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Recent Important Decisions

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ARREST—RIGHT OF OFFICER TO KILL WHEN SERVING WARRANT FOR MISDEMEANOR.—Defendant had a warrant for the arrest of one White, charging him with being drunk and disorderly. When the defendant served the warrant, White advanced upon him with an open knife. Although the defendant had a chance to escape through an open door, he shot and wounded White. In the prosecution of defendant for shooting and wounding White, it was *held* that the defendant was justified in shooting him. *State* v. *Dunning* (N. C., 1919), 98 S. E. 530.

The rule of the common law was that if an officer under the authority of a warrant attempted to arrest a felon, he was justified in killing the felon if he fled, but the officer could not justify the killing of a misdemeanant who fled. And, irrespective of the question of self-defense, if either the felon or misdemeanant resisted arrest, the rule was that the officer was justified in opposing force to force, even though the death of the persons resisting be the consequence. HALE'S PLEAS OF THE CROWN (Small's 1st Am. Ed.) 489; EAST, PLEAS OF THE CROWN (1716), 298; 4 COOLEY'S BLACKSTONE, 4th Ed., Vol. 2, 1348; 1 RUSSELL, CRIMES, (9th Am. Ed.) 893; CLARK, CRIMINAL LAW, 161-2. This view is supported on grounds of public policy and in justice to the officer. And the common law rule is in general followed by the later cases. *State* v. *Smith,* (felon resisted), (1905), 127 Ia. 534; *Brown* v. *Weaver,* (misdemeanant fled), (1898), 76 Miss. 7; *Head* v. *Marten,* (misdemeanant fled) (1887), 85 Ky. 480; *Commonwealth* v. *Rhoads,* (misdemeanant fled), (1903), 23 Pa. Supr. Ct., 512; *Lynn* v. *People,* (misdemeanant resisted), (1897), 170 Ill. 527; *State* v. *Dierberger,* (misdemeanant resisted), (1888), 96 Mo. 666; VOORHEES, LAW OF ARREST, 156-8. Among the modern cases there are authorities, however, holding that the officer is not justified in killing a misdemeanant who resists arrest unless in self-defense. *Dilger* v. *Commonwealth,* (dicta), (1889), 88 Ky. 550; *Smith* v. *State* (1894), 59 Ark. 132; *Clements* v. *State* (1873), 50 Ala. 117; *Holland* v. *State* (1909), 162 Ala. 5. That this rule may put the officer in a precarious position is shown in the *Clements Case, supra.* There the party resisting arrest had made threats on the life of the officer, and, though there was a conflict in the evidence, it tended to prove that the deceased had cocked and half drawn a pistol. The court said that this was a preparation to resist, an attitude of defiance, not amounting to an assault, which did not justify the officer's killing the deceased.

BILLS AND NOTES—CONFLICTING DUE DATES.—Payee sued the maker's executors on an instrument substantially as follows: "December 12, 1891. One day after date I promise to pay to the order of V. A. Zimmerman seven thousand dollars with interest from date, to be paid at my death. JAMES R. ZIMMERMAN." *Held,* plaintiff nonsuit. The uncertainty in due dates was incurable and unexplained. *Zimmerman* v. *Zimmerman* (Pa., 1919), 106 Atl. 198.

The plaintiff had no evidence to explain the ambiguity between the two inconsistent due dates or to indicate which one was intended. But the courts,

even in the absence of extraneous evidence, will attempt by judicial interpretation to give a reasonable meaning to all the terms of an instrument. *Washington County Bank* v. *Jerome,* 8 Mich. 490. To do this they will insert an omitted word. *Nichols* v. *Frothingham,* 45 Me. 220, where "months" was supplied after "six" in a note reading "six after date we promise to pay." Payments "on or before" a certain date are almost universally held enough to satisfy the requirement for certainty in the due date of a note. *Bank* v. *Skeen,* 101 Mo. 683. And "one day after date I promise to pay, or at my death" has been held sufficient to make a note collectable eleven years after the date on which made, the maker's death occurring at this latter time. *Conn* v. *Thornton,* 46 Ala. 587. The court might have held the instrument in the principal case a good note by implying the word "or" between the two dates, on analogy with these cases.

BILLS AND NOTES—HOLDER IN DUE COURSE—CHECK DEPOSITED WITH BANK FOR COLLECTION.—One White deposited a check for four hundred and forty dollars with plaintiff bank. The deposit slip on which the check was listed contained the provision that "Items other than cash are received on deposit with the express understanding that they are taken for collection only." Later White drew out his entire balance including the provisional credit. Payment on the check was stopped. *Held,* plaintiff was a holder in due course not subject to equitable defenses. *Old National Bank of Spokane* v. *Gibson* (Wash., 1919), 179 Pac. 113.

By the Laws of 1899, chapter 149, the State of Washington adopted the Uniform Negotiable Instruments Law. Under its provisions, the courts have extensively developed the question as to the rights of a bank in paper held for collection. *Washington Brick etc. Co.* v. *Traders Nat. Bank,* 46 Wash. 23. Where provisional credit only has been given and no money advanced, the general rule is that the bank has no interest in the paper, *Belshiem* v. *First Nat. Bank of White Salmon,* 77 Wash. 552; *Morris-Miller Co.* v. *A. Von Pressentin,* 63 Wash. 74. A like rule prevailed under the Law Merchant; *Lawson, Mann et al.* v. *Second Nat. Bank of Springfield,* 30 Kans. 412; *Manufacturers' Bank of Racine* v. *Newell,* 71 Wis. 309; *First Nat. Bank* v. *Nelson,* 105 Ala. 180. However, where the bank extends irrevocable credit and assumes responsibility for the paper, it has been treated as a holder in due course. *Wheeler etc.* v. *First Nat. Bank of Battle Creek,* 3 Tex. Ct. App. Civ. Cas. 192. Where advances made were in the nature of general credit extended and not on the strength of the paper deposited, the bank has been denied this protection. *American Savings Bank and Trust Co.* v. *Dennis,* 90 Wash. 547. But where money is advanced in one form or another on the faith of paper deposited for collection, the courts have quite generally considered the bank to be a holder in due course and entitled to recover as against latent equities. *City Deposit Bank* v. *Green* (Iowa) 103 N. W. 96, 130 Iowa 384, 106 N. W. 942; *Shawmut Nat. Bank* v. *Manson,* 168 Mass. 425 (decided prior to the adoption of the statute in Massachusetts); *Morrison* v. *Farmers and Merchants Bank,* 90 Okla. 697. The result in the instant

case may be said to be consistent with the general trend of the law. The contract of conditional credit was changed when the bank honored the depositor's check. In the tender and acceptance of the check without provision for credit, the reasonable presumption would be that both parties considered this transaction as changing the ownership of the paper.

BOYCOTT—PHYSICIANS AND SURGEONS—RULES OF MEDICAL ASSOCIATION.—Defendant, British Medical Association, is an organization of medical men, its object, as stated in its memorandum of incorporation, being "To promote the medical and allied sciences, and to maintain the honor and interests of the medical profession." Plaintiff had been practicing medicine since 1895 and had been a member of the Association. In 1908 he was expelled from membership for having engaged in "contract practice", and thereupon the defendant put into operation, pursuant to its rules, a "prolonged, deliberate and pitiless boycott." This boycott or ostracism was so effective that throughout the whole period of its operation plaintiff was unable to secure the services in consultation of a single medical practitioner (with one exception) in his own community or the territory thereabouts. "His private practice was, in consequence, greatly injured, and he and the members of his family were treated as social and professional outcasts." In action for the resulting damage *held* plaintiff was entitled to recover. *Pratt* v. *British Medical Association* (1919), 1 K. B. 244.

The judgment of McCardie, J., is an able, thorough review of the authorities bearing on the problem of *Allen* v. *Flood* (1898), A. C. 1; *Quinn* v. *Leathem* (1901), A. C. 495, etc., and consideration of the principles underlying the determinations in such cases. The learned judge concludes that a threat to inflict upon a man the slur of professional dishonor was as much an "unlawful means" in injuring a person's business as is a threat to cause a strike, "each may produce intimidation." That the self interest of the defendant and its members and the alleged desire to set a particular standard of professional ethics were not a justification of what was done was deemed equally clear. The judgment concludes that malice was not an essential element in plaintiff's action, but finds that there was proof of malice. The case will be commented upon more fully in a subsequent issue of the Review.

CONSTITUTIONAL LAW—ANTI-TIPPING STATUTES.—Plaintiff was arrested for violation of the Iowa Code, Supplemental Supp. 1915, § 5028u, which provided that any employee of a hotel, barber-shop ,or other enumerated places (sic) who should accept a tip or gratuity should be guilty of a misdemeanor. The case arose on suit for a writ of habeas corpus. *Held,* the statute was unconstitutional. *Dunahoo* v. *Huber* (Iowa, 1919), 171 N. W. 123.

The court held that there was no reasonable ground whatever for distinction between employees and employers so far as concerned preclusion from accepting tips, and that, as the statute did not purport to restrict employers, it had not a "uniform operation" as required by the Iowa constitution, and did deny to employees that equal protection of the law prescribed by the federal constitution. A dissenting opinion argued that "the tipping

evil, if such, is in its very nature a wrong by the employee against the employer * * *" and that in this there was sufficient ground for classification. Other decisions on anti-tipping statutes are noted in 17 MICH. LAW REV. 96.

CRIMINAL LAW—MOTION IN ARREST—INDICTMENT—NAMES OF PARTIES.—Defendant, Goldberg, was indicted in fifty counts for the illegal sale of liquor. In forty-nine of the counts his name was spelled correctly, in one of them it was spelled Holdberg. He was convicted on all fifty counts, and moved in arrest of judgment. The motion was denied in the trial court. *Held,* reversed and remanded, the names not being *idem sonans,* the holding must be reversed *in toto. People* v. *Goldberg* (Ill., 1919), 122 N. E. 530.

The decision is one of those which grate on the legal conscience as well as add to the layman's arguments against the technicalities of legal procedure. To arrive at it the court took three steps. First: that Holdberg and Goldberg are not *idem sonans.* This is equivalent to saying that the attentive ear would have no difficulty in distinguishing between them when pronounced. *Maier* v. *Brock,* 222 Mo. 74. Second: that the objection was correctly raised by a motion in arrest of judgment. Other courts hold that this is too late to raise such an objection. See *Verberg* v. *State,* 137 Ala. 73, that a plea of not guilty is a waiver of the fact that the name is a misnomer; and *Commonwealth* v. *Dedham,* 16 Mass. 141, that misnomer is only matter of abatement, and not of arrest of judgment. Third: that the decision must be reversed *in toto.* The court goes on the authority of *People* v. *Gaul,* 233 Ill. 630. The United States Supreme Court seems to differ, holding that where there is error in one count the verdict may still stand as to the rest. *Ballew* v. *United States,* 160 U. S. 187.

CRIMINAL LAW—NEGLIGENT ASSAULT AND BATTERY WITH AN AUTOMOBILE.—Defendant was convicted of assault and battery. There was evidence tending to prove that he was driving an automobile in a closely built-up portion of a city at a speed of about thirty-five miles an hour and that, at a street crossing which he knew to be dangerous, he struck and injured the prosecutor who was riding a motorcycle. *Held,* the evidence was sufficient to support the conviction: affirmed on rehearing. *Bleiweiss* v. *State* (Sup. Ct. of Ind., 1918, 1919), 119 N. E. 375; 122 N. E. 577.

The court quotes *Luther* v. *State,* 177 Ind. 619, as follows: "Intent, on the part of the person charged, to apply the force constituting the battery, is an essential element of the offense. But the intent may be inferred from circumstances wihch legitimately permit it. It may be from intentional acts * * * done under circumstances showing a reckless disregard for the safety of others, and a willingness to inflict the injury." The case thus rests on the same theory as *State* v. *Schutte,* 87 N. J. L. 15 (Supreme Court), 88 Ib. 396 (Court of Errors), which was discussed at some length in 13 MICH. L. REV. 594. It seems obvious that, under the beneficent fiction of implied intent, we are developing a doctrine of negligent assault and battery, limited perhaps to the grosser degrees of negligence (as negligent homicide often is), and possibly excluding cases where there is no act save one of omission.

In the first opinion in the principal case, the court seems to rest in part on the doctrine of constructive intent, as applied to the violation of the speed law. The inappropriateness of this doctrine is made clear by *Commonwealth* v. *Adams,* 114 Mass. 323 (cited with approval in 177 Ind. 619, 629), and by the opinion of the Court of Errors in the case of *State* v. *Schutte, supra.* See also 17 MICH. L. REV. 603.

DAMAGES — TIPS INCLUDED IN ESTIMATING DAMAGES OF AN EMPLOYEE WRONGFULLY DISMISSED.—The plaintiff was employed as a hair dresser by the defendant, and in the ordinary course of his service he received tips from the persons whom he attended. The defendant wrongfully dismissed him. *Held,* that the plaintiff was entitled to include the loss of tips in the damages claimed as a result of the wrongful dismissal. *Manubens* v. *Leon* [1919], 1 K. B. 208.

The case involves a somewhat unique application of a familiar principle. The damages recoverable on a breach of contract are said to include such as may reasonably be considered as arising naturally from the breach of the contract itself or such as may reasonably be supposed to have entered into the contemplation of the parties when they made the contract. *Hadley* v. *Baxendale* (1854), 9 Exch. 341. The application of this general principle to cases involving loss of tips seems to be an open question on authority. There are a few analogies. It has been held, for example, that where the practice of tipping is open, notorious, and sanctioned by the employer, such gratuities may be included in estimating the "average weekly earnings" in respect of which compensation is awarded under the English Workmen's Compensation Act of 1906. *Penn* v. *Spiers & Bond* [1908], 1 K. B. 766; *Great Western Railway Co.* v. *Helps* [1918], A. C. 141. It has also been held that an employee who turns over the tips received to his employer, under a mistake as to his rights, may compel the employer to make restitution. *Zappas* v. *Roumeliote* (1912), 156 Ia. 709; *Polites* v. *Barlin* (1912), 149 Ky. 376. So long as an indulgent public is willing to tolerate the tipping system, it would seem on principle that the law ought to take account of this kind of remuneration in estimating the damages to be awarded for breach of a service contract.

FIRES—TRACTOR ON HIGHWAY — DANGEROUS AGENCY — DOCTRINE OF RYLANDS V. FLETCHER.—A steam engine (presumptively of the nature of a steam tractor) was being driven by defendant along a highway and sparks emitted from the engine set fire to plaintiff's premises. The engine was equipped with a special apparatus to prevent the emission of sparks. *Held,* that since defendant was using a "dangerous fire-producing engine," the doctrine of *Rylands* v. *Fletcher,* L. R. 3 H. L. 330, and *Gunter* v. *James,* 24 Times L. R. 868, was applicable; hence defendant was liable in damages for the injury caused, although he was in no way negligent. *Mansel* v. *Webb* (1918), 88 L. J. K. B. 323.

The principal case is significant in that the English courts have no compunction about confirming the extension of the application of a doctrine

which had a peculiarly historical origin in cases of trespass by domestic animals (see *Tillett* v. *Ward*, L. R. 10 Q. B. D. 17), which later was extended to apply to the use of land (*Rylands* v. *Fletcher, supra*), and which was finally extended in its application to the use of inanimate chattels (*Jones* v. *Festiniog Ry.*, L. R. 3 Q. B. 733 and *Powell* v. *Fall* L. R. 5 Q. B. 597); a doctrine which, in its extended application, "would impose a penalty upon efforts, made in a reasonable, skilful, and careful manner, to rise above a condition of barbarism." Doe, J., in *Brown* v. *Collins*, 53 N. H. 442. In a case similar to the principal one the Supreme Court of Tennessee said that "the degree of care required of one * * * with a steam thresher, in respect to setting fires, is the same as that devolved upon railway companies in the use of their engines." *Martin* v. *McCrary*, 115 Tenn. 316; 1 L. R. A. (N. S.) 530. That duty as laid down by the same court in a prior case is that "a degree of care and prudence commensurate with the danger to which property is exposed by them" must be used. "And when they have them properly constructed and equipped with spark arresters and appliances of the latest and most approved character to prevent the escape of coals and cinders, in good repair, and carefully and skillfully handled, * * * they are not liable for property unavoidably destroyed by escaping sparks and cinders." *Louisville & N. Ry.* v. *Fort*, 112 Tenn. 432. In this matter the Tennessee court exemplifies the weight of authority in America which asserts, while the English courts repudiate, a hornbook principle of the common law, *viz.*, that "blame must be imputable as a ground of responsibility for damage proceeding from a lawful act." *Marshall* v. *Welwood*, 38 N. J. L. 339.

INDEPENDENT CONTRACTOR — LIABILITY TO INJURED THIRD PARTY — PROXIMATE CAUSE.—Testatrix of a party killed by the collapse of a defective county bridge, sues the company which, as independent contractor, constructed the bridge for the county some five years before time of suit. Negligence and knowledge of the defects are admitted by defendant's demurrer to the complaint. *Held*, that in the absence of a showing that fraud, deception or intentional concealment of defects was practiced by the contractor in obtaining acceptance of the bridge by the county, such acceptance was the intervention of an independent human agency which had the effect of breaking the chain of causation between any negligence of the contractor and the death of the third party, and defendant is therefore not liable to plaintiff in this action. *Travis* v. *Rochester Bridge Co.* (Ind., 1919), 122 N. E. 1.

In exposition of its reasoning that acceptance by the county amounts to the actual intervention of an independent human agency, the opinion of the principal decision holds, *inter alia*, that, "In the class of cases to which the one at bar belongs the work is generally done by the contractor in accordance with plans furnished by the party letting the contract or under his direction and supervision." But the court's comment is certainly not wholly in harmony with the legal conception of an independent contractor as, "One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely in accordance with his own ideas, or in accordance with a plan previously given him by the person for whom the work is

done, without being subject to the orders of the latter in respect to the details of the work" 26 Cyc. 970. The county was, then, not bound to exercise supervision and there is nothing in the facts which indicates that the work was not directed solely by the contractor. The county did not consciously accept the defects of the bridge nor take to itself the negligence of the independent contractor. What happened in fact was a mere change of possession and on this topic BIGELOW, CASES ON TORTS, 618, says: "If the injury occurs by reason of the defendant's default, what matters it that he had not control over the thing at the time? The change of control is nothing, unless the original defect has been increased thereby, so that it cannot be proved that the original negligence of the defendant caused the damage." Granting, however, that the acceptance by the county and its subsequent failure to repair the bridge constituted the intervention of an independent responsible agency the question naturally presents itself: Does such intervention relieve the contractor of the original liability which an application of the doctrine of proximate cause inferentially admits? It would seem that the conduct of the county can hardly be classed as other than that which the contractor was under obligation to anticipate and endeavor to prevent. He knew of the defects and was also aware that they were not discoverable upon reasonable inspection. Under these circumstances, it appears to be neither illogical nor unjust to hold that the contractor was bound to foresee the almost inevitable result of his own neglect. Acceptance by the county, subsistence of the inherent weaknesses of the bridge and consequent accidents, were in view of the facts and from the defendant's standpoint, sequels "likely to happen in the ordinary course of events." *Stone* v. *Boston, etc., Railway Co.*, 171 Mass. 536, 540.

INTOXICATING LIQUORS—REED AMENDMENT—POWER OF STATE OFFICERS TO ARREST PERSONS CARRYING LIQUOR THROUGH DRY STATES.—Defendant was indicted for carrying liquor into Virginia a dry state. The evidence furnished in the bill of particulars showed that he was transporting liquor on a through passenger ticket from Maryland to North Carolina. He was arrested while the train stopped temporarily at Lynchburg, Va. On a motion to quash, it was *held* that the Reed Amendment, rightly construed, did not embrace the act which it was admitted that the prosecution could prove. *United States* v. *Gudger* (U. S. Supreme Ct., No. 408, April 14, 1919).

The court said that the terms of the Reed Amendment did not prohibit the movement of liquor in interstate commerce through a dry state to another state. The temporary stop at Lynchburg, Va., was not enough to give the liquor a situs therein or to interrupt the interstate commerce character of the trip. Similarly it has been held that sheep being driven along the road from one state to another were in interstate commerce and not subject to the state's taxing power even though they grazed as they were driven. *Kelley* v. *Rhoads* (1902), 188 U. S. 1. In cases on the question of the right of the state to tax property temporarily within the state, though intended by the shipper to be forwarded ultimately, the property was taken from the hands of the carrier to serve some purpose of the shipper, as grading grain, *People*

v. *Bacon* (1909), 243 Ill. 313, (affirmed 227 U. S. 504), 44 L. R. A. (N. S.) 586; separating oil, *General Oil Co.* v. *Crain* (1908), 209 U. S. 211; to allow carload shipments, *Merchants' Trans. Co.* v. *Des Moines* (1905), 128 Ia. 732. There was nothing in the instant case to divest it of its interstate character. The suggestion that the construction adhered to would make evasion of the law easy was rejected on the ground that a different holding would be "an enactment by construction of a new and different statute". That the Reed Amendment is a proper exercise by Congress of its power over interstate commerce see 17 MICH. LAW REV. 511.

INTOXICATING LIQUOR—RIGHT OF STATE TO PROHIBIT POSSESSION THEREOF. —The Georgia prohibitory law, approved in November, 1916, to become effective May 1, 1917, prohibited the possession of more than one gallon of intoxicating liquor. Under it the defendant was convicted of having in his possession more than the forbidden quantity. He asserted that the liquor had been acquired before May 1, 1917; and contended that the statute, if construed to apply to liquor so acquired, was void under the Fourteenth Amendment. It was *held* that the defendant could not stay the exercise of the State's police power by acquiring such property, and that the defendant, acquiring it after the enactment of the statute, took it with notice of its infirmity that its possession would become a crime. *Barbour* v. *The State* (U. S. Sup. Ct. No. 191, April 14, 1919), affirming *Barbour* v. *The State* (1917), 146 Ga. 667.

The majority of the early cases denied the right of the state to prohibit the mere possession of liquor for personal use as violating the Fourteenth Amendment. *Kentucky* v. *Campbell* (1909), 133 Ky. 50, 24 L. R. A. (N. S.) 172 and note; *Kentucky* v. *Smith* (1915), 163 Ky. 227, L. R. A. 1915 D 172. These cases considered that to deny the right of a person to possess liquor was not reasonably necessary to protect the public health, public morals, or public safety, and, consequently, an improper exercise of the police power and the abridgement of the privileges and immunities. At this time the purpose of prohibition was said to be the abolition of the saloon and the prevention of general traffic therein, not the prevention of consumption. FREUND, POLICE POWER, Sec. 453, 454. In *Crane* v. *Campbell* (1917), 245 U. S. 304, the Supreme Court of the United States settled the question, upholding the right of a state to prohibit possession of liquor, but it did not there appear when the liquor was acquired. These decisions leave open the question of the right of the state to make the mere possession of liquor acquired before the enactment of the statute a crime. As in the instant case, the court previously held that this question was not before it. *Bartermeyer* v. *Iowa* (1873), 18 Wall. 129. In the state courts there is a conflict. In the early case of *Wynehamer* v. *The People* (1856), 13 N. Y. Rep. (Kernan) 378, a statute prohibiting traffic in intoxicating liquors was held void for the reason that the law operated so rigidly on property innocently acquired under previous laws as to amount to depriving the owner of his property. In Washington a prohibitory law primarily purposing to prevent the sale and barter of intoxicating liquors, though also making possession thereof unlawful, was held not to apply to liquor acquired and possessed for personal use before the statute

was enacted. *Washington* v. *Eden* (1916), 92 Wash. 1. In Utah a very stringent statute made the possession of liquor unlawful and further abolished all property rights therein. This statute was held constitutional. *Utah* v. *Meek* (1918) — Utah —, L. R. A. 1918 E, 943. The court said that the tendency of modern legislation, and the purpose of the act, was against the consumption of liquor; and, if the legislature deemed it necessary to enforce the statute they were not going beyond their powers, citing *Mugler* v. *Kansas* (1887), 123 U. S. 623, and the *Crane case, supra.* It is submitted that the view taken by the Utah Court is the correct one. If the legislature think it an administrative necessity to the proper enforcement of and the prevention of evasion of the prohibitory laws now designed to protect the community against the evils attending the excessive consumption of liquor, it is constitutionally within their power to destroy property rights in liquor and make possession thereof a crime. Such extreme steps probably would not have been countenanced when the view pertained that the best government was that which governed least, but to-day the tendency is toward regulation. The Supreme Court has upheld a law forbidding possession of game during the closed season, though the game in question had been imported from Russia, on the ground that without such prohibition or restriction any law for the protection of domestic game could successfully be evaded. *Silz* v. *Hesterberg* (1906), 211 U. S. 31.

Logs and Logging—Contract for Sale of Standing Timber with Definite Time for Removal.—Plaintiff was the owner of timber under a deed, but failed to remove the same within the time specified therein. Defendant in possession of the land was sued for conversion of the timber. *Held,* that plaintiff remained entitled after the expiration of the time limit but having lost his right to immediate possession at the moment of conversion, the action could not be maintained. *Long et al.* v. *Nadawah Lumber Company* (Ala., 1918), 81 So. 25.

The question of the rights of parties under so-called "timber contracts" after the lapse of a reasonable or stipulated time for removal has resulted in an abundance of conflicting decisions. The general theory controlling is indicated in the case of *Green* v. *Bennett,* 23 Mich. 464, where the court concluded that if the instrument purports to make an absolute conveyance, provision for removal within a certain time is a covenant and title remains in the vendee, who may sue the vendor if the latter converts the trees; but where the provision is a condition, the title revests on breach. Some difficulty may be experienced in determining whether or not the provision was intended to operate as a condition or a covenant. Having once determined this, the courts are generally agreed that if the covenant be conditional, title will revert. The difficulty arises where there is a prima facie conveyance in fee. Alabama, as held in the instant case, is committed to the position there taken as regards the disposition of the title. *Ward* v. *Moore,* 180 Ala. 403; *Goodson* v. *Stewart,* 46 So. 239; *Magnetic Oil Co.* v. *Marbury Lumber Co.,* 104 Ala. 465. Other jurisdictions in accord with this principle are, New Jersey, *Irons* v. *Webb,* 41 N. J. Law 203; Indiana, *Halstead* v. *Jessup,* 150 Ind. 85.

Probably the weight of authority is with the view that such stipulations can only be considered as conditions, *Young* v. *Cowan* (Ark.), 204 S. W. 312; *Bennett* v. *Vinton Lumber Co.*, 28 Pa. Sup. Ct. 495; *Hartley* v. *Neaves*, 117 Va. 219; also reported and annotated in 1 Va. L. Reg. n. s. 25. Nor is a provision for reversion necessary at least in Texas, see *Adams* v. *Fidelity Lumber Co.*, 201 S. W. 1034 and Georgia, *Allison* v. *Wall*, 121 Ga. 822. The absence of such provision was held to prevent a reversion where no time was fixed in *Watt* v. *Baldwin*, 60 Mich. 622. There is little ground for quarreling with those courts which hold to the theory of reversion. Their decisions may work a hardship on the holder of the timber rights but any other would equally distress the owner of the land. The former is responsible for his own predicament. To hold him entitled to harass and embarrass the landowner indefinitely by threatened trespasses or legal proceedings would in the balance outweigh the undoubtedly self-imposed hardship to the vendee. The instant case is an illustration of the resuscitation of common law technicalities to ease the burden of deciding a hard case. The result is such as no sane person would contemplate at the time of contracting. In *Halstead* v. *Jessup*, *supra*, under similar circumstances, the court assuming the title to be in the vendee, allowed him to recover from the landowner in conversion for refusing him permission to enter, cut and remove the timber. It is submitted that the courts asserting the Alabama view must go the whole way as did the Indiana court in *Halstead* v. *Jessup*. Litigants are no longer satisfied with the determination of some nice point of law arising in their case, leaving the substantial question at issue and the equitable rights of the parties unsettled.

SALES—FAILURE TO DELIVER—EXCUSE—CONSTRUCTION OF CONTRACT.—Defendant sold wheat to plaintiff, contracting to deliver it "at" a certain public warehouse by a stated time. Before this time defendant took the grain to the warehouse, but as it was full it was impossible for him to store it there. This impossibility continued through the time in which delivery was to be made, and upon defendant declaring that he was relieved of his contract, plaintiff sued for damages. *Held*, (TOLMAN, J., dissenting), the impossibility did not relieve the defendant. *Farmers' Grain & Supply Co.* v. *Lemley* (Wash., 1919), 178 Pac. 640.

With the exception of a few well known, and fairly well defined, classes of cases, the rule as generally laid down in the older cases and by the text writers is that an intervening impossibility will not relieve the promisor on his agreement. 2 BENJAMIN ON SALES, 748-753; 2 PARSONS ON CONTRACTS (2d. Ed.) 823. See *supra*, p. —; *Isaccson* v. *Starrett*, 56 Wash. 18; *Stees* v. *Leonard*, 20 Minn. 494. However, the courts are today tending to relax this very stringent rule, relieving the promisor when it appears "that the contingency which makes the contract impossible of performance is such that the parties to the contract, had they actually contemplated it, would probably have regarded it as so obviously terminating the obligation as not to require expression." 1 COL. L. R. 533; *Clarksville Land Co.* v. *Harriman*, 68 N. H. 374. See comprehensive annotation thoroughly reviewing the cases in L. R. A. 1916 F, 10. But no matter how this rule may be considered, it should be

based, like all the rules of contract law, on the intention of the parties; and it is this which the courts should seek. Hence, if by defendant's agreement to deliver the grain "at" the warehouse it was the intention of the parties that it should be delivered "in" the building, and it was the further understanding that defendant's promise to put it there was in the nature of an absolute undertaking, the contingency which arose to prevent his performance should not relieve him. The prevailing opinion impliedly assumes, and probably correctly so, that the grain was to be placed "in" the warehouse, for it entirely ignores this consideration in construing the contract. The dissenting opinion, however, holds that when defendant took the grain to the warehouse he had done all that was required of him, and in support of this cites *Dockman* v. *Smith,* 21 Ky. (5 T. B. Mon.), 372, which holds that a covenant to deliver tobacco "at" a warehouse does not require the obligor to deliver it "in" the warehouse. But in *Halstead* v. *Woods,* 48 Ind. App. 127, where a note was made payable at a certain bank, it was held that it was payable "in" the bank. See 1 WORDS AND PHRASES, 595.

WILLS — EXECUTION — "PRESENCE OF TESTATRIX". — The attestation of the will in question took place in a room connected with the room in which the testatrix was by an archway about six feet wide. The testatrix could have seen the attaching of the signatures had she had her eyesight; but she was blind. The Missouri statute required attestation in "the presence of the testator". *Held,* that the statute was satisfied. The rule for a blind testator is the same as that which would be applied to him if he had sight. The purpose of the statute is that the testator may have knowledge that the witnesses have signed the instrument which he intends as his will. This protection is ordinarily afforded by observation—which a blind person cannot have. All the other senses are inadequate to avoid the possibility of substitution. The statute does not require more for a blind person than for a person who can see. Wade, J., dissenting. *Welch* v. *Kirby* (Circuit Ct. of App., 1918), 255 Fed. 451.

The court correctly states the purpose of the statute to be that the testator may have knowledge that the instrument signed is the one which he intends as his will. But sight is only one of the ways in which the testator may gain this knowledge. It is no doubt the best assurance. Nevertheless, even vision may not be entirely adequate in certain cases. The courts have set it down as the exclusive test merely because it happens to be the usual and the safest test. It is well established now that an attestation is in the presence of the testator if he could have seen the act even though he did not see it done because of some indifference or indisposition to take visual notice. *Re Snow,* 128 N. C. 100; *Hill* v. *Barge,* 12 Ala. 687. However, these courts seem to ignore the fact that this knowledge may be gained by means of senses other than sight. In *Cunningham* v. *Cunningham,* 80 Minn. 180, the testator could have seen if he had moved about two or three feet but the court held the attestation to have been made in his presence because it was "within the testator's voice; he knew what was being done". The court cited with approval the statement in *Cook* v. *Winchester,* 81 Mich. 581 that in the definition of

the phrase "in the presence * * * due regard must be had to the circumstances of each particular case. * * * If they sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him they are considered in his presence". The best expression of this view is found in *Aiken* v. *Weckerly*, 19 Mich. 482, where the court said that the testator must be "mentally observant of the specific act in progress." See also *In re Will of Hiram Allred*, 170 N. C. 153, L. R. A. 1916, C. 946; Ann. Cas. 1916 D, 788; *Riggs* v. *Riggs*, 135 Mass. 238. To say the least, the vision test is hardly consistent with itself. According to this test the statute is not satisfied if the testator could not move his head into the line of vision by reason of some infirmity; or could not see the act because his vision was obstructed by a curtain or the foot-board of his bed. *Gordon* v. *Gilmire*, 141 Ga. 347. Is not blindness as much an obstruction to the vision as a curtain or a board? Yet in one case the testator is afforded all the possible means of minimizing the possibility of fraud while in the other the testator is guaranteed only an imaginary safeguard. It would seem that the dissenting view attains more completely the "rational, practical construction" which the prevailing view asserts as the ideal. The principal case is supported by the case of *Piercy's Goods*, 1 Rob. Eccl. R. 278.

WILLS—REVOCATION—ADOPTIVE CHILD—"ISSUE."—The testator adopted a child in compliance with the provisions of the statute. He had no children by his first wife and remarried after the adoption. He then made his will. After his death a posthumous child of the second marriage was born. A section of the statute of wills read as follows: "That every last will and testament made when the testator had no issue living, wherein any issue he might have is not provided for or mentioned, if at the time of his death he leave a child, or children, or issue, or leave his wife enceinte of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate." The will was objected to in a caveat filed really on behalf of the adopted child. *Held*, that the will was void, having been revoked by force of the statute. The adopted child was not an "issue" within the meaning of the statute of wills, hence there was no living issue at the time of the making of the will. When the section of the statute of wills above mentioned was enacted there was no adoption statute and consequently adopted children could not have been intended to be included. Moreover, the adoption statute did not clothe the adopted child with all the legal incidents of a child born in lawful wedlock. *In re Book's Will*, 105 Atl. 878, (Perog. Ct. of N. J., Nov., 1918).

When adoption by statute first came into practice the legislatures hesitated to endow the child with all the legal incidents of a natural born child. The attitude of the legislatures was restrictive hence the interpretation of the courts was also restrictive. To-day adoption is the common thing and that feeling of reluctance to put the adopted child on the same plane with the natural child is no longer present in the minds of the legislatures. But unfortunately the courts are one step behind the legislatures, as is often the case, and the restrictive interpretation still continues. It is only when the

statute is precisely explicit that the courts come round to the modern ideas about adoption. Thus, in Massachusetts the statute provided that the adopted child should be deemed for the purposes of inheritance "and all other legal consequences and incidents of the natural relation of parent and child" the child of the parents by adoption the same as if he had been born to them in lawful wedlock. Consequently, the court held in *Sewall* v. *Roberts*, 115 Mass. 262, that an adopted child was included within the term "children" in a voluntary settlement made long prior to the adoption. See also *In the Matter of Wardell*, 57 Cal. 484; *Flannigan* v. *Howard*, 200 Ill. 396, 59 L. R. A. 664. But the adoption statute in the principal case said nothing about the legal consequences and incidents of adoption being the same as if born in lawful wedlock; it merely enumerated certain rights consequent on the adoption-education, maintenance, and the rights of inheritance and the distribution of the personal estate as if born to the parents in lawful wedlock. The court admitted that the adopted child would come within the terms of a descent or distribution statute so long as the adoptive statute gave the child the right to take; however, the reason which allowed this would not apply to cases arising under the statute of wills. This discrimination is hardly warranted. There is no apparent reason why the court should conclude that the legislature intended to apply a different rule as to the rights of an adopted child in the case of testacy from the case of intestacy. It all hinges around the interpretation of the word "inheritance" used in the adoptive statutes. In view of the modern ideas about adoption, this narrow construction fails to reach the real intent of the legislature. On authority the principal case is correct, and indeed has little opposition to dispute it. Let us hope for a case which meets the issue squarely.