Michigan Law Review

Volume 18 | Issue 2

1919

Recent Important Decisions

Michigan Law Review

RECENT IMPORTANT DECISIONS

BANKS AND BANKING—NEGOTIABLE INSTRUMENTS—INDORSEMENT OF FORGED CHECK.—Plaintiff, knowing that the one who signed the drawer's name was not the drawer herself, but not knowing further of signer's lack of authority, presented a check drawn on defendant bank in which bank the supposed drawer had an account but not sufficient to cover the check. The check was payable to plaintiff and indorsed by him and was placed to his credit in the bank. After discovering the forgery defendant charged the check to plaintiff's account. Plaintiff objected to such charge. *Held*, that the defendant might repudiate the payment as the plaintiff was not a bona fide holder within the general rule. *Woodward* v. *Savings and Trust Co.* (N. C., 1919), 100 S. E. 304.

The proposition for which the plaintiff contended is unquestionably supported by the weight of authority. The doctrine was first adopted by Lord Mansfield in *Price* v. *Neal*, 3 Burr. 1354, and was followed by Justice Story in *Bank of U. S.* v. *Bank of Georgia*, 10 Wheat. 333. See also *Bank* v. *Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *American Exchange Bank* v. *Gregg*, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 173. There is no distinction between the case of a holder before and after acceptance. *Bank of U. S.* v. *Bank of Georgia, supra; National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77. The reason of the rule seems to rest on the presumption that a bank knows the signature of its customers and likewise upon convenience in commercial transactions. *Bank of U. S.* v. *Bank of Georgia, supra.* However there are several qualifications to this rule, of which the principal case is a fair illustration. The holder must be bona fide, guilty of no actual or constructive fraud or negligence contributing to the mistake. *Smith* v. *Mercer*, 6 Taunt. 76; *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96. In the principal case the plaintiff was not such a holder. A party who demands re-payment after discovering the forgery must act promptly. *Levy* v. *Bank of U. S.*, 4 Dallas 234; *Bank of U. S.* v. *Bank of Georgia, supra.* The general rule is clearly at variance with the principle that money paid under a mistake of fact may be recovered. This the courts have not failed to recognize. The soundness of the doctrine is questioned by Mr. Daniels in his work on NEGOTIABLE INSTRUMENTS, vol. 2, Sec. 1361, in which a distinction is drawn between the case of an accepted and an unaccepted bill. Mr. Daniels points out that when the holder of an unaccepted bill presents the bill for payment the holder stands to the drawee as a warrantor of the genuineness of the bill by his indorsement or by the very assertion of ownership, and that the acceptor should be allowed to recover the amount paid, provided he acts with due diligence after learning that the bill is a forgery. In support of this view the following cases are cited. *First National Bank of Crawfordsville* v. *First National Bank of Lafayette*, 4 Ind. App. 35; *Warren-Scharf Asphalt Paving Co.* v. *Commercial Bank*, 97 Fed. 181. See also, *Ellis and Morton* v. *Ohio Life Insurance and Trust Co.*, 4 Ohio St. 628. These authorities can hardly be said

entirely to support the contention of Mr. Daniels but they indicate that the general rule is by no means decisive in favor of the payee of a forged check or bill to which he has himself given credit by his indorsement. See also 13 MICH. L. REV. 602; 14 MICH. L. REV. 151.

BOUNDARIES—LINE MARKED AND SURVEYED PREVAILS OVER DESCRIPTION IN DEED.—Defendant and M, tenants in common, agreed to partition; they employed a surveyor to run the division line, which was done in presence of the co-owners. The deed of partition, however, described a line not in accord with the one marked out. In action by M's remote grantee to establish the boundary according to the deed, *held* the following instruction was correct: "* * * where, with a view to making a deed or a division, the parties go upon the land and have a line marked and surveyed, intending it to be the line and to be included in the deed, then the line so surveyed and marked prevails against the description in the deed where there is a difference between them." *Dudley* v. *Jeffress* (No. Car., 1919), 100 S. E. 253.

It is familiar and sound doctrine that where calls in a deed for monuments conflict with other calls the former shall in general prevail. *Hoban* v. *Cable,* 102 Mich. 206; *Whitehead* v. *Ragan,* 106 Mo. 231. And the rule is very properly applied where the deed calls for monuments which are not then in existence but which the parties later set. *Makepeace* v. *Bancroft,* 12 Mass. 469; *Lerned* v. *Morrill,* 2 N. H. 197. *Cf. Cleaveland* v. *Flagg,* 4 Cush. 76; *Miles* v. *Burrows,* 122 Mass. 579. Some courts have gone beyond this. For example, in *Burkholder* v. *Markley,* 98 Pa. 37, in an action of trespass the turning point was the proper location of a boundary line; if the line was to be run according to the calls in the deed, the defendant had trespassed; but if the true division line was one marked out by the parties on the land itself, then no trespass had been committed. The court held evidence should have been admitted as to the line actually marked out. *Emery* v. *Fowler,* 38 Me. 99, is to the same effect. It is this doctrine which is announced in the principal case. In an action to reform the deed or to establish a boundary line by acquiescence (see *Gertzer* v. *Kammerer,* 13 Phila. 190), such evidence would seem entirely proper. Since, however, land can be conveyed only by deed—or at least by a writing—it is submitted that the doctrine applied in the principal case goes a step too far.

