHER.—The plaintiff depositor mailed to the defendant bank a check in favor of himself drawn by another depositor, requesting that it be credited to his account. The bank notified the plaintiff that it had done so. It being discovered on the same day that the drawer's account was insufficient the amount of the check was never debited against it. Two days later the defendant wired the plaintiff that the check was worthless and thereupon recharged the amount to the plaintiff's account. The plaintiff afterwards received the bank's letter of acknowledgment and drew a check for the amount of the credited sum. Payment being refused, he brought suit. *Held*, that the plaintiff could recover. *Cohen v. First Nat. Bank of Nogales* (1921, Ariz.) 198 Pac. 122.

The underlying principle upon which the instant case seems to rest is an exception to the general rule that money paid under a mistake of fact may be recovered. *Bank v. Schwarzschild* (1909) 109 Va. 539, 64 S. E. 954; *Liberty Trust Co. v. Haggerty* (1921, N. J. Eq.) 113 Atl. 596. That the drawer's signature was forged, for instance, is no ground for recovery by a drawee bank that has paid a check to a holder in good faith for value and without fault. *Bank of Portland v. U. S. Bank* (1921, Or.) 197 Pac. 547; (1921) 30 YALE LAW JOURNAL, 296. Nor is the drawer's insolvency a ground for recovery. *American Bank v. Miller* (1911, C. A. A. 6th) 185 Fed. 338; *Nat. Exch. Bank v. Ginn Co.* (1916) 114 Md. 181, 78 Atl. 1026. But to bring the instant case within this principle it must be assumed, as the court did, that the credit given the plaintiff was equivalent to an actual payment of the money and a redeposit. *Cohen v. Nat. Bank, supra* at p. 124. But whether or not paper so deposited is for payment or collection is to be finally determined by the expressed or implied intention of the parties. *Williams v. Cox* (1896) 97 Tenn. 555, 37 S. W. 282; *Fayette Bank v. Summers* (1906) 105 Va. 689, 54 S. E. 862; 7 L. R. A. (N. S.) 694, note. When the indorsement of a check is in blank and credit is given and the crediting bank

is not drawee, the general presumption is that the deposit was for payment and title to the paper passes to the bank. *Magee Banks and Banking* (2d ed. 1913) secs. 266, 267; *Walker and Brock v. Ranlett* (1915) 89 Vt. 71, 93 Atl. 1054. *A fortiori* such a presumption seems justified where the check is deposited with the drawee bank. But see *Nat. Gold Bank v. McDonald* (1875) 51 Calif. 64. The instant case seems to prefer the technical rule of law to the equitable principle of estoppel, which might have been applied had the court been so inclined, for the plaintiff showed no loss through the bank's conduct and did nothing in reliance upon the extension of credit. See *Walnut Hill Bank v. Nat. Reserve Bank* (1913) 141 App. Div. 475, 139 N. Y. Supp. 117.

CRIMINAL LAW—NECESSITY OF MENS REA IN STATUTORY OFFENCES.—The defendant killed a domestic pigeon under an honest belief that it was a wild dove. The Larceny Act, (1861) 24 & 25 Vict. c. 96, sec. 23, provided that, "Whosoever shall unlawfully and wilfully kill any House Pigeon or Dove under such circumstances as shall not amount to Larceny at Common Law" shall be liable to a penalty. *Held*, that an honest mistake of fact was no defence to a charge under that section. *Horton v. Gwynne* [1921] 2 K. B. 661.

It is elementary that *mens rea* is essential to common-law offences. 1 Bishop, *New Criminal Law* (8th ed. 1892) sec. 301. But the legislature may make certain acts criminal irrespective of guilty knowledge. *Commonwealth v. Weiss* (1891) 139 Pa. 247, 21 Atl. 10. In the absence of specific language, the necessity of *mens rea* is a problem of construction, in the solution of which the purpose and design of the statute must be kept in view. *Troutner v. State* (1916) 17 Ariz. 506, 154 Pac. 1048. Guilty knowledge is essential to crimes *malum in se*. 1 Bishop, *op. cit.* sec. 303, note 2. But intent is usually immaterial in offenses *malum prohibitum*. *Mens rea* was immaterial in a conviction for selling liquor to a minor in violation of a statute. *State v. Brown* (1914) 73 Or. 325, 144 Pac. 444. And for furnishing oleomargarine without notifying patrons. *State v. Welch* (1911) 145 Wis. 86, 129 N. W. 656. Ignorance of fact was no defence to a charge of selling an intoxicant as a "soft drink." *Commonwealth v. Weiss* (1891) 139 Pa. 247, 21 Atl. 10. The instant case seems to have carried the *malum prohibitum* doctrine to the extreme. The preamble to the Larceny Act begins, ". . . to consolidate and amend the statute law relating to Larceny and other similar offenses." The section in question is preceded by sections dealing with the stealing of horses, cows, sheep, and other animals. "Wilfully" in a criminal statute generally means with a bad purpose. *State v. Clifton* (1910) 152 N. C. 800, 67 S. E. 751. "Unlawfully" is sufficient to charge a wrongful intent. *Ex parte Ahart* (1916) 172 Calif. 762, 765, 159 Pac. 160, 162; *Newby v. State* (1905) 75 Neb. 33, 36, 105 N. W. 1099, 1100. It is believed, therefore, that *mens rea* should have been an essential element for conviction in the instant case. Such a result was reached in an indictment under the same section. *Taylor v. Newman* (1863, Q. B.) 4 B. & S. 89. The court, however, tried to distinguish that case.

EMPLOYERS' LIABILITY ACT—LACK OF KNOWLEDGE OF DESTINATION IMMATERIAL IN DETERMINING INTERSTATE STATUS OF SHIPMENT.—The plaintiff's intestate, a conductor of a switching crew, employed by the defendant on its terminal track at Buffalo, was killed by reason of the derailment of his engine while transferring three carloads of beef from a local storage house to the New York Central tracks in East Buffalo. The beef was in fact destined for Montreal and thence to England, but the waybill merely called for switching between lines, and the defendant had not been notified in advance of the foreign character of the shipment. The lower court ruled that the plaintiff's intestate was engaged in foreign commerce when killed. *Held*, (three judges *dissenting*) that the plaintiff could

recover under the Federal Employers' Liability Act. *Cott v. Erie Ry.* (1921) 231 N. Y. 67, 131 N. E. 737.

The test adopted by the United States Supreme Court in determining whether an employee is engaged in interstate commerce within the meaning of the Federal Employers' Liability Act, is whether he was engaged at the time of the injury in interstate transportation or in work so closely related to it as to be practically a part of it. *Shanks v. Delaware, L. & W. Ry.* (1916) 239 U. S. 556, 36 Sup. Ct. 188. The multitude of apparently conflicting decisions on the subject, however, seems to indicate that if any definite criterion exists it is difficult to apply. In the last analysis, the particular facts of each case are decisive, and the tendency of the courts is to give to the term "interstate commerce" a broad significance. *Hopkins v. United States* (1898) 171 U. S. 578, 19 Sup. Ct. 40. The test is the nature of the work being done at the time of the injury. *Erie Ry. v. Welsh* (1916) 242 U. S. 303, 319 Sup. Ct. 116. If such work is a necessary preparatory movement in aid of interstate transportation, the national statute applies to employees so engaged. *Southern Ry. v. Puckett* (1917) 244 U. S. 571, 37 Sup. Ct. 703. The burden of proving that the injured employee was engaged in interstate or foreign commerce at the time of the injury is on the plaintiff. *Hench v. Pennsylvania Ry.* (1914) 246 Pa. 1, 91 Atl. 1056; L. R. A. 1915 C, 64, note; 1 Roberts, *Federal Liabilities of Carriers* (1918) sec. 465. But when the action is brought under a state workmen's compensation statute or at common law, and the defence is that the Federal Act applies, the defendant has the burden of proving that the employee was employed in interstate commerce when he was injured. *Zavitovsky v. Chicago, M. & St. P. Ry.* (1915) 161 Wis. 461, 154 N. W. 974. The view of the majority in the principal case appears to be sound. The interstate or foreign status of a shipment cannot be determined by the mere forms of billing or contract, but by the essential character of the commerce, that is, whether there is a continuity of movement from a point in one state to a point in another. *Texas & N. O. Ry. v. Sabine Tram Co.* (1913) 227 U. S. 111, 33 Sup. Ct. 229; *Ruppell v. New York Cent. Ry.* (1916) 171 App. Div. 832, 157 N. Y. Supp. 1095; *Rich v. St. Louis & S. F. Ry.* (1912) 166 Mo. App. 379, 148 S. W. 1011; L. R. A. 1915C, 60, note. If the cars are in fact moving in interstate or foreign commerce, knowledge on the part of the employer concerning their ultimate destination would seem to be immaterial. [The Supreme Court of the United States has refused to review the decision in the instant case. See daily press, October 11, 1921.]

EVIDENCE—ADMISSIBILITY—HABITUAL USE OF DRUGS.—To discredit a witness for the defence, the prosecution questioned her in regard to her habitual use of morphine. She denied its use. The prosecution then introduced evidence which tended to prove that the witness was a confirmed drug addict, and also that the drug had a harmful effect upon her powers of observation. It was not shown that the witness was under the influence of the drug at the time of the event concerning which she testified nor at the time of giving her testimony. Held, that such evidence was admissible. *State v. Prentice* (1921, Iowa) 183 N. W. 411.

Evidence tending to prove that a witness was under the influence of a drug either at the time of the event concerning which he testifies or at the time of giving his testimony is everywhere admitted for the purpose of affecting the credibility of the witness. *People v. Webster* (1893) 139 N. Y. 73, 34 N. E. 730; *Wilson v. United States* (1913) 232 U. S. 563, 34 Sup. Ct. 347. The mere fact that a witness is a habitual user of drugs is not of itself admissible to discredit the witness. *Williams v. United States* (1904) 6 Ind. Ter. 1, 88 S. W. 334; *Botkin v. Cassady* (1898) 106 Iowa, 334, 76 N. W. 722; *Gordon v. Gilmer* (1914) 141 Ga. 347, 80 S. E. 1007. But if it is accompanied by evidence that the use of drugs has materially impaired the testimonial qualifications of the witness, then

such evidence is received. *Anderson v. State* (1912) 65 Tex. Cr. App. 365, 144 S. W. 281; *State v. Fong Loon* (1916) 29 Idaho, 248, 158 Pac. 233; but see *State v. King* (1903) 88 Minn. 175, 92 N. W. 965. The opinions seem to indicate that only direct evidence is admissible to show that a witness's mind has been impaired by the use of drugs. *Eldridge v. State* (1891) 27 Fla. 162, 9 So. 448; *Gordon v. Gilmer*, *supra*. However, the court in the principal case is not without authority to admit circumstantial evidence for this purpose. *State v. Robinson* (1895) 12 Wash. 491, 41 Pac. 884; *Anderson v. State*, *supra*. The inquiry in regard to a witness's use of drugs has been restricted by some courts entirely to the cross examination of the witness. *State v. Schuman* (1915) 89 Wash. 9, 153 Pac. 1084. The better view, however, is to admit extrinsic evidence which tends to discredit the witness's testimonial powers, and the court in the principal case seems to be correct in so doing. *People v. Webster*, *supra*; 2 Wigmore, *Evidence* (1904) sec. 1005.

JURISDICTION—EMINENT DOMAIN—POWER OF ONE STATE TO CONDEMN PROPERTY IN ANOTHER.—Pursuant to a Wisconsin statute (Wis. Sts. 1911, ch. 87, sec. 1797, m. 79) the city of Superior in that state began eminent domain proceedings to acquire the plaintiff's waterworks system, a part of which was in the state of Minnesota. The plaintiff filed a bill to enjoin these proceedings and the city demurred. Held, that the demurrer should be sustained. Rosenberry, J., *dissenting*. *Superior Water, Lt. & Power Co. v. City of Superior* (1921, Wis.) 183 N. W. 254.

The power of eminent domain can be exercised only as prescribed by statute. See 1 Lewis, *Eminent Domain* (3d ed. 1909) secs. 367-368; 1 Nichols, *Eminent Domain* (2d ed. 1917) sec. 19. Statutes generally have no extra-territorial effect. See Sutherland, *Statutory Construction* (1891) sec. 12; 1 Lewis, *op. cit.* sec. 385. (This is true, however, only as a matter of positive law. See Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 276-280.) The court seeks to avoid the fact by calling the entire plant personalty and hence Wisconsin property,—even as to "any real estate or interest therein that the company may own" across the state line. See *Superior Co. v. Superior*, *supra* at p. 257. Even if this fiction were true, it does not settle the question of jurisdiction; for, in eminent domain proceedings, the decree operates to pass title and, the statute having no extra-territorial effect, obviously a decree rendered thereunder can have none. See 2 Nichols, *op. cit.* secs. 369, 370, 374; see *State v. Superior Court* (1914) 80 Wash. 417, 422, 141 Pac. 906, 908; COMMENTS (1919) 28 YALE LAW JOURNAL, 588, 589. Nor would such a decree be binding on the courts at the situs. See *Evansville Traction Co. v. Henderson Bridge Co.* (1904, C. C. W. D. Ky.) 134 Fed. 973, 975. But to obviate this the court declares that "equity has ample power to compel a conveyance on the part of the water company." But it has been held that equity will not exercise its power to enforce the power of eminent domain. *West. Union Tel. Co. v. N. C. & St. L. Ry.* (1917, N. D. Ga.) 243 Fed. 694; *Mobile Ry. v. Hoyer* (1906) 87 Miss. 571, 40 So. 5. The court tries to avoid this by considering the franchise as a contract. But it is then far from its original position that there was jurisdiction to divest the water company of title "pursuant to its power of eminent domain." Even this construction is arguable. See the instant court's discussion in *Superior Power Co. v. Superior* (1921, Wis.) 181 N. W. 113, 123; *State v. Circuit Court* (1915) 162 Wis. 234, 236, 155 N. W. 139, 140; as to when equity will take jurisdiction over foreign property see COMMENTS (1918) 27 YALE LAW JOURNAL, 946. The result of the decision in the instant case is desirable; the reasoning is difficult to justify. On almost identical facts the opposite result has been reached. See *Crosby v. Hanover* (1858) 36 N. H. 404, 422. Some states have remedied the situation by reciprocal

statutes. See Wash. Laws, 1909, ch. 16; Or. Laws, 1920, sec. 3772; (1921) 19 MICH. L. REV. 448.

MASTER AND SERVANT—INDEPENDENT CONTRACTOR—DELEGATION OF DUTY OWED TO INVITEE.—The deceased, an employee of an independent contractor, while installing elevator doors in the defendant's mercantile building, was killed through the carelessness of the elevator attendant, an employee of another independent contractor, who operated the elevator for the defendant. *Held*, (three judges *dissenting*) that the defendant was liable. *Besner v. Central Trust Co.* (1921) 230 N. Y. 357, 130 N. E. 577.

It is well settled that it is the duty of the owner of land to exercise reasonable care to keep the premises in a safe condition for the use of those present by express or implied invitation. 3 Shearman and Redfield, *Negligence* (6th ed. 1913) 1853. A person is an invitee when he is present for the benefit, or in the interest of, the owner or occupant, or when his presence is of mutual interest. *Meiers v. Fred Koch Brewery* (1920) 229 N. Y. 10, 127 N. E. 491; *Coburn v. Village of Swanton* (1920, Vt.) 109 Atl. 854. An employee of a contractor engaged to do work on the premises is regarded as an invitee. 1 Thompson, *Negligence* (1901) 898; *John Spry Lumber Co. v. Duggan* (1898) 80 Ill. App. 394. As a general rule, an employer is not liable for the negligence of his independent contractor or the latter's servants. 14 R. C. L. 79. But if one is on the premises as an invitee, the duty of keeping the premises *reasonably safe for use according to the invitation*, cannot be delegated to an independent contractor. *Curtis v. Kiley* (1891) 153 Mass. 123, 26 N. E. 421. Upon this principle the decision in the instant case seems sound since the deceased may well have understood that the owner of the building was holding himself out as having control of the elevator and that he could be relied upon to use due care in its operation. And since at the time of the accident the deceased was engaged in the performance of the very purpose for which he was invited and in accordance with the terms of the invitation as he understood them, the owner ought not to be allowed to delegate the duty to use reasonable care for his safety to an independent contractor. A more difficult situation would present itself if the deceased were aware of the fact that the elevator were under the control of the independent contractor. It is problematical whether the owner would be liable under such circumstances.

MASTER AND SERVANT—RESPONSIBILITY FOR SERVANT'S DEVIATION OR DEPARTURE.—The defendant's chauffeur was ordered to go from the defendant's mill to some freight yards and to bring back some barrels of paint. After loading, he drove four blocks beyond the yard to his sister's house to give her some waste wood found at the yard. On the way back to the defendant's mill, and before he had passed the yard again, he negligently injured the plaintiff. *Held*, (three judges *dissenting*) that, even if the trip to his sister's house were a departure and not a mere deviation, he had reached a point, on the return toward the mill, which brought him again within the scope of his employment, so as to render the master liable. *Riley v. Standard Oil Co.* (1921) 231 N. Y. 301, 132 N. E. 97.

The wide conflict in this class of cases is not due to any uncertainty in the law, but to constantly varying interpretations of the facts. For example, it is well settled that, when a chauffeur is "on a frolic of his own," i. e., without permission and for no purpose connected with his master's service, he takes out the car, the trip is a complete departure, and the master is not liable for any accidents occurring. *Storey v. Ashton* (1869) L. R. 4 Q. B. 476; *Donnelly v. Yuille* (1921) 197 App. Div. 59, 188 N. Y. Supp. 603; *Colwell v. Aetna Bottle Co.* (1912) 33 R. I. 531, 82 Atl. 388; *contra*, *Quinn v. Power* (1882) 87 N. Y. 535. It is as well settled that, when the servant is simultaneously doing his master's

and his own business, he is within the scope of his employment, and the master is liable. *Patten v. Rea* (1857) 2 C. B. (N. S.) 605; *Clawson v. Pierce-Arrow Motor Car Co.* (1921) 231 N. Y. 273, 131 N. E. 914; *contra*, *Schoenherr v. Hartfield* (1916) 172 App. Div. 294, 158 N. Y. Supp. 388; (1920) 30 YALE LAW JOURNAL, 189. But where a servant starts out to do his master's business, and somewhere on the way deviates for his own purposes, some courts have held this as a departure absolving the master. *Mitchell v. Crassweller* (1853) 13 C. B. 237; *McCarthy v. Timmins* (1901) 178 Mass. 378, 59 N. E. 1038. Others have called it a mere deviation, equivalent to doing the master's work irregularly or badly. *Whimster v. Holmes* (1914) 177 Mo. App. 130, 164 S. W. 236. The dividing line between a departure and a deviation is, of course, a difficult "question of degree." *Storey v. Ashton*, *supra*. The tendency is however, to consider even a departure only a deviation, if on the way back,—that is, as soon as the servant's own errand is at an end, and he *begins* to return—he is again performing his service. *Barmore v. Vicksburg* (1904) 85 Miss. 426, 38 So. 210. This is as extreme a view as that which regards the entire trip as outside the scope of his employment. *Patterson v. Kates* (1907, C. C. E. D. Pa.) 152 Fed. 481; 2 *Mechem, Agency* (2d ed. 1914) par. 1907. The better view—a compromise between these two extremes—is that when the servant returns to that point, where, if he had not *continued* for a personal purpose, it would be considered a deviation and not a departure, the master's responsibility reattaches. *Dockweiler v. Amer. Piano Co.* (1916, Sup. Ct.) 94 Misc. 712, 160 N. Y. Supp. 270. The principal case seems to reflect this better tendency.

PROPERTY—COVENANT AGAINST INCUMBRANCES—EFFECT OF EASEMENT GRANTED BY IMPERFECT DEED.—The defendant conveyed land to the plaintiff with a covenant against incumbrances. A third person held a deed of an easement on the land and had made improvements while in possession. But the deed was unattested and unacknowledged and a statute rendered it invalid against the subsequent purchaser of the land. The plaintiff, having notice of the facts, sued for a breach of the covenant. *Held*, (three judges *dissenting*) that the plaintiff could recover. *City of New York v. New York and South Brooklyn Ferry & Steam Transp. Co.* (1921) 231 N. Y. 18, 131 N. E. 554.

An incumbrance in a covenant against incumbrances is a burden on land depreciative of its value. 16 A. & E. Enc. Law, 158. A specifically enforceable contract against the grantor of which the grantee has notice is such. *Cummins v. Beavers* (1904) 103 Va. 230, 48 S. E. 891; *Willoughby v. Lawrence* (1886) 116 Ill. 11, 4 N. E. 356; Clark, *Equity* (1919) sec. 86. The fact that the latter had knowledge of the incumbrance before accepting the deed does not release the former from his covenant. *Huyck v. Andrews* (1889) 113 N. Y. 81, 20 N. E. 581. Being a freehold estate, an easement can be granted only by deed. *Cayuga Ry. v. Niles* (1878, N. Y.) 13 Hun, 170. In equity, however, partial performance of an oral contract gives the claimant of the easement an equitable interest in the land. *Wiseman v. Lucksinger* (1881) 84 N. Y. 31. By statute, a subsequent purchaser is not bound by an unattested and unacknowledged grant of a freehold. N. Y. Cons. Laws, 1909, ch. 50, sec. 243. Even if such purchaser acts in bad faith and with notice. *Chamberlain v. Spargur* (1881) 86 N. Y. 603; *Dunn v. Dunn* (1912) 151 App. Div. 800, 136 N. Y. Supp. 282. But the grant is effective between the original parties. *Strough v. Wilder* (1890) 119 N. Y. 530. In the instant case the court held that, though the deed was invalid as a conveyance by the statute, partial performance in reliance on it bound the subsequent purchaser with notice and therefore that the covenant against incumbrances had been broken. The case depends entirely upon interpretation. If the subsequent purchaser is protected absolutely against all persons holding grants which lack the formal

requisites of the statute, the dissenting opinion is justified. The majority view, however, seems preferable. Strict interpretation would contradict the established principles of equity, which are recognized as paramount in another section of the same statute. N. Y. Cons. Laws, 1909, ch. 50, sec. 250.

TORTS—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED OF GUEST IN AUTOMOBILE.—The plaintiff, a guest in an automobile driven by the owner, was injured in a collision with a street car. Familiar with the surroundings, and with adequate opportunity to make observations, the plaintiff took no measures to discover the danger or warn the driver. A proximate cause of the collision was the driver's negligence. The plaintiff sought damages from the street railway company. Held, that the plaintiff's conduct constituted contributory negligence and that therefore he could not recover. *Hill v. Philadelphia Rapid Transit Co.* (1921, Pa.) 114 Atl. 634.

The duty of a driver to his guest is not to increase the dangers ordinarily incident to driving. *Perkins v. Galloway* (1916) 198 Ala. 658, 73 So. 956. The courts differ as to the degree of care to be exercised by the guest, the cases being sometimes divided into two groups. NOTES (1918) 3 CORN. L. QUART. 156. The first charges the guest with the absolute duty of keeping a lookout for his own safety, not permitting him to trust to the care of the driver. *Koehler v. Rochester & L. Ont. Ry.* (1893, N. Y.) 66 Hun, 566. This category, apparently that of the principal case, is perhaps extreme. The second allows the guest to rely upon a driver whom he believes to be careful. *Howe v. Minneapolis, St. P. & S. Ste. M. Ry.* (1895) 62 Minn. 71, 64 N. W. 102. Where the guest has no control over the driver, the negligence of the latter is not imputed to him. *Chodes v. Clark Seed Co.* (1920) 95 Conn. 263, 111 Atl. 58. But the guest is bound to exercise such care for his safety as the exigencies of the situation require. *Praught v. Great Northern Ry.* (1920) 144 Minn. 309, 175 N. W. 998. He must observe the care of an ordinary person in like circumstances in respect to dangers known to him or reasonably foreseeable by him; but he is under no duty to anticipate that the driver, if reasonably believed to be competent, will fail to exercise proper care. *Birmingham Ry. v. Barranco* (1920) 203 Ala. 639, 84 So. 839. A guest is not charged with the same strict duty of keeping a lookout as the driver; he may rely in some measure on the assumption that the driver will use care to avoid the dangers of the road. *Christensen v. Johnston* (1917) 207 Ill. App. 209; *Martin v. Southern Pac. Co.* (1919, Calif. App.) 185 Pac. 1030. The guest is not guilty of contributory negligence as a matter of law merely because he has done nothing; for in many cases, the highest degree of caution consists of inaction. *Hermann v. Rhode Island Co.* (1914) 36 R. I. 447, 90 Atl. 813. Failure to keep a lookout and warn may be evidence of negligence, but not conclusive evidence. *Carnegie v. Great Northern Ry.* (1914) 128 Minn. 14, 150 N. W. 164. "A guest is not expected to direct the driver nor keep a lookout; he may go to sleep, read, talk, or remain in deep thought, without being chargeable with negligence; but he would be negligent should he unreasonably fail to give warning of known danger." *Weidlich v. N. Y., N. H. & H. Ry.* (1919) 93 Conn. 438, 106 Atl. 323. He is not responsible for the failure to discover dangers which he might have discovered had he given attention to the roadway ahead. *Azinger v. Pennsylvania Ry.* (1918) 262 Pa. 242, 105 Atl. 87. The extent to which a guest should foresee an impending peril and act in relation thereto, depends upon the facts peculiar to each case, and it is a question of fact for the jury. *Christison v. St. Paul City Ry.* (1917) 138 Minn. 456, 165 N. W. 273. Unlike that of the principal case, the better rule, it seems, would impose no duty on the guest to keep a lookout and warn the driver, unless a manifest danger has come to his knowledge, which he has reason to believe is unknown to the driver. *Weidlich v. N. Y., N. H. & H. Ry. supra.*

TORTS—INFANT TRESPASSER UPON AERIAL RIGHT OF WAY—UNINSULATED ELECTRIC WIRES.—The thirteen year old plaintiff climbed a tree through which ran the uninsulated wires of the defendant company. The tree was standing near the highway, but was not on the defendant's land. He grasped a wire, and received the injury for which suit was brought. *Held*, that the plaintiff could not recover. Peaslee, J., *dissenting*. *McCaffrey v. Concord Electric Co.* (1921, N. H.) 114 Atl. 395.

The courts are in conflict as to whether a small boy climbing in a tree, through which an electric company has a right of way for its wires, is a trespasser against the electric company. Some courts hold that he is a trespasser against the owner of the tree, but not against the electric company. *Williams v. Springfield Gas & Electric Co.* (1918) 274 Mo. 1, 202 S. W. 1; *Benton v. North Carolina Public Service Co.* (1914) 165 N. C. 354, 81 S. E. 448; Curtis, *The Law of Electricity* (1915) sec. 512; *contra*, *Robbins v. Minute Tapioca Co.* (1920, Mass.) 128 N. E. 417. Another line of cases holds that when a company places an unattractive, though dangerous, instrumentality, in a place attractive to children, it is liable for any injuries suffered by a trespassing infant due to its uninsulated wires. *Consolidated Electric Co. v. Healy* (1902) 65 Kan. 798, 70 Pac. 884. It is negligent to leave uninsulated a highly-charged electric wire which passes through a tree near the roadside, for the company must anticipate that infants will climb in such a tree. *Temple v. McComb City Electric Co.* (1907) 89 Miss. 1, 42 So. 874; *Sweeten v. Pacific Power & Light Co.* (1915) 88 Wash. 679, 153 Pac. 1054; (1920) 18 MICH. L. REV. 426. Where a dangerous electric wire, impracticable of complete insulation, was placed in close proximity to the trellis-like support of another company, so that an infant, being attracted to climb the trellis, was injured by contact with the wire, the court held that the party responsible for creating the dangerous agency was liable. *Stedwell v. City of Chicago* (1921, Ill.) 130 N. E. 729; 1 Thompson, *Negligence* (1901) sec. 1030. Some courts have in terms adopted the "Turntable Doctrine" in cases similar to the principal one. *New York, New Haven, & Hartford Ry. v. Fruchter* (1921, C. C. A. 2d) 271 Fed. 419; criticized in (1921) 30 YALE LAW JOURNAL, 870; see (1915) 25 YALE LAW JOURNAL, 84; COMMENTS (1919) 29 YALE LAW JOURNAL, 223; Jeremiah Smith, *Liability of Landowners to Children Entering without Permission* (1898) 11 HARV. L. REV. 349, 434. The orthodox view, to which that of the principal case is analogous, is that a landowner has a right to the exclusive possession of his property, and that anyone trespassing, whether infant or adult, does so at his own risk except where the injury is caused by a wilful or wanton act. *Ryan v. Towar* (1901) 128 Mich. 463, 87 N. W. 644; *Gherra v. Central Illinois Public Service Co.* (1918) 212 Ill. App. 48 (company not liable for injury received due to an uninsulated wire by a trespassing infant climbing a tree near the highway). The present decision follows its state precedents, but it seems as though it would have been better if the court had regarded the defendant as owing a duty to the infant, and not looking upon the trespass on the aerial right of way in such a highly technical sense, had allowed a recovery, as was done in a recent well-considered case which involved a similar technicality. *Hynes v. New York Central Ry.* (1921) 231 N. Y. 229, 131 N. E. 898.

TORTS—PROXIMATE CAUSE—INJURY CAUSING DISEASE RESULTING IN DEATH.—Due to the defendant's negligence, the decedent, a subway passenger, suffered an injury resulting in the bruising of her body. Some three weeks later she died of pneumonia. In an action brought by her administrator for negligently causing the death of the deceased, the jury found for the plaintiff. *Held*, reversing the judgment of the lower court, that the plaintiff had failed to show an unbroken connection between the wrongful act and the death. Greenbaum, J., *dissenting*. *Santolo v. Interborough Rapid Transit Co.* (1921) 196 App. Div. 34, 187 N. Y. Supp. 390.

A defendant is usually liable for any injury proximately due to his negligence, although the particular injury could not have been anticipated as probable. See *Childs v. Standard Oil Co.* (1921, Minn.) 182 N. W. 1001; *Polemis v. Furness, Withy, & Co. Ltd.* (1921, C. A.) 37 L. T. R. 940. Causal connection is not generally broken by the following facts: (1) instinctive acts of the plaintiff or third persons, if reasonable; *Woolley v. Scovell* (1828, K. B.) 3 Man. & R. 105; *Scott v. Shepherd* (1773, C. P.) 3 Wils. 407; (2) acts due to deliberate choice of plaintiff or third persons, if reasonable; *Boggs v. Jewell Tea Co.* (1919) 263 Pa. 413, 109 Atl. 666; *Vandenburg v. Truax* (1847, N. Y.) 4 Denio, 464; (3) innocent, or indeed wrongful, acts of third persons, if foreseeable and reasonable; *Brower v. N. Y. C. & H. R. Ry.* (1918) 91 N. J. L. 190, 103 Atl. 166; *contra, Andrews & Co. v. Kinsel* (1901) 114 Ga. 390, 40 S. E. 300. See (1918) 27 YALE LAW JOURNAL, 1087; (4) fright caused by negligence resulting in injury, such as a miscarriage; *Ala. Fuel & Iron Co. v. Baladini* (1916) 15 Ala. App. 316, 73 So. 205; *contra, Nelson v. Crawford* (1899) 122 Mich. 466, 81 N. W. 335; (5) disease, even though there was a pre-existing tendency toward it. *McCahill v. N. Y. Transportation Co.* (1911) 201 N. Y. 221, 94 N. E. 616. Where, however, the injury caused insanity, and, while insane, the injured person committed suicide, death is held not to be a proximate result of the injury. *Daniels v. N. Y., N. H. & H. Ry.* (1903) 183 Mass. 393, 67 N. E. 424. There seems to be no sound reason for this holding. Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633, 645. A greater degree of liberality is shown in workmen's compensation cases than in those at common law when death resulted from a disease following an injury. *State, ex rel. Jefferson, v. District Court* (1917) 138 Minn. 334, 164 N. W. 1012; Harper, *Workmen's Compensation* (2d ed. 1920) 130. On facts similar to the principal case the finding of a workmen's compensation commission in favor of a plaintiff has been sustained. *Driscoll v. Jewell Belting Co.* (1921, Conn.) 114 Atl. 109. The distinction is without foundation. If disease brought on by injury causes death, the injury is the proximate cause of death, and the disease is not an independent cause. 1 Thompson, *Negligence* (1901) 150. Disease after an injury is as probable and foreseeable as any of the intermediate causes previously enumerated. No inflexible, definite principle of causation can be laid down. 1 Street, *Legal Liability* (1906) 110; *Parker v. Marlboro Cotton Mills* (1920) 114 S. C. 156, 103 S. E. 512. Whether a particular disease is the result of a particular injury is a question of fact for the jury. *Baltimore City Passenger Ry. v. Kemp* (1883) 61 Md. 74; 1 Thompson, *op. cit.* 154. It seems as if the court might well have upheld the verdict in the instant case.

TORTS—RECOVERY BY ADMINISTRATOR ON BEHALF OF BENEFICIARY WHOSE NEGLIGENCE CONTRIBUTED TO INJURY CAUSING DEATH OF INTESTATE.—The administrator of a child killed by the defendant's negligence brought action under the Ohio death statute to recover damages on behalf of the child's parents. The trial court instructed the jury to disregard the contributory negligence of the parents in determining the right of recovery. Held, that the question of contributory negligence should have been submitted to the jury. *Star Fire Clay Co. v. Budno* (1920, C. C. A. 6th) 269 Fed. 508.

The Ohio statute (Gen. Code Ohio, 1910, tit. 3, ch. 3, secs. 10770, 10772) under which this action was brought is substantially similar to Lord Campbell's Act. In cases brought under statutes of this type many courts deny recovery to a negligent beneficiary, because it would be unreasonable to permit one who had negligently sacrificed another's life to profit by that negligence. *Lee v. New River Coal Co.* (1913, C. C. A. 4th) 203 Fed. 644, under W. Va. Code, 1906, ch. 103, secs. 3488, 3489; *Kentucky Utilities Co. v. McCarty's Adm'r.* (1916) 169 Ky.

38, 183 S. W. 237, under Const. 1891, sec. 241 and Sts. 1915, sec. 6; *Kuchler v. Milwaukee etc. Co.* (1914) 157 Wis. 107, 146 N. W. 1133, under Sts. 1898, ch. 178, secs. 4255, 4256 as amended by Laws, 1911, ch. 226. Other jurisdictions, contrary to the holding of the instant case, allow a recovery under statutes of the Lord Campbell type on the ground that the legislature has specifically declared that a right of action shall exist in the personal representative, and that it is not within the province of the court to consider the negligence of the beneficiaries. *Hines v. McCullers* (1920) 121 Miss. 666, 83 So. 734 under Hem. Ann. Code, 1917, ch. 9, sec. 501; *Braun, Adm'r. v. Buffalo Gen'l. Elec. Co.* (1914) 213 N. Y. 655, 107 N. E. 338, under C. C. P. 1890, ch. 15, sec. 1902. The statutes which are modeled on Lord Campbell's Act provide for a right of action in the personal representative, if the deceased, had he lived, would have had a cause of action. The so-called "survival" statutes simply provide that the deceased's cause of action shall survive to the personal representative. Under statutes of the latter type, a recovery is generally allowed on behalf of negligent beneficiaries, the courts viewing such recovery as a mere incident to the action in favor of the estate. *Wymore v. Mahaska County* (1889) 78 Iowa, 396, 43 N. W. 264, see Code, 1897, tit. 18, ch. 1, secs. 3443, 3445. *Warren, Adm'r. v. Manchester Ry.* (1900) 70 N. H. 352, 47 Atl. 735, under Pub. Sts. 1891, ch. 191, secs. 8, 13. But see contra, *Crevilli v. Chicago Ry.* (1917) 98 Wash. 42, 167 Pac. 66, under Act of April 5, 1910 (36 Stat. at L. 291); see criticism (1917) 27 YALE LAW JOURNAL, 413. It has been held that recovery can be had under such a "survival" statute, whereas had the action been brought under the death statute in the same state—Kirby's Ark. Dig. 1904, ch. 125, secs. 6289, 6290—substantially following Lord Campbell's Act; no recovery could be had. *Nashville Lumber Co. v. Busbee* (1911) 100 Ark. 76, 139 S. W. 301, 38 L. R. A. (N. S.) 754, note, under Kirby Dig. 1904, ch. 125, sec. 6285 and ch. 51, sec. 2636 (2); compare likewise *Love v. Detroit Ry.* (1912) 170 Mich. 1, 135 N. W. 963 with *Feldman v. Detroit United Ry.* (1910) 162 Mich. 486, 127 N. W. 687. If it is conceded to be a fundamental principle of law that one guilty of contributory negligence proximately contributing to an injury should not be allowed any recompense for the loss occasioned through his own negligence, the view of those courts denying recovery is sound. If, on the other hand, it be thought more just and politic in the average case to allow recovery in spite of such negligence, on the ground that actual damages are thereby more evenly distributed—the loss of the person, compensated as well as may be by damages, being borne by the family, the loss of money by the defendant—the statutes, whether of the Lord Campbell or of the survival type, unquestionably permit—by literal interpretation—such a recovery,—a result in fact reached by the courts of many jurisdictions, among them New Hampshire and New York.

WILLS—CONSTRUCTION OF REPUGNANT CLAUSES—GIFT OVER AFTER GENERAL BEQUEST.—The testator provided: "To my sister Georgie I give and bequeath four thousand dollars. At her decease same to go to my sister Frances." *Held*, (three judges *dissenting*) that Georgie took a life estate only. *Gregg v. Bailey* (1921, Me.) 113 Atl. 397.

The majority opinion rested on the testator's intention as disclosed by the two gifts considered together, while it was argued in the dissenting opinion that the bequest to Georgie, being without words of limitation, passed an absolute estate, rendering any limitation over repugnant and void. A Maine statute declares that "a devise of land conveys all the estate of the devisor therein unless it appears by the will that he intended to convey a less estate." Rev. Sts. 1903, ch. 76, sec. 16. By analogy, the same rule is applied to bequests of personalty. *Loring v. Hayes* (1894) 86 Me. 351, 29 Atl. 1093. The statute seems to require a reading of the will as a whole in the determination of the testator's intent. If two plainly repug-

nant intentions are then discovered, one must give way to the other. *Ramsdell v. Ramsdell* (1842) 21 Me. 288, 293; *Jackson v. Robins* (1819, N. Y.) 16 Johns. 537, 589. This difficulty does not arise in the instant case unless it is necessary to consider the clause providing for the gift to Georgie as absolute, separate, and apart from the provision making the gift to Frances. A gift to one and his heirs is clearly absolute. *Morrill v. Morrill* (1917) 116 Me. 154, 100 Atl. 756. A gift *simpliciter* coupled with an absolute power of disposition, express, or implied by a gift over of the residue, likewise gives a fee. *Jones v. Bacon* (1877) 68 Me. 34; *Henderson v. McCowan* (1920, N. J. Eq.) 110 Atl. 517. But a power of disposal, however sweeping, will not enlarge an express life estate into a fee. *Brant v. Va. Coal & Iron Co.* (1876) 93 U. S. 326; *Stuart v. Walker* (1881) 72 Me. 145; *contra*, *Bowen v. Bowen* (1891) 87 Va. 438, 12 S. E. 885. When the gift is indefinite, if the power can be construed as limiting the first taker's enjoyment to his lifetime, he will be given a life estate only. *Barry v. Austin* (1919) 118 Me. 51, 105 Atl. 806; *Mansfield v. Shelton* (1896) 67 Conn. 390, 35 Atl. 271; *Brookover v. Branyan* (1916) 185 Ind. 1, 112 N. E. 769. And when the words of the gift to the first taker would naturally imply an absolute gift if standing alone, a limitation over clearly showing that the testator believed that he had given merely a life estate will cut down the first gift. *Smith v. Bell* (1832, U. S.) 6 Pet. 68; *Gruenewald v. Neu* (1905) 215 Ill. 132, 74 N. E. 101; *Hopkins v. Keazer* (1896) 89 Me. 347, 36 Atl. 615; *contra*, *Mitchell v. Morse* (1885) 77 Me. 423, 1 Atl. 141 (but not supported by authorities cited). It is clear that a bequest *simpliciter* is not an absolute gift when the will as a whole shows a contrary intention. The decision in the principal case should settle the Maine law beyond dispute. For a general classification of bequests giving life estates, see (1921) 30 YALE LAW JOURNAL, 868.

WILLS—DECREE OF PROBATE COURT—CONCLUSIVE THOUGH ENTERED UNDER A MISTAKE OF LAW.—Upon the petition of an administratrix, a final decree of distribution had been entered and the time for appeal had elapsed. Having obtained the advice of new counsel, she sought to have the previous decree vacated on the ground that it was entered under a mistake of law. A statute provided that the court might relieve a party from a judgment taken against him through his mistake. (Rem. Wash. Code, 1915, sec. 303.) *Held*, that the decree was conclusive. *In re Jones' Estate* (1921, Wash.) 199 Pac. 734.

The ecclesiastical courts of England, which exercised exclusive jurisdiction over the personalty of deceased persons, were not courts of record. Thus, unlike the judgments of common-law courts, their decrees were not conclusive. *Ward v. Vickers* (1802, N. C.) 2 Hayw. 164. Probate might be recalled for fraud or collusion in propounding a will. See *Hayle v. Hasted* (1836) 1 Curt. Eccl. 236. Also the conclusion of a cause could be rescinded to allow evidence of the testator's signature to be introduced. *Shaunessy v. Allen* (1752) 1 Lee Eccl. 9. When, however, jurisdiction over all wills was concentrated in a probate court, this became a court of record. (1857) 20 & 21 Vict. c. 77. In the United States, probate courts owe their existence and power to constitutions and statutes. *Pelham v. Murray* (1885) 64 Tex. 477, 481. They are usually courts of record. *Farris v. Burchard* (1912) 242 Mo. 1, 145 S. W. 825. At common law a final judgment of a court of record, unless void, could not be set aside at a subsequent term. *Spivey v. Taylor* (1920) 144 Ark. 301, 222 S. W. 57. Statutes, however, usually specify certain grounds upon which a court may vacate a judgment of a previous term. *Miller v. Prout* (1920) 32 Idaho, 728, 187 Pac. 948. Mistake is often included in these grounds, as in the Washington statute. It is ordinarily construed to mean a mistake of fact and not a mistake of law. *Mann v. Hall* (1913) 163 N. C. 50, 79 S. E. 437; *contra*, *Baxter v. Chute* (1892) 50 Minn. 164, 52 N. W. 379. The

refusal to vacate the judgment in the instant case seems clearly sound, for, even in the few states where judgments are set aside for mistakes of law, such relief would not be granted to a party who petitioned for the very decree entered. See *Douglass v. Todd* (1892) 96 Calif. 655, 659, 31 Pac. 623, 624.

WILLS—GIFTS CAUSA MORTIS—TO BE VALID AS DEED MUST PASS PRESENT INTEREST.—A quitclaim deed from a wife to her husband for a nominal consideration, made in anticipation of possible death from an operation, provided that it was to be effective only if the grantee survived her, that it was "to vest and take effect" on her decease and until that time was to be subject to revocation on her part. Held, that it was a testamentary document and invalid under the Statute of Wills. *Butler v. Sherwood* (1921) 196 App. Div. 603, 188 N. Y. Supp. 242.

The border line between a will and a deed not to be fully operative until the death of the grantor, is elusive. Ballantine, *When are Deeds Testamentary* (1920) 18 MICH. L. REV. 470. A will passes no present interest and is subject to recall at any time. *Nichols v. Emery* (1895) 109 Calif. 323, 41 Pac. 1089. But a deed, operative at the death of the grantor, to be valid, must be delivered by the grantor with an intent to transfer some present interest to the grantee. *Turner v. Scott* (1866) 51 Pa. 126; *Shaul v. Shaul* (1918) 182 Iowa, 770, 166 N. W. 301; Underhill, *Wills* (1900) sec. 37. The grantor may convey a fee simple estate expressly reserving to himself a life estate. *Tennant v. John Tennant Memorial Home* (1914) 167 Calif. 570, 140 Pac. 242; *Hudspeth v. Grumke* (1919, Mo.) 214 S. W. 865. Or the grantor may have clearly negated any intent to pass a present interest. *Leaver v. Gauss* (1883) 62 Iowa, 314, 17 N. W. 522. It is in the absence of such express conditions that the courts have difficulty in determining whether a present interest has passed. This is dependent upon the intention of the parties to be ascertained by a close analysis of the language used or by the surrounding circumstances. *Hohenstreet v. Segelhorst* (1920, Mo.) 227 S. W. 80; *Seay v. Huggins* (1915) 194 Ala. 496, 70 So. 113; *Sprunger v. Ensley* (1920) 211 Mich. 102, 178 N. W. 714. The majority of courts attempt to construe the language as implying a life estate reserved to the grantor with the grantee's fee arising by way of remainder, i.e. title vests *in praesenti*, though the enjoyment is *in futuro*. *Bullard v. Suedmeier* (1920) 291 Ill. 400, 126 N. E. 117; *Green v. Skinner* (1921, Calif.) 197 Pac. 60; see *Abbott v. Holway* (1881) 72 Me. 298. The delivery must in every case be unequivocal. Where the deed is to be operative on the happening of an uncertain contingency other than the death of the grantor, the delivery is usually held ineffective even though the contingency occur. *Stone v. Daily* (1919) 181 Calif. 571, 185 Pac. 664; *Weber v. Brak* (1919) 289 Ill. 564, 124 N. E. 654; see also *Seeley v. Curtis* (1913) 180 Ala. 445, 61 So. 807. The retaining of the power to control or recall the deed during the grantor's lifetime renders delivery conditional and hence ineffective. *Wortz v. Wortz* (1915) 128 Minn. 251, 150 N. W. 809; *Eckert v. Stewart* (1918, Tex. Civ. App.) 207 S. W. 317; *contra*, *Lippold v. Lippold* (1900) 112 Iowa, 134, 83 N. W. 809. But every effort is made to validate the manifest intent of the parties. *Jones v. Caird* (1913) 153 Wis. 384, 141 N. W. 228; *Price v. Cross* (1918) 148 Ga. 137, 96 S. E. 4. However, the combination of conditions of testamentary aspect such as appears in the instant case, coupled with the power to recall the deed, clearly renders the instrument void as an attempted will.