Michigan Law Review

Volume 3 | Issue 5

1905

Note and Comment

Michigan Law Review

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Recommended Citation

Michigan Law Review, *Note and Comment*, 3 MICH. L. REV. 387 (1905).
Available at: https://repository.law.umich.edu/mlr/vol3/iss5/5

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE, $2.50 PER YEAR, ... 35 CENTS PER NUMBER

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NOTE AND COMMENT

THE FEDERAL SAFETY APPLIANCE ACT AS A REGULATION OF INTERSTATE COMMERCE.—President Harrison in his first annual message in 1889 said: "It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." He repeatedly urged congressional action, as did also various congressional committees. At length, a Safety Appliance Act was passed March 2, 1893 (27 Stat. 531, 3 U. S. Comp. Stat. 1901, pp. 3174-3176), which provided, among other things, that after January 1, 1898, "it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive or engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train brake system; * * * or for such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars; * * * any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of $100.00 for each violation, etc.; * * * and any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the pro-

visions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

Statistics show that in 1889, when President Harrison's recommendation was first made, about six per cent of the freight cars were equipped with automatic couplers; in 1893, when the act was passed, the percentage had increased to twenty-six, and in 1898, when it was to go into effect, the percentage was sixty-eight. After full hearing the Interstate Commerce Commission extended the time of compliance in certain cases to August 1, 1900. In 1893 when the law was passed 433 employees were killed in coupling accidents, one to every 349 trainmen employed,—and 11,277 were injured, one to every 13 employed; in 1897, the year before the act went into operation, the killed were 214, one to 647; the injured were 6,283, one to 22; in 1901, after the law was fully in operation, 198 were killed, one to 824, and 2,768 were injured, one to 59 employed. This is a gratifying showing as to the value of the law, but its good effects were likely to be largely nullified by the decision in *Johnson* v. *Southern Pacific Co.*, in the District Court of the United States, affirmed by the Circuit Court of Appeals of the United States, Aug. 28, 1902, 117 Fed. Rep. 462, holding that the law did not require engines to be equipped with automatic couplers nor require cars to be equipped with automatic couplers that would couple with one of another kind, and did not apply to a car left on a side track, while it was being turned in order to be attached to an interstate train soon to arrive, and continue on its journey. The case was taken to the Supreme Court, and was decided Dec. 19, 1904, *Johnson* v. *Southern Pacific Co.*, 25 Sup. Ct. R. 158, Mr. CHIEF JUSTICE FULLER pronouncing the opinion. The facts were: Johnson was head brakeman on a regular freight train between San Francisco and Ogden; on reaching a town some distance west of Ogden, he was directed to uncouple the engine from the train, couple it to a dining car, standing on the side track, turn the car around, so it could be picked up and put on the next west-bound through passenger train; the engine had a Janney coupler and the car a Miller hook,—these would not automatically couple together, and Johnson had to go between and couple by hand; in doing so, his hand was crushed. The dining car was attached to an east-bound passenger train at San Francisco, and usually run into Ogden, where it was attached to the west-bound train for San Francisco; on this trip the east-bound train had been too late to allow this car to run into Ogden, and it had been left at the town out of Ogden, to be there attached to the west-bound train. The view of the lower court was based upon the doctrine that the law was penal, and in derogation of the common law, and should be most strictly construed. The Supreme Court overruled all the conclusions of the lower court; the intention of the law should govern; its meaning should be drawn from the words, but to carry out the intention of Congress; the preamble stated that the act was "to promote the safety of employees": automatic couplers are as necessary on locomotives, for the safety of employees, as on cars; "any car," by the context, subject matter, and object, includes locomotive,—"car" is used in the generic sense; the dic-

tionaries and decisions so hold. (*Winkler* v. *Phil. R. R. Co.*, 4 Penn. (Del.) 387, 53 Atl. Rep. 90; *Fleming* v. *Southern Ry. Co.*, 131 N. C. 476; *East St. L. Ry. Co.* v. *O'Hara*, 150 Ill. 580; *Kansas City R. Co.* v. *Crocker*, 95 Ala. 412; *Thomas* v. *Georgia, etc., R. Co.*, 38 Ga. 222; *New York* v. *Third Ave. Ry. Co.*, 117 N. Y. 404.)

Again, the Act is not complied with merely by having automatic couplers on the engine and cars, that would couple with those of the same kind; it requires such as will couple with those of different kinds; the object was to protect the lives and limbs of employees—to make it unnecessary to go between cars to couple or uncouple; the statute forbids the use of cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars"; this should be read as if there were a comma after "uncoupled."

Again, it was held below "that as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act." Upon this point it is said, "The presumption is that it was stocked for the return, and as it was not a new car or a car just from the repair shop on its way to its field of labor, it was not an 'empty' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and it cannot be true that on the eastern trip the act would be binding, because the cars were loaded, but would not be binding on the return trip, because the cars are empty," citing *Voelker* v. *Ry. Co.*, 116 Fed. R. 867.

Again, to the argument that the character of the car was local only, and could not be changed until it was actually engaged in interstate movement or being put into a train for such use, it was answered that *Coe* v. *Errol*, 116 U. S. 517, holding that logs cut in New Hampshire, and hauled to a river in order to be transferred to Maine, did not apply, for there is a "distinction between merchandise which may become an article of interstate commerce, or not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip."

After the decision of the lower court Congress amended the law so as to make it clearly include such cases as this (Mar. 2, 1903, C. 976; 32 Stat. 943). This fact, however, in no way detracts from the real value of the court's decision in this case as an announcement that in law humane principles have place.

LIABILITY OF CHRISTIAN SCIENCE HEALER FOR NEGLIGENCE AND DECEIT.—In the recent case of *Spead* v. *Tomlinson* (N. H. Sup. Court, Oct. 4, 1904), 59 Atl. Rep. 376, an action was brought for damages alleged to have been suffered by the plaintiff at the hands of the defendant, who is a christian science healer. The declaration contained counts in contract, negligence and deceit, but the case as finally decided by the Supreme Court involved only the questions of negligence and deceit. It seems that the plaintiff, who had become

interested in the doctrines of christian science and who had attended meetings at which the defendant had told of wonderful cures performed by him, suffered from an attack of appendicitis; that while so suffering, she visited defendant at his home, informed him of the nature of her trouble and of her dread of a surgical operation; that before becoming interested in christian science she had suffered from the same disease, employed a medical practitioner for several months, and learned in a general way the ordinary treatment by physicians of the difficulty. She employed defendant, who "told her that a surgical operation was not necessary, that she was not to take any medicine, and that he could and would cure her if she continued his treatment. He directed her to read 'Science and Health,' to continue her usual diet of solids, and to take her accustomed exercise. He also read to her extracts from 'Science and Health,' and administered treatment by sitting in front of her in an attitude of prayer." Notwithstanding the treatment of defendant, the plaintiff's condition became more serious, and she finally submitted to a surgical operation by regular physicians and was cured. "There was evidence tending to show that the defendant's treatment was injurious to the plaintiff, and that, if it had been persisted in, a cure would have been impossible." It appeared that the plaintiff knew that the defendant made no claim to medical knowledge in the ordinary sense of the term, and that he relied solely upon the ordinary practices of the christian science healer. But it also appeared "that she employed him because she believed he could cure her, and that her belief was based upon his representations as to the efficacy of his treatment in other cases." At the time of the treatment the defendant was not only the physician but also the pastor of the plaintiff.

The plaintiff's right to recover upon the ground of negligence was denied. The conclusion was based primarily upon the proposition that it was the care, skill and knowledge of the ordinary christian science healer that should be the standard by which the defendant should be judged, and not the care, skill and knowledge of the ordinary physician. There being no evidence that defendant had fallen below that standard in the treatment of the plaintiff, it necessarily followed that the plaintiff could not recover. But was the court correct in its premise? The court relied upon those cases that hold that the treatment of a physician must be tested by the principles of the school to which he belongs, citing among other cases *Patten* v. *Wiggin,* 51 Me. 594, in which it is stated that "if there are distinct and different schools of practice, as allopathic or old school, homœopathic, Thompsonian, hydropathic or water cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that both parties so understand it. The jury are not to judge by determining which school, in their own view, is best." But the application of this doctrine requires some standard by which it can be determined as to what is a school of medicine from the point of view of the law. Can there be said to be a christian science school of medicine within any definition that has received judicial sanction? An answer to the question can probably be found in the case of *Nelson* v. *Harrington,* 72 Wis. 591. Although not a christian science case, the doctrines announced

by the court are certainly applicable to the case under examination. The action was against a spiritualist and clairvoyant physician for damages alleged to have been suffered by the plaintiff through improper diagnosis and treatment by the defendant. It was contended on the part of the defendant that he was employed only as a spiritualist and clairvoyant, and that his diagnosis and treatment were "strictly in accordance with the ordinary and customary practice and system of practice used and employed by spiritualists and clairvoyants in diagnosing, attending and prescribing for diseases and ailments of the human body." The court held that in order that a system of practice may constitute a school of medicine under the rule that a physician is only required to possess such knowledge and to exercise such reasonable care and skill as is usually possessed and exercised by physicians in good standing of the same system or school of practice in a like locality, it must have rules and principles of practice both as to diagnosis and treatment that are generally observed by those following the system. In a word, the court held in effect that a school of medicine, in order to be recognized as such before the law, must have a substantial basis in principle. "The regular physician of any school or system," said the court, "acquires his professional knowledge by the study of the general principles of the science, and applies such knowledge to each particular case as it arises, while the clairvoyant physician may have no such general knowledge, but believes himself especially and effectually educated to treat each particular case as it is presented to him, without reference to any particular school." And again: "The proposition that one holding himself out as a medical practitioner and as competent to treat human maladies, who accepts a person as a patient and treats him for disease, may, because he resorts to some peculiar method of determining the nature of the disease and the remedy therefor, be exonerated from all liability for unskilfulness on his part, no matter how serious the consequences may be, cannot be entertained. The proposition, if accepted as true, would * * * contravene a sound public policy." The judgment for the plaintiff in the court below was affirmed. It goes without saying that the so-called christian science system, notwithstanding the name, has not even the semblance of a scientific basis. It has no recognized foundation in principle. Its practitioners are not only without medical training of any kind, but they regard such training as unnecessary for their calling. They utterly repudiate the use of all material means in the treatment of human ills. But the climax of inconsistency and absurdity is reached in the claim that disease is, in the last analysis, but a creature of the imagination to be exorcised by divine interposition. It perhaps would not be judicial to say that the system, so far as it has to do with the healing of the sick, is a stupendous fraud, but it may certainly be claimed that, from the point of view of the law, as set forth in the above-noted Wisconsin case, it cannot be regarded as constituting a school of medicine.

Ordinarily, if a person employ one whom he knows to be without skill to do work requiring skill, he cannot complain of results. But are there not exceptions to the rule? Does not a sound public policy demand that there should be exceptions, when the health and even the lives of people are

involved? Should the principle be applied, as the New Hampshire court applies it in this case, for the protection of a mere pretender whose practices put in jeopardy all who come under his influence? The answer is apparent. To treat appendicitis, as was done in this case, by sitting before the patient in an attitude of prayer and by reading selections from Mary Baker Eddy's notorious book, would seem to the ordinary mind to be so contrary to common sense and reason as to raise a question of negligence for the consideration of the jury, even though the patient assented to the treatment. Indeed, the court says that such would have been the result had plaintiff been "an infant, non compos or had never assented to christian science treatment." But in this connection the fact is overlooked that the defendant was the pastor as well as the physician of the plaintiff, a relation of trust and dependence that is certainly significant as bearing upon the question of assent.

As already suggested, the declaration contained a count in deceit as well as in negligence. But the trial court refused to allow the plaintiff to go to the jury upon the latter theory as well as upon the former. The Supreme Court declined to sustain exceptions to this ruling, basing its conclusion upon the proposition that there was nothing in the case to show a fraudulent intent upon the part of defendant. "Assuming," said the court, "that the defendant's statement that he could and would cure the plaintiff may be the foundation of an action of deceit, her case fails, for there was no evidence that he made it with a fraudulent intent. Although a jury could find from their knowledge of human affairs, their own experience, and the evidence in the case, that the defendant's statement that he could cure the plaintiff without the aid of any material agency, when he knew she had appendicitis, was untrue, it does not follow that they could infer, from the single fact that they were convinced of its untruth, that the defendant did not believe he could induce God to heal her when he made the statement." Ordinarily in an action in deceit, the plaintiff must prove both a false representation and a fraudulent intent, but in certain cases the fraudulent intent may be found from the fact that the representation is false. This cannot be the case generally when the representation is in the form of an opinion. But when the opinion is given by one who is in a position to speak with authority and is advanced evidently for the purpose of inducing another to act, and particularly when the one advancing the opinion occupies a place of trust or confidence with regard to the other, then the expression of an opinion becomes the representation of a fact and a fraudulent intent may be inferred from the circumstances under which the opinion was given. The case of *Hedin* v. *Minneapolis Medical and Surgical Institute,* 62 Minn. 146, 64 N. W. Rep. 158, is in point. In this case, a physician was held liable in an action of deceit, without direct proof of a fraudulent intent, for inducing a patient to submit to treatment by expressing the positive opinion that he could effect a cure, the opinion being given under circumstances from which a fraudulent intent could be inferred. "Generally speaking," said the court, "the representations must be as to a material fact, susceptible of knowledge; and if they appear to be mere matters of opinion or conjecture, they are not actionable. There are many cases, however, in which even a false assertion of an opinion will amount to a

fraud, the reason being that, under the circumstances, the other party has a right to rely upon what is stated or represented. Thus, the liability may arise where one has or assumes to have knowledge upon a subject of which the other is ignorant, and knowingly makes false statements on which the other relies. Where parties possess special learning or knowledge on the subject with respect to which their opinions are given, such opinions are capable of approximating the truth. And for a false statement of them, when deception is designed and injury has followed from reliance on the opinions, an action will lie. * * * The doctor, especially trained in the art of healing, having superior learning and knowledge, assured plaintiff that he could be restored to health. That the plaintiff believed him is easily imagined; for a much stronger and more learned man would have readily believed the same thing. The doctor, with his skill and ability, should be able to approximate to the truth when giving his opinion as to what can be done with injuries of one year's standing, and he should always be able to speak with certainty before he undertakes to assert positively that a cure can be effected. If he cannot speak with certainty, let him express a doubt. If he speaks without any knowledge of the truth or falsity of a statement that he can cure, and does not believe the statement true, or if he has no knowledge of the truth or falsity of such a statement, but represents it as true of his own knowledge, it is to be inferred that he intended to deceive. The deception being designed in either case, and injury having followed from reliance upon the statements, an action for deceit will lie." It is submitted that the case under examination falls within the principle of the foregoing case. Certainly the christian science healer, particularly when he occupies toward his patient the relation of pastor as well as that of physician, should be held to as strict a rule in regard to the expression of his opinions as is the regular physician.

With all the new and irregular methods of healing that are now bidding for public recognition and support, subjects like the one discussed in this note must frequently challenge the attention of the courts, and it is of the highest importance that a sound public policy should not be overlooked in dealing with such questions. For other notes upon the same subject see 2 MICHIGAN LAW REVIEW, 149, 212, 3 MICHIGAN LAW REVIEW, 141.

IOWA AND THE RULE IN SHELLEY'S CASE.—When Robert Andis in 1862 conveyed certain land to Samuel Andis "during his natural life and then to his heirs," he probably little thought that forty-three years afterwards his conveyance would furnish the occasion for the first positive declaration of an old common law doctrine by the courts of Iowa.

Until the recent decision in the case of *Doyle* v. *Andis*, 102 N. W. Rep. 177, no one has been able to say certainly whether the rule in Shelley's case was, or was not, the law in Iowa; for, as MR. JUSTICE LADD, speaking for the majority of the court in this case, says: "This court has up to the present time avoided the necessity of saying whether it [the rule] should be recognized as a part of the common law of this state." To be sure, there have been Iowa decisions, as pointed out by MR. JUSTICE WEAVER in his dis-

senting opinion, that have seemed to repudiate the rule, at least as applied to devises; in *Wescott* v. *Binford,* 104 Ia. 645, for example, the court says: "If it be in force, it cannot defeat the intent of a testator, as expressed by the language of his will." When applied in its integrity it certainly can defeat the testator's intention as most clearly expressed by the language of his will—see, for recent instances, *Deemer* v. *Kessinger,* 206 Ill. 57, and *McCann* v. *Barclay,* 204 Pa. St. 214, which simply follow hundreds of cases of the same sort. LORD MACNAGHTEN says in one of the latest English decisions on the subject—*Van Grutten* v. *Foxwell* [1897], A. C. 658, 66 L. J. Q. B. 745—"it was constantly made a matter of complaint that the rule disappointed the intention, as if that were not its very end and purpose; as if it had not been at the outset 'levelled against the views of the parties.'"

Nevertheless, this ancient rule of uncertain origin and curious history has survived discussion, criticism and explanation, and is law. The majority of the Iowa court say it is "the duty of this court to administer the law as found, and, even though it be confident of possessing the wisdom essential to successfully reform and improve many of its rules, the Constitution has conferred the authority so to do upon another branch of government."

Perhaps the legislature will abrogate the rule, but even so lawyers of Iowa must for a long time keep it in mind, as it will apply to grants and devises taking effect before its abolishment—*Wilson* v. *Alston,* 122 Ala. 630; *Spader* v. *Powers,* 56 Hun. 153; *Hurst* v. *Wilson,* 89 Tenn. 270—and during all these past years Iowa testators and grantors must have known the law, though their Supreme Court has never been sure of it till now.

ARE CONDITIONS IMPOSED BY THE VENDOR OF CHATTELS BINDING ON SUBSEQUENT PURCHASERS?—The owners of "proprietary medicines" and other patented articles, in their effort to maintain a high level of prices, have been making strenuous efforts to inject into the law of sales doctrines which would seem to be somewhat foreign to common law principles. Recent court decisions resulting from such efforts are not wholly harmonious.

Garst v. *Harris,* 177 Mass. 72, 58 N. E. Rep. 174, was an action of contract to recover stipulated damages for breach of an agreement not to resell a proprietary medicine, purchased by defendant of plaintiff, below a stipulated price. At the time of the sale and as a part of it a written statement of terms containing this agreement was read and delivered to the defendant. Defense to the action was made on the ground that the contract was in restraint of trade; but the court, speaking through HOLMES, C. J., held that the contract was valid, and that, in selling below the specified price, defendant was guilty of breach, for which stipulated damages should be awarded. In *Garst* v. *Hall,* 179 Mass. 588, 61 N. E. 219 (See 1 MICH. LAW REVIEW, 336), an effort was made to extend the restriction as to the minimum price of resale to third persons who had purchased from the original vendee. The contract relied upon was in the same form as in the prior case, and an injunction was prayed for restraining the defendant from selling below the stipulated price. The court held that as the defendant had not purchased from or contracted with

the plaintiff, but had bought of a purchaser of plaintiff's vendee, he had absolute title and could sell as he pleased. In other words, the court held that such restrictions could not be made to follow the goods into the hands of third persons, even where notice of the restriction, coupled with a statement that subsequent purchasers "will be deemed to have accepted such conditions and to be bound thereby," is given by means of a label or other device attached to the goods. But in *Garst* v. *Charles*, 72 N. E. Rep. 839 (Mass.), decided Jan. 5, 1905, the same type of contract was in controversy. The defendant had formerly purchased a quantity of the medicine from plaintiff, but had returned it in accordance with a term of said contract, which provided that he might so return it in case he wished to discontinue selling. He then procured one Bickford, a retail druggist, to purchase a supply of plaintiff. This was done, Bickford entering into the same form of contract, and agreeing not to sell at less than the specified price. Bickford turned the medicine over to defendant at the purchase price, who proceeded to advertise and sell it at less than the agreed price. The Supreme Court held this to be a conspiracy to deprive plaintiff of the benefit of his contract, and affirmed the decree of the trial court allowing an injunction with damages. It will be noted that in *Garst* v. *Hall*, supra, the bill averred notice to defendant of the contract price restrictions, but as the case went up on demurrer to said bill, notice was not proved. In *Garst* v. *Charles*, though the defendant did in fact have notice, the decision was based on conspiracy and not on notice to defendant. But the question of the effect of notice to succeeding purchasers has been squarely met and decided in two recent English cases. *Taddy & Co.* v. *Sterious* [1904], 1 Ch. 354, 73 Law Journal Reports, 191, which was discussed in 2 MICH. LAW REVIEW, 726, and *McGruther* v. *Pitcher* [1904], 2 Ch. 306, 73 Law Journal Reports, 653. In the latter case plaintiffs, who were manufacturers of rubber heel pads, sold them in boxes to which were affixed printed conditions relating to the minimum prices on resale, and stating that acceptance of the goods by any purchaser would be deemed an acknowledgment that they were sold to him on those conditions, and that he agreed with the vendors, as agents of the plaintiffs, to be bound by said conditions. Defendant, a retail dealer, had purchased from a factor of plaintiffs; and it was shown that he had knowledge of the conditions, having been orally informed of them. He then proceeded to sell said pads at retail at less than the stipulated prices. The principal opinion was stated by VAUGHAN WILLIAMS, L. J., and is based largely upon the holding in *Taddy & Co.* v. *Sterious & Co.*, the gist of which is that "conditions of this kind do not run with the goods, and cannot be imposed upon them. Subsequent purchasers, therefore, do not take subject to any conditions which the court can enforce." ROMER, L. J., in a concurring opinion added that even if it were shown that defendant had agreed with plaintiff's factor regarding these conditions, he "would have difficulty in holding that that fact * * * made a contract between defendant and plaintiffs." There can be no doubt that these English holdings are in accordance with reason and fundamental principles.

Numerous decisions in our Federal courts, which seem at first glance somewhat at variance with the English rule, are based upon peculiar features of

patent law. Thus where the owner of patents granted licenses to use and vend the patented articles, the licensee agreeing not to resell such articles for less than a stipulated price, nor to anyone who did not sign a like agreement, and that should such articles be sold in violation of such agreement, the license should be void, it was held that such conditions were valid, and that a sale in violation of them constituted an infringement. *Edison Phonograph Co.* v. *Pike,* 116 Fed. Rep. 863. See also the much cited case *Heaton-Peninsular, etc., Co.* v. *Eureka Specialty Co.,* 25 C. C. A. 267, 77 Fed. Rep. 288. But in *Victor Talking Machine Co.* v. *The Fair,* 118 Fed. Rep. 609 (1902), it was held that an absolute sale of a completed patented article, even though restrictions as to its resale are sought to be imposed by notices placed thereon, falls under the general rule, and that such restrictions are of no effect so far as subsequent purchasers are concerned. The court said in that case, "the patented article has passed, by the sale to the jobber, entirely out of the domain of patent, and cannot again be brought within that domain." Similar restrictions regarding copyrighted articles have been put upon much the same legal basis. Thus, in *Henry Bill Publishing Co.* v. *Smythe,* 27 Fed. Rep. 914, it was held that so long as the owner of a copyright retains the title to books covered thereby he can impose restrictions as to the manner (as by subscription) and to whom the copies can be sold, and that violation of his instructions to his agents, who fraudulently sell to a person with notice or knowledge of the restrictions, or who under all the circumstances should be held to have notice thereof, will be an infringement of the copyright. But it is held, and certainly with sound reason, that where the owner of a copyright has made an absolute sale of copies of the book covered thereby, he cannot by notices printed in or attached to such books control the price at which such copies may be resold. *Bobbs-Merrill Co.* v. *Snellenburg,* 131 Fed. Rep. 530; *Harrison* v. *Maynard,* 61 Fed. Rep. 689, 10 C. C. A. 17.

NECESSITY FOR THE PERSONAL PRESENCE OF THE ACCUSED UPON ARRAIGNMENT.—The defendant was charged with larceny from the person, a misdemeanor punishable by fine or imprisonment, and executed a bail bond with sufficient sureties, conditioned that he should make his appearance before the proper court on a certain day and from day to day thereafter, to answer to the said offense. When the case was called the defendant was not present, but his authorized counsel offered to enter a plea of guilty for him. On this state of facts the Supreme Court of Georgia held, in *Wells* v. *Terrell* (1904), 49 S. E. Rep. 319, that the trial court properly refused to allow the plea to be made by counsel, and that only the actual, personal presence of the defendant would satisfy the condition of the bond.

In discussing the function and the essentials of an arraignment, the court said: "Regularly, this procedure requires the defendant to stand up, face the court and jury, and listen to the reading of the indictment. In answer to the clerk's inquiry whether he is guilty or not guilty of the offense charged, he orally makes his plea. This is not a mere idle ceremony, but furnishes a safe and conclusive means of identification. It permits the court, on the rendition of a verdict of guilty, to impose sentence and put the identified

defendant into execution. To secure this important end, it is therefore the state's right to have him present when the trial begins. Besides, this requirement prevents the prosecution from degenerating into the appearance of a mock trial before a moot court, with no one in apparent jeopardy. And while the arraignment may be expressly or tacitly waived, yet the waiver must be an equivalent of the thing waived, and be made while present, and under such circumstances as will serve the purpose of the law in requiring that formality."

It is very likely true that the court, in rendering this opinion, followed the weight of common law authority. But the importance of the actual presence of the accused is by no means so great as the court seems inclined to think, if we may judge from the expression of legislative opinion shown in the statutes of many of our states. Thirteen states and territories have the following statute now in force: "If an indictment be for a felony, the defendant must be personally present when arraigned; but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel." These jurisdictions are Alaska, Arizona, California, Idaho, Minnesota, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, South Dakota, and Utah. There is no statute in any state, so far as we know, expressly requiring the personal appearance of a defendant charged with a misdemeanor. Two states, Arkansas and Iowa, require a plea of guilty to be made by the defendant in person in open court.

Aside from statute, there is some difference in authority regarding the necessity of the accused's presence. BISHOP, in his NEW CRIMINAL PROCEDURE, § 268, says that a personal appearance and plea in person is necessary, except in cases of misdemeanor punishable only by a fine without imprisonment, where the defendant may, for cause shown and with the consent of the court, appear by counsel. In support of this rule he cites a number of cases more or less closely in point, and among them *United States* v. *Mayo,* 1 Curt. (U. S.) 433. But the rule laid down by this case is somewhat different. It was there held that the privilege of allowing the defendant to plead by attorney would be regulated by the following circumstances: 1. That it is not an offense for which imprisonment *must* be inflicted. 2. It must be reasonably certain that the case is such that imprisonment *will not* be inflicted. 3. It must appear that the district attorney has given his consent or unreasonably withholds it. 4. Special cause must be shown by affidavit. 5. A special power of attorney must be executed and filed in the court by the attorney.

In *State* v. *Jones,* 70 Iowa, 505, on a charge of a felony, the defendant was not present, but his counsel put in a plea of "not guilty" for him. This was held to be proper practice, although under the statute a plea of "guilty" could only be made in the prisoner's presence. On the other hand, in *State* v. *Meekins,* 41 La. Ann. 543, it was held generally that a defendant must always be present at the arraignment and must plead personally. *Slocovitch* v. *State,* 46 Ala. 277, seems to take the same view, making no distinction between felonies and misdemeanors in this respect.

CHIEF JUSTICE REDFIELD, in *Gardner Tracy, ex parte,* 25 Vt. 93, lays down a rule quite similar to, but not identical with, the rule stated by BISHOP. He

says: "When the ordinary judgment will not extend to the infliction of imprisonment, by way of punishment primarily, the accused may appear by counsel, and having made appearance the trial may proceed. And one state has declared substantially this rule by statute, as follows: "If the indictment or information be for a misdemeanor punishable by fine only, the defendant may appear upon arraignment by counsel." Washington, Bal. Code, § 6885.

Doubtless, as JUDGE HUGHES suggests in *United States* v. *Shepherd*, 1 Hughes (U. S.), 521, in a somewhat analagous case, the notion that the physical absence of the defendant upon arraignment was a fatal defect in the proceedings, originated when the penal code of England was a very bloody one, and when the judges sought to mitigate the rigors of the law by availing themselves of technical irregularities to protect prisoners who were threatened with the most terrible punishments for the most venial offences. Under the humane laws which now regulate criminal proceedings, the reason for the old rule has largely passed away, and the statutes already referred to seem to voice the modern view.

UNCONSTITUTIONAL AIDS TO LOCAL INDUSTRIES.—The wisdom of a great part of the legislation designed to regulate or suppress the sale or consumption of liquors has yet to be proved. It is doubtful whether a higher plane of morality exists in states where prohibition, so-called, is a feature, than may be noticed in jurisdictions which have not resorted to that measure. Granting, however, that laws tending to suppress the evil of "rum" are a boon to mankind, it ought equally to go without saying that these laws should not serve as a cloak for the oppression of a class of merchants who pay an immense revenue to the government and deal in a lawful article of commerce. Acts, therefore, which do not have as an object the honest policing of the liquor trade, but are partisan measures to benefit local dealers or producers by discriminating against outside merchants or products should be regarded with the contempt which hypocrisy of this kind deserves.

It is for the courts to condemn such legislation. For that reason, decisions like that of the Texas Supreme Court in the recent case of *Douthit* v. *State* (Dec. 1904), 83 S. W. Rep. 795, will, we believe, be read with surprise. It was held, after a cursory examination, that a proviso to a law imposing certain taxes upon liquor dealers and requiring bonds to be procured by them was constitutional, although it stated that the "provisions [mentioned] shall not apply to wines produced from grapes grown in the state, while the same is in the hands of the producer or manufacturer thereof." Only one case was cited to sustain the position taken, *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, and that is clearly distinguishable. It is strange that the Texas court could overlook the other decisions of the same tribunal bearing upon the question. In *Welton* v. *Missouri*, 91 U. S. 275, an act declaring a license tax upon merchandise peddled except the growth, product, or manufacture of Missouri was held void. In *Guy* v. *Baltimore*, 100 U. S. 434, an ordinance of Baltimore imposing a wharfage tax on extra-state grown products was decided to be invalid. It was there stated that a state cannot "build up its domestic commerce by means of unequal and oppressive burdens upon the industry

and business of other states," and that "if a state, under the guise of exerting its police power, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other states, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States." So in *Tiernan* v. *Rinker*, 102 U. S. 123, the Texas law of 1873, exempting from an "occupation" tax wine and beer manufactured in Texas, was held to be inoperative "so far as it makes a discrimination against wine and beer imported from other states. * * * A tax cannot be exacted for the sale of beer and wine when of foreign manufacture, if not exacted from their sale when of home manufacture." To the same effect, *Walling* v. *Michigan*, 116 U. S. 446. A great number of other decisions of the state courts announcing and affirming the invalidity of such legislation is collected in BLACK ON INTOXICATING LIQUORS, §§ 44, 79, and 17 ENC. OF LAW (2d ed.), 216. The more recent cases, also overlooked, in which similar questions have been involved, come to the same conclusion. In *State* v. *Ebey* (1902), 170 Mo. 497, a law exacting an inspection fee from manufacturers of beer for the sale thereof within the state which those manufacturing for export need not pay, was held unconstitutional. See, also, *State* v. *Bengsch* (1902), 170 Mo. 81. So an exception to a statute, not requiring a license to sell intoxicating liquors "in sales by the makers thereof of native wine or of cider manufactured in the Commonwealth of Massachusetts" was held invalid and void in *Commonwealth* v. *Petranich*, 183 Mass. 217.

Such legislation has been considered nugatory for several reasons. It is an unwarranted interference with interstate commerce; *Guy* v. *Baltimore*, supra; *Commonwealth* v. *Petranich*, supra: it denies the equal protection of the law guaranteed by the Fourteenth Amendment; *State* v. *Bengsch*, supra: and it unlawfully abridges the privileges and immunities of citizens of the United States; *McCreary* v. *State*, 73 Ala. 480.

Both reason and authority indicate that the conclusion of the Texas Supreme Court is erroneous.

DAMAGES FOR MENTAL SUFFERING UNACCOMPANIED BY PHYSICAL INJURY.—North Carolina has recognized for some time the right of a person to recover damages for mental anguish caused by the negligence of a telegraph company in failing to transmit or deliver a telegram, or in delaying its delivery, when the company had means of knowing that such failure would produce mental anguish. Usually the cases have involved the consideration of telegrams announcing serious illness or death. In the case of *Green* v. *W. U. Tel. Co.*, — N. C. —, 49 S. E. Rep. 165, it is held that mental anguish may result from failure to deliver other messages than those telling of sickness or death. Dr. Green telegraphed a friend in Columbia to meet his daughter, a girl of sixteen, who would reach Columbia at midnight. Through negligence the company failed to deliver the message, and upon the girl's arrival there was no one to meet her. She was disturbed and anxious, but after some delay she was sent in a hack to her friend's home, which she reached safely. She sued for damages for "mental anguish." The lower

court sustained a demurrer to the complaint on the ground that she had suffered merely disappointment and annoyance and not mental anguish. In reversing the judgment the Supreme Court said that because the previous decisions in that state had involved telegrams concerning sickness or death it must not be inferred that it was only in such cases that a recovery for mental anguish could be permitted; that the feelings of an inexperienced girl who finds herself alone in a strange city at midnight may properly be found to be mental anguish.

The case of *Green* v. *W. U. Tel. Co.,* — N. C. —, 49 S. E. Rep. 171, arose out of the same transaction. Here Dr. Green sued for damages, including mental anguish resulting from a failure to notify him promptly of the non-delivery, thereby preventing him from making further attempts to provide for his daughter's comfort and safety. The company notified him of the non-delivery the next morning, causing him great distress, as he had not learned of his daughter's safe arrival. *Held,* that the facts were sufficient to entitle him to go to the jury on the question of mental anguish.

These cases raise again the much disputed question concerning the right to recover for mental anguish alone, a question on which there is sharp division and on which there has been earnest discussion. Many courts deny that there is a right, seem to regard the claim as an innovation and are overwhelmed by the conditions that they conjure up as certain to result from recognizing such a right. Just how these courts harmonize their position with cases such as libel, slander, malicious arrest and prosecution, false imprisonment and some others where a right to recover for mental anguish has long been recognized it is difficult to understand, though the attempt to differentiate is sometimes made. It may be that in the principal case these courts may see the advancing wave of that "flood of litigation" which they feared. And yet it would seem that a decision that would tend to protect a mere child from such an experience may be founded on sound legal principles, and very well suited to advance public policy and to require of quasi public servants a decent regard for their obligations. And to deny a right lest it might result in much litigation through asserting that right does not seem to be properly within the province of a court.

That the principal case is in harmony with the holdings in a steadily increasing number of courts cannot well be denied, Indiana being the only state to take what we regard as a backward step. *Tel. Co.* v. *Ferguson,* 157 Ind. 64.

The difficulty of determining the amount to be allowed, which may seem great in theory, has in practice proved far from insuperable, as no case has come to our attention where the verdict was excessive or extravagant. And it is difficult to see how even in theory it is more easy to compute the damages that should be allowed for mental suffering when accompanying a physical injury than when standing alone. And the real and ultimate purpose of making persons liable whose negligence causes mental anguish to another is not so much to get a money value on such anguish as to prevent the frequent recurrence of such offenses, and to establish the proposition that one has no more right to outrage the feelings of another than to injure

his person, or to destroy his property. And further, the contrary view has, in the judgment of able courts, required the conclusion that as there is no recovery for mental suffering alone there can be none for physical injury, though resulting proximately from the nervous shock. It would seem that there should be a clear distinction between mental anguish and nervous shock causing physical disease, but this distinction seems not to have been generally recognized by courts opposed to the doctrine of the principal case, and so we find cases which outrage every sense of justice, as *Spade* v. *Lynn & B. R. R. Co.*, 168 Mass. 285; *Mitchell* v. *Rochester Railroad*, 151 N. Y. 107; *Haile* v. *T. & P. R. Co.*, 23 U. S. App. 80, 60 Fed. Rep. 557; *Victorian Railways Com'rs.* v. *Coultas*, 13 App. Cas. 222; *Moore* v. *Chesapeake & Ohio R. Co.*,— Ky. —, 77 S. W. Rep. 361, and others that might be mentioned. These cases are a reproach to the common law, and if correct would force one to the conclusion that the common law is a crystallized and rigid thing, and that its adaptability to changing needs and conditions is an idle boast.

For further discussion and cases see 2 MICHIGAN LAW REVIEW, 150, 226, 411, 421, 642.