CARRIERS—LIVE STOCK—INTERSTATE SHIPMENT—LIMITATION OF LIABILITY—TRANSPORTATION—TIME FOR CLAIM.—Plaintiff shipped a carload of horses from Texas to New York under a contract, *inter alia,* limiting the railway's liability to damages caused in actual transportation, claims for which were presented within five days. After arrival at destination and process of unloading under control of plaintiff had commenced the car was struck by another car and several of the horses were injured. *Held,* Clarke, McKenna, Brandeis and Day, JJ. dissenting, the car was still in transit and the provision as to notice applied. *Erie R. Co.* v. *Shuart* (1919), 39 Sup. Ct. 519.

On the question of notice where the injury is caused while the goods are still represented by the bill of lading, see 17 MICH. L. REV. 420, where a sim-

ilar provision was upheld in the case there noted. Such time limit must be reasonable in its effect on both parties. The instant case assumes this point as to the facts in hand in sustaining the general proposition that limitations are valid. The issue involved in the opinion of the court lies in the interpretation of the term "transportation" as used in the Hepburn Amendment. To determine this question the court resorts to the case of *Cleveland, Cincinnati, Chicago and St. Louis Railway Company* v. *Dittelbach*, 239 U. S. 588, purporting to find there authority in point. That case involved the extent of the railway company's liability for services extrinsic to those ordinarily assumed under the common law but imposed by the Amendment. The goods were still in the hands of the company and plaintiff had not accepted a delivery thereof. Under the circumstances, the court held the term "transportation" included storage and all other services rendered or imposed after arrival and that since the goods had not been delivered to the consignee the nature of the position of the company, in view of the Amendment became immaterial. No question of delivery was involved. As pointed out by Clarke, J., delivery is the one thing present in this case which changes the carrier relation. The property had been accepted by the consignee and since nothing further remained to be done by the carrier, delivery was complete. *St. Louis S. W. Ry. Co.* v. *Crawford* (Texas) 35 S. W. 748. Commonly, it is true, the relation of carrier continues after arrival for a reasonable time to allow removal. *Columbus W. Ry. Co.* v. *Ludden*, 89 Ala. 612; *Rome R. Co.* v. *Sullivan*, 14 Ga. 277; *McMillan* v. *M. S. & N. J. R. R. Co.*, 16 Mich. 79; *Winslow* v. *Vermont & M. R. Co.*, 42 Vt. 700. But a delivery and acceptance at any time after arrival may terminate the relation. *Texas & Pacific Ry. Co.* v. *Schneider*, 1 White & W. Civ. Cas. Ct. App. sec. 119. Nothing in the Hepburn Act in any way affects these several rights. Its application therefore in this case hardly warrants the decision.

CONSTITUTIONAL LAW—DEFINITION OF AMENDMENT.—Plaintiff seeks a writ of mandamus commanding the Secretary of State to publish an amendment to the state Constitution, approved by a majority of the electors voting at the election of November, 1918. Defendant set up an amendment, submitted at the same election, which amendment was in conflict with, and approved by a larger majority than that set up by plaintiff. Held, the constitutional provision that, of two conflicting proposed amendments approved at the same election the one receiving the highest affirmative vote shall be the amendment, is applicable. In his opinion, Johnson, J., further declared, "an amendment to the constitution, which is made by the addition of a provision on a new and independent subject, is a complete thing in itself, and may be wholly disconnected with other provisions of the constitution; such amendments, for instance, as the first ten amendments to the constitution of the United States. These were therein referred to as articles in addition to and amendment of the constitution." *State* v. *Fulton* (Ohio, 1919), 124 N. E. 172.

The quotation would seem to be *dictum*, but it is interesting on account of its possible bearing on the Eighteenth Amendment to the Federal Constitution. The Eighteenth Amendment does not alter or change any article in the

present constitution, but consists entirely of new matter; and it is possible that, failing in other points of attack, its opponents may resort to this feature. However, it is submitted that the view of the court in the instant case is the only one tenable. Amendment is defined in the Century Dictionary as "An alteration * * * in a constitution; a change made in a law either by way of correction or addition." Furthermore, common sense points out that an amendment like the Eighteenth, though it may not alter the subject matter of any part of the present constitution, certainly changes the whole by enlarging its scope. A number of the earlier amendments to the Federal Constitution, especially the Sixth, Seventh, and Fourteenth, contained new matter, but they have come down to the present time without any serious contest on this point. See also: *People* v. *Sours*, 31 Colo. 369; *Livermore* v. *Waite*, 102 Cal. 113.

COVENANTS—BUILDING RESTRICