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Recent Important Decisions

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CRIMINAL LAW—DIRECTED VERDICT OF ACQUITTAL—The accused was convicted of crime. Error was assigned upon the refusal of the court to direct a verdict of not guilty. *Held,* that a motion to direct a verdict of acquittal should never be entertained. *People* v. *Zurek* (Ill. 1917), 115 N. E. 644.

Inasmuch as the court also ruled that the verdict of guilty was not contrary to the evidence, that part of the decision touching upon the policy of directing a verdict of acquittal was probably not necessary to the decision. The point was, however, considered by the court of review and a definite policy of practice was laid down. The great weight of authority supports the doctrine that a court cannot instruct a jury in a criminal case to return a verdict of guilty. See 16 COL. L. REV. 594 and note to Ann. Cas. 1916A 1241. There are a few cases which uphold the opposite view. *Paxton* v. *State,* 114 Ark. 393, 170 S. W. 80, Ann. Cas. 1916A 1239; *People* v. *Worges,* 176 Mich. 685, 142 N. W. 1100; *Commonwealth* v. *Brown,* 28 Pa. Sup. Ct. 296. The Illinois court declared itself in favor of the orthodox rule, and apparently justified its policy of not allowing directed verdicts of acquittal on the ground that a verdict of acquittal should not be directed when a verdict of guilty could not be so directed,—the end sought apparently being a mutuality of remedy as between the state and the defendant. This conclusion, however, does not follow, for courts refuse to direct a verdict of guilty because such action is held to interfere with the accused's right to a jury trial, while there is no such objection to ordering a verdict of acquittal. Further, a judge can set aside a verdict of guilty when it is contrary to the evidence, and can continue to do so indefinitely, even though he cannot set aside a verdict of acquittal, and it is submitted that a trial court should have the power and duty to direct a verdict of not guilty in the first instance rather than to allow a series of new trials. The theory of mutuality breaks down, even in Illinois, so far as respects the power to set aside a verdict, and a corresponding inequality as regards the power to direct a verdict is certainly not unreasonable or anomalous. This view is supported by the authorities. *State* v. *Trove,* 1 Ind. App. 553, 27 N. E. 878; *State* v. *Brown,* 72 N. J. L. 354, 60 Atl. 1117; *Murphy* v. *State,* 124 Wis. 635, 102 N. W. 1087; *People* v. *Ledwon,* 153 N. Y. 10, 46 N. E. 1046.

DIVORCE—CUSTODY OF CHILDREN IN CASE OF DENIAL OF DIVORCE—The plaintiff sued for divorce from her husband on the ground of cruelty. The divorce was denied; but as the parties were not living together, the court gave the plaintiff custody of the three children. The Divorce Statute provided that although decree for separation * * * be not made the court may make decree for the support of the wife and children. *Held,* that under this statute the court, though denying a divorce to the wife, may award her the custody of the children. *Jacobs* v. *Jacobs* (Minn. 1917), 161 N. W. 525.

The cases are not in accord upon the question decided in the principal case. In some of the states there are statutes dealing with this question and similar to the statute in the principal case and in others there are not. The statute mentioned above was copied from the New York statute, but the New York cases reach a different conclusion. The earlier New York statute did not authorize a granting of custody of the children when there was no decree for divorce and separation, and the court held that the intent of the statute above, passed later, was merely to authorize granting of custody in cases where the wife had statutory grounds sufficient to get a separation but had waived them or condoned the offense. *Davis* v. *Davis,* 75 N. Y. 221; *Atwater* v. *Atwater,* 36 How. Prac. 431; *Davis* v. *Davis,* 1 Hun 444; *Douglas* v. *Douglas,* 5 Hun 140; *Robinson* v. *Robinson,* 131 N. Y. Supp. 260. In other states where the statute is similar the right to a decree of custody has been upheld. *Cornelius* v. *Cornelius,* 31 Ala. 479; *Johnson* v. *Johnson,* 57 Kan. 343; *in Re Cooper,* 86 Kan. 573. In *Anderson* v. *Anderson,* 124 Cal. 48, maintenance was given a wife for herself and allowance for support of her minor child. But see *Brenot* v. *Brenot,* 102 Cal. 294. Other cases granting custody, where no statute was mentioned are: *Knoll* v. *Knoll,* 114 La. 703; *Horton* v. *Horton,* 75 Ark. 22; *Hoskins* v. *Hoskins,* 28 Ky. Law Rep. 435. Contra, *Garrett* v. *Garrett,* 114 Ia. 439; *Thomas* v. *Thomas,* 250 Ill. 354; *King* v. *King,* 42 Mo. App. 454. It is settled that when the husband and wife have separated and are living apart the court may determine which parent shall have the custody of the children in habeas corpus proceeding. The instant case contains an exhaustive discussion of the authorities and seems to have slightly the weight of authority with it.

EVIDENCE—BLOODHOUNDS.—Appellant was tried and convicted of crime. At the trial testimony as to the conduct of a bloodhound was offered by the state as evidence of the accused's guilt, and was rejected as incompetent and inadmissible. In spite of the ruling, some evidence of this kind was introduced incidentally in proving other facts. The appellant's requested instruction to the effect that evidence as to the bloodhounds should not be considered in determining his guilt was refused, and later a motion for a new trial was overruled. *Held,* that a new trial should be granted for error in not giving the instruction requested. *Ruse* v. *State* (Ind. 1917), 115 N. E. 778.

The decision in the principal case, holding that bloodhound evidence is incompetent and inadmissible, is supported by few very recent cases. *People* v. *Pfanschmidt,* 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915A 1171; *Stout* v. *State,* 174 Ind. 395, 92 N. E. 161, Ann. Cas. 1912D 37; *Brott* v. *State,* 70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789. For a discussion of "the competency of the conduct of bloodhounds as evidence in criminal cases" see 2 MICH. L. REV. 402. The great majority of cases are agreed in holding that upon a proper foundation being first laid as to the training, testing, and experience of a dog in trailing human beings, evidence is admissible as to his conduct, actions, and doings while following the trial of one accused of

crime, the weight of such evidence to be determined by the jury in the light of all the surrounding circumstances. *Pedigo* v. *Commonwealth,* 103 Ky. 41, 44 S. W. 143, 42 L. R. A. 432, 82 Am. St. Rep. 566; *State* v. *Adams,* 85 Kan. 435, 116 Pac. 608, 35 L. R. A. N. S. 70; *Carter* v. *State,* 106 Miss. 507, 64 So. 215, 50 L. R. A. N. S. 1112; *Hargrove* v. *State,* 147 Ala. 97, 41 So. 592, 10 Ann. Cas. 1126; *State* v. *Norman,* 153 N. C. 591, 68 S. E. 917. For a full collection of cases see notes to 42 L. R. A. 432; 35 L. R. A. N. S. 870; Ann. Cas. 1912D 39; Ann. Cas. 1915A 1193. The ruling in the principal case seems indicative of a modern tendency to hold this kind of evidence inadmissible,—at least in northern jurisdictions.

EVIDENCE—EXCLUSION OF TESTIMONY AS TO HOW LIBEL MADE LIBELED PERSON FEEL.—Plaintiff, a minister, sued defendant for a libel contained in defendant's newspaper, calling the plaintiff an "interloper, a meddler, and a spreader of distrust, discontent and sedition." A witness for the plaintiff was asked how this libelous matter seemed to make the plaintiff feel. *Held,* that the answer was properly excluded because it called for the opinion of the witness. *Van Lonkhuyzen* v. *Daily News Co.* (Mich. 1917), 161 N. W. 979.

A search of the authorities discloses that only one jurisdiction, Alabama, follows the instant case. In *McAdory* v. *State,* 59 Ala. 92, in a prosecution for arson it was held error for a witness to state that the defendant "looked downcast," because it was merely a statement of the witness's opinion. To the same effect, in *Johnson* v. *State,* 17 Ala. 618, the court held it error for a witness to say "the prisoner looked serious, although habitually a lively man." In neither case did the courts give satisfactory reasons, but simply called it opinion evidence. Seemingly all the other authorities, for cogent reasons, take the opposite view. In *State* v. *McKnight,* 119 Ia. 79, 93 N. W. 63, the court held it proper for a witness to testify that the deceased when sick "appeared to be despondent" and "did not seem hopeful," without stating the facts upon which he based his opinion, on the theory that it was mixed fact and opinion. In *State* v. *Bradley,* 64 Vt. 466, 24 Atl. 1053, a witness was permitted to testify that when accused of the crime the defendant "seemed kinder worried," because it is more a statement of a fact than of an opinion. In *Fritz* v. *Hudson Union Tel. Co.,* 25 Utah 263, 71 Pac. 209, the statement "he looked at me in a disgusted way" just before his accident, was held to be a fact, not an opinion. In *State* v. *Wright,* 112 Ia. 436, 84 N. W. 541, it was held error to exclude the statement that the defendant "looked queer." These statements are of exactly the same character as the answer to the question in the instant case. The question would at most, call for a mixed answer of fact and opinion and it seems, according to the authorities, should have been answered. But even admitting that the answer called for an opinion purely, it still should have been admitted. One of the exceptions to the opinion rule allows a layman even to give an opinion where it is practically impossible for the witness to make the jury see and hear what he saw and heard, by reciting the facts without

giving his opinion. This is precisely such a case. The witness could not describe the appearance of the plaintiff to the jury to show how it made him feel, as well as he could inform the jury by his own impression from seeing the plaintiff. The exception to the opinion rule should have been applied, and the evidence admitted.

EVIDENCE—EXPERT MEDICAL TESTIMONY BASED ON BOTH OBJECTIVE AND SUBJECTIVE SYMPTOMS.—The plaintiff, a street car conductor, sued the defendant railroad company for personal injuries received by reason of defendant's negligence. Several weeks after the injury plaintiff was examined by a physician for the purpose of qualifying him as an expert witness. The physician based his diagnosis both on physical examination and on the history of the injuries and their causes as related by the plaintiff; and on the trial he was allowed to state his opinion based on both the objective and the subjective symptoms. *Held,* that the expert opinion formed by the intelligent diagnosis of both the objective symptoms and the history of the case, including the causes of the injuries, were properly admitted, though not part of the res gestae. *St. Louis & S. F. R. Co.* v. *McFall* (Okla. 1917), 163 Pac. 269.

The above case takes an extremely liberal view, making no distinction between an attending physician and one examining for the express purpose of testifying for the plaintiff. There are cases in Alabama, California, Indiana, Massachusetts, New Jersey, Texas, Vermont, and Wisconsin, holding with the instant case. They go on the theory that a history of the case is usually necessary to reach a correct intelligent diagnosis, which is as important in the case of an expert witness who is to render an opinion, as for an attending physician who is to administer medicine. See *Quaife* v. *The Chicago & N. W. R. R. Co.,* 48 Wis. 513; *Missouri, K. & T. Ry. Co.* v. *Rose,* 19 Tex. Civ. App. 470; *People* v. *Shattuck,* 109 Cal. 673, 42 Pac. 315. A number of states allow past history as basis of the opinion, when stated to an attending physician, but exclude it when given to a physician for the express purpose of qualifying him to testify, on the theory that in the latter case the plaintiff is liable to make dangerous self-serving statements. See *Hintz* v. *Wagner,* 25 N. D. 110, 140 N. W. 729; *Grand Rapids & Ind. R. Co.* v. *Huntley,* 38 Mich. 537, 31 Am. Rep. 321; *Darrington* v. *N. Y. & N. Eng. R. Co.,* 52 Conn. 285, 52 Am. Rep. 590; *James Edward* v. *Illinois Central R. R. Co.,* 161 Ill. App. 630; *Divine* v. *Rothschild,* 178 Ill. App. 13. Statements made to a physician called to treat a patient are usually very dependable; for the patient is anxious to give the physician a true version of the history of the case and of his present condition to enable the physician to make a correct diagnosis. But statements made to a physician called for the purpose of qualifying him as an expert witness are very apt to include all that is favorable to the plaintiff's case and exclude all that is detrimental. Besides there is always the possibility that the patient has given a fraudulent version of his case. There is a tendency to make statements to such a physician strongly self-serving. A few states hold that a physician may base

his opinion both on objective symptoms and on statements of present pains and sensations, but not on statements of past symptoms. *Williams* v. *Great Northern R. Co.*, 68 Minn. 55, 70 N. W. 860. In the following jurisdictions the statement of the past history of the case is held hearsay and inadmissible, the United States Courts, Florida, Georgia, Kansas, Kentucky, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Carolina, and South Carolina. The following are typical cases. *People* v. *Murphy*, 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661; *Atlanta K. & N. Ry. Co.* v. *Gardner*, 122 Ga. 82, 49 S. E. 818; *Gibler* v. *Quincy, Omaha & Kansas City Ry. Co.*, 129 Mo. App. 93, 107 S. W. 1021. The authorities are practically uniform that statements made by the patient about the cause of, and the responsibility for, the injury are not admissible, unless as res gestae. *Citizens St. R. Co.* v *Stoddard*, 10 Ind. App. 278, 37 N. E. 723.

INJUNCTION—RESTRAINING A NUMBER OF ACTS OF PICKETING ON THEORY THAT THEY CONSTITUTE AN UNLAWFUL WHOLE.—The defendant company and its striking employees were enjoined from interfering in any way with the telephone service of the defendant company. One of the strikers, in an intervening petition, asserted his intention to interfere singly and in concert with others with the business of the company, in every peaceable and lawful manner possible. The intervenor and several of the other strikers were attached for violation of the injunction. Upon motions questioning the validity of the proceedings *held* that the injunction was not too broad to be valid under the CLAYTON ACT. *Stephens* v. *Ohio State Telephone Co.* (1917), 240 Fed. 750.

The CLAYTON ACT prohibits the Federal courts from granting an injunction in labor disputes against the doing of any act "which might lawfully be done in absence of such dispute by any party thereto." The court in the principal case says that there is nothing new in this statute; that it represents the view taken universally by the courts before its passage. "What constitutes peaceful picketing may be answered," says the court, "by any fair minded man if this question is asked, 'Would this be lawful if no strike existed?'" In passing on the pleadings of the intervenor, the court says that the declaration of the intention to interfere with the business in concert with others by lawful and peaceful means is practically a confession of an unlawful conspiracy. The court says: "It is a legal proposition, too firmly settled to be disregarded, that two or more persons may not combine to employ activities, in which singly they might lawfully engage, with an intent that the effect of their joint action should be the injury of another." It is submitted that this is sound. An act may be wrongful if committed by an individual, but too insignificant to be regarded as "unlawful" or punishable, while if participated in by many it would be punishable because of its serious consequences. There are a number of Federal cases in accord. *Oxley Stove Co.* v. *Cooper's International Union*, 72 Fed. 695; *Allis-Chalmers Co.* v. *Iron Moulders' Union*, 150 Fed. 155; *Tri-City Cent. Trades Council* v. *Am. Steel Foundries*, 238 Fed. 728. Also see *George Jones Glass Co.* v.

Glass Bottle Blowers' Ass'n, 72 N. J. Eq. 653, 66 Atl. 953. In a recent similar case, the Minnesota court refused to grant an injunction, giving as its principal reason the difficulty of framing a decree. *Grant Const. Co.* v. *St. Paul Bldg. Trades Council* (Minn. 1917), 161 N. W. 520. Other state cases have denied the doctrine of the principal case. *Lindsay & Co.* v. *Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127; *Meier* v. *Speek*, 96 Ark. 618, 132 S. W. 988. It is important to notice that these cases invariably involve powerful labor unions. It is possible that the divergence of the decisions can be somewhat accounted for on the ground that most State judges are elected by popular vote while Federal judges and the judges in New Jersey are appointed.

NEGLIGENCE—LIABILITY OF MANUFACTURER FOR FOREIGN SUBSTANCE IN BREAD.—Plaintiff, while masticating a piece of bread, bit into a nail which was below the surface and as a result lost two teeth. The loaf from which the slice was cut was made by the defendant and sold to a grocer from whom it was purchased by the plaintiff's sister. The defendant offered no evidence but rested at conclusion of the plaintiff's case. *Held* that the defendant is liable, in the absence of proof of the exercise of care and inspection in the manufacture of the bread, notwithstanding the lack of privity of contract between the plaintiff and defendant. *Freeman* v. *Schults Bread Company* (1917), 163 N. Y. Supp. 396.

The decision in this case is in line with the tendency of recent New York cases to extend the liability of a manufacturer who fails to exercise care in the manufacture of his goods or in inspecting them before putting them upon the market for sale. *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C 440; *Miller* v. *Steinfeld*, 160 N. Y. Supp. 800. The decision in the principal case is put squarely upon the ground that a loaf of bread is an article which it is reasonably certain will become dangerous if so negligently made as to allow foreign substances to enter into its manufacture. The earlier cases which considered the liability of a manufacturer, vendor or packer to the ultimate purchaser, as well as to persons not in privity of contract, for injuries from defects in the article sold, are collected and discussed in the note to *Tomlinson* v. *Armour & Company*, 19 L. R. A. N. S. 923. See also the note to *Mazeetti v. Armour & Company*, 48 L. R. A. N. S. 213, and the long list of cases there cited and reviewed. These earlier cases limited the application of the doctrine announced in the principal case to poisons, explosives and things of like nature which in their normal operation are implements of destruction. See *Thomas* v. *Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Wellington* v. *Downer Kerosene Oil Company*, 104 Mass. 64; *Norton* v. *Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *McCafferty* v. *Mossberg & G. Mfg. Co.*, 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822. 91 Am. St. Rep. 637; *Huset* v. *J. I. Case Threshing Machine Co.*, 120 Fed. 805, 57 C. C. A. 237, 61 L. R. A. 303. We have seen the principle extended to an automobile (*MacPherson* v. *Buick Motor Co.*, supra), to a stepladder (*Miller* v. *Steinfeld*, supra.) and now to a loaf of bread, and apparently the

end is not yet. Is it not time that we called a halt to this constantly growing list of manufactured articles that are considered so inherently dangerous in their nature as to put an absolute duty of inspection upon the manufacturer and an absolute liability, even to those with whom he has no privity of contract, if he fails to make such inspection? This criticism is not directed at the conclusion reached by the court but at the basis on which it rests its decision. The defendant contended that it was incumbent upon the plaintiff to show that the defendant had been negligent in the manufacture of the loaf and that the doctrine of *res ipsa loquitur* did not apply to such a case. But this contention was brushed aside and the doctrine of *res ipsa loquitur* allowed to control. In that it would seem the court was wrong. Why not put the case upon the ground that the defendant owed a certain duty of care to the plaintiff and that for the plaintiff to recover he must first show that the defendant has been negligent in the performance of that duty? This phase of the question is barely mentioned, while the duty to inspect is stressed to the point that would hold the defendant liable at all events if he failed to make such inspection. In this regard, and in putting a loaf of bread in the same category with deadly poisons, explosives, and other dangerous instrumentalities the court placed its decision upon a ground extremely hard to support. Opposed to *MacPherson* v. *Buick Motor Co.*, supra, on which case the decision in the principal case was based, is *Cadillac Motor Co.* v. *Johnson*, 221 Fed. 801, 137 C. C. A. 279, L. R. A. 1915E 287, decided by the Federal Court in New York about a year before the decision in *MacPherson* v. *Buick Motor Co.*, by the New York Court of Appeals.

TORTS—STRIKES.—Employes of plaintiff, who is a retail grocer, refused to pay their dues to the local grocery clerks' union. The union, although having no trade dispute with plaintiff, declared a strike against him, and picketed his place and sought to prevent persons from buying of him. Plaintiff brings suit against defendants as officers of the union and also as individuals representing the other numerous members. *Held* that the acts were illegal, and the union and its members were liable therefor. *Harvey* v. *Chapman et al* (Mass. 1917), 115 N. E. 304.

In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. *Martel* v. *White*, 185 Mass. 255, 69 N. E. 1085, 102 Am. St. Rep. 341, 64 L. R. A. 260; *Jackson* v. *Stanfield*, 137 Ind. 592, 36 N. E. 345, 24 L. R. A. 469. The weight of authority is to the effect that the right of a labor union to use coercion and compulsion by strikes or threats thereof is limited to strikes or threats thereof against persons with whom the combination has a trade dispute. *Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 753, 116 Am. St. Rep. 272, 6 L. R. A. N. S. 1667. Likewise it is illegal to coerce the customers or prospective customers of one with whom the union has no trade dispute to withhold their patronage from him. *Thomas* v. *Cincinnati etc. R. Co.*, 62 Fed. 803; *United States* v. *Cassidy*, 67 Fed. 698. Nor is this liability for injury to

one's business by coercing his customers to cease to patronize him dependent on the fact that contract relations are thereby broken. *Gray* v. *Building Trades Council,* 91 Minn. 180, 97 N. W. 666, 103 Am. St. Rep. 477, 63 L. R. A. 753; *Jersey City Printing Co.* v. *Cassidy,* 63 N. J. Eq. 759, 53 Atl. 230. The decision in the principal case is clearly right, there being no real trade dispute between the parties and no justification disclosed for the acts of the defendants. See generally, COOLEY TORTS (3rd ed.) 597-608. See also *Ertz* v. *Produce Exchange,* 79 Minn. 140, 81 N. W. 737, 79 Am. St. Rep. 433, 48 L. R. A. 90. For cases apparently contra to rule of principal case see *J. F. Parkinson Co.* v. *Building Trades Council,* 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. N. S. 550; *State* v. *Van Pelt,* 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760.

VENDOR AND PURCHASER—TIME OF THE ESSENCE.—Plaintiff agreed to sell certain land to the respondent. The purchase was to be completed by a fixed date, and time was to be "in all respects strictly of the essence of the contract." The purchaser was accidentally prevented from completing at the fixed date, by the sickness of his attorney, and the vendor claimed a right to rescind the contract. In an action by the purchaser for specific performance *Held,* the vendor was entitled to rescind. *Brickles* v. *Snell* [1916] 2 A. C. 599, 86 L. J. P. C. 22.

Time is not of the essence of an agreement to convey land unless it is expressly so stipulated, or follows by necessary implication from the nature of the transaction. *Cromwell* v. *Clinton Realty Co.,* 67 N. J. Eq. 540, 58 Atl. 1030. There are, however, a few decisions to the contrary. *Crippin* v. *Heermance,* Clarke Ch. (N. Y.) 133. But when the contract is merely an option to purchase the courts are agreed that time should be of the essence. *McKenzie* v. *Murphy,* 31 Colo. 274, 72 Pac. 1075. The reason for this is apparent. Any extension of time in such a case might work the prospective vendor irreparable injury. But a contract of that nature is not involved in the principal case. The right to reject title if it is proved legally defective, and the obligation to accept if it is valid, leaves the vendee no option. The most reasonable construction of a contract such as the one involved here would seem to be that the equitable title vested when the contract was entered into; subject to be divested if the vendor should be unable to make good title. But if this view is not taken it must be plain that the vendor-purchaser relation must have been established at the expiration of the ten days at which time, as provided by the contract, the title would be deemed accepted if no written objection were made thereto. The vendor-purchaser relation having been established then under either possible view, the question arises whether the estate of the latter should be divested for failure to perform what must properly be considered a condition subsequent. The vendor could have had specific performance of the contract, and the injury which resulted to him from the trivial default of the purchaser was so slight that enforcement of the stipulation making

time of the essence, would be, substantially, the inposition of a penalty. See note to *Wells* v. *Smith*, 31 Am. Dec. 278, and 2 Lead Cases Eq. 1134; POMEROY EQ. §455.

WILLS—ELECTION OF WIDOW TO TAKE UNDER WILL ESTOPPING HER TO TAKE INTESTATE PROPERTY.—Testator gave the residue of his property to his wife and son in equal shares, but the devise to the son lapsed upon his death during the life of the testator, and the testator died intestate as to this property. It was contended on behalf of the widow of the testator that she was entitled to this intestate property, she being the sole heir at law of her husband. *Held* that since the widow had elected to take under the will she was estopped from taking any portion of her husband's estate except that given her under the will; and that the property as to which he died intestate went to those who would inherit had the deceased left no widow. *In Re McAllister's Estate* (Minn. 1917), 160 N. W. 1016.

Upon the point here presented there seems to be an irreconcilable conflict of authority. See in accord with the principal case, *In Re Benson*, 96 N. Y. 499, 48 Am. Rep. 646; *Compton* v. *Ackers*, 96 Kan. 229, 150 Pac. 219. In an English case where the will expressly declared that certain provisions were made in lieu of dower, the court declared that the provisions applied only to such part of the estate as was disposed of by the testator, and the widow was not excluded from sharing in intestate property. *Naismith* v. *Boyes* [1899], A. C. 495. The same rule was followed in *Thompson's Estate*, 229 Pa. 542, 79 Atl. 173; *Bane* v. *Wick*, 14 Ohio St. 505; *Kaser* v. *Kaser*, 68 Ore. 153, 137 Pac. 187; *Sutton* v. *Read*, 176 Ill. 69, 51 N. E. 801. Contra *Ellis* v. *Dumond*, 259 Ill. 483, 102 N. E. 801. In *Demoss* v. *Demoss*, 47 Tenn. 256, where it was not expressly stated to have been in lieu of dower, the court decided in favor of the widow, basing their opinion upon the interpretation of their statute. Cf. *Collins* v. *Collins*, 126 Ind. 559, 25 N. E. 704. In *Beshore* v. *Lytle*, 114 Ind. 8, 16 N. E. 499, the court noticed the fact that the will gave the widow no "separate or individual estate," but merely made her a trustee, therefore her election to take under the will was not inconsistent with her claim to an ultimate share under the law. See in accord, *Micherson* v. *Bowly*, 49 Mass. 424; *State* v. *Holmes*, 115 Mich. 456, 73 N. W. 548; *Philleo* v. *Holliday*, 24 Tex. 38; *Bost* v. *Bost*, 57 N. C. 484. Also, 1 COL. LAW REV. 521.

WILLS—INCORPORATION OF FUTURE EVENT AS PART OF ORIGINAL DESCRIPTION.—Testatrix devised an estate to an afflicted son for life with remainder to "either one of my children who will take him into their family and see that he is supported and treated well"; no child was named to perform this duty. After the death of the life tenant, despite the fact that there is no dispute as to who did fulfil the condition by caring for the invalid, it is contended that this provision is void for uncertainty. *Held* (one justice dissenting) that the attempt to dispose of the remainder failed because the testatrix did not name or sufficiently designate which of the children should care for

the life-tenant and thereby become entitled to the remainder. *Summers* v. *Summers* (Ala. 1916), 73 So. 401.

In *Lehnhoff* v. *Theine,* 184 Mo. 346, 83 S. W. 469, an estate was given to those who paid for the maintenance of testator, but the court found that the one who claimed to have fulfilled the provision was indebted to the testator, and as a matter of fact there was no person who answered the requirements. The same question was before the court in *Fiester* v. *Shepard,* 92 N. Y. 251, on an appeal from the Surrogate court, but the case was dismissed on the grounds that the lower court had no jurisdiction. The writer of the opinion in the principal case expresses his dissent from the decision of the court, and cites *Dennis* v. *Holsapple,* 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526, in support of his dissent. The theory of the dissent is that where an intention clearly appears in a will that a gift should vest in a person to be ascertained upon the happening of a certain event or by the performance of certain conditions, the will is not void for uncertainty, but the gift will vest in such person who does answer the description, for example, the determination of the members of a class. See *Festing* v. *Allen,* 12 M. & W. 279. If the vesting of the gift may depend upon a contingency, then, as was decided in *Stubbs* v. *Sargon,* 2 Keen 256, an event to happen in the future may form part of the original description of the devisee. See in accord *Howard* v. *American Peace Soc.,* 49 Me. 288; *Shepard* v. *Shepard,* 57 Conn. 24, 17 Atl. 173.

WORKMEN'S COMPENSATION ACT—EXCLUSIVE CHARACTER OF REMEDY.—In an action under §§1902-1908, Code of Civ. Proc., by an intestate's surviving brothers and sisters against his employer to recover damages resulting from intestate's death caused by the employer's negligence, the employer interposed the WORKMEN'S COMPENSATION ACT as a defense, it appearing that the deceased was employed in an occupation to which the ACT applied, and that he left no wife, children, or other kin answering the description of those entitled to compensation under the ACT. The Supreme Court sustained plaintiff's demurrer to this answer. *Shanahan* v. *Monarch Engineering Company,* 156 N. Y. Supp. 143. The Appellate Division affirmed this decision in 159 N. Y. Supp 257. On appeal to the Court of Appeals it was *held* that the order of the Appellate Division be reversed on the ground that the remedy provided by the WORKMEN'S COMPENSATION ACT was exclusive, and that the surviving adult brothers and sisters of a servant killed in service had no right of action. *Shanahan* v. *Monarch Engineering Co.* (N. Y. 1916), 114 N. E. 795.

The principal case turns upon the construction of the statute providing a remedy for death of an employee. The court construes the word "exclusive," appearing in §11 of the ACT as meaning that the remedy provided by the ACT for those enumerated as beneficiaries, not only excludes any other action by them, but it also excludes any action by those not enumerated. Hence the plaintiffs in this action, not being named as beneficiaries in the ACT, cannot maintain an action. The rule of statutory construction involved

is that where a statute institutes a new remedy for an existing right, it does not take away a pre-existing remedy without express words or necessary implication. Applying this rule to the principal case, it would seem that the correct result was reached. The same rule was applied with the opposite result in *Colorado Milling & Elevator Co.* v. *Mitchell,* 26 Colo. 284, 58 Pac. 28. The Colorado statute in the latter case was, however, silent as to the exclusiveness of the remedy. If damages for wrongful death are punitive as well as compensatory, it would seem that the construction adopted by the New York Court might, in certain cases like the principal one, allow an employer to escape the consequences of his negligence; but unless the word "exclusive" as used in the New York statute can be interpreted to mean that the remedy provided is exclusive so far as provision is made for beneficiaries, and that as in this case no provision was made for adult brothers and sisters, then the old remedy applies, there is no escape from the conclusion of the New York Court.

WORKMAN'S COMPENSATION ACT—WHAT IS HAZARDOUS EMPLOYMENT?—On appeal to the New York Court of Appeals, the case of *Fogarty* v. *National Biscuit Co.,* 161 N. Y. Supp. 937, was reversed, holding it not necessary that the deceased have been himself immediately engaged in a hazardous occupation, but that the statute is satisfied if the deceased were doing an act, at the time of the accident, which was fairly incidental to the prosecution of a business enumerated in the statute as "hazardous." *Fogarty* v. *National Buscuit Co.* (N. Y. 1917), 115 N. E. —.

For a criticism of the decision in the lower court, see 15 MICH. L. REV. 528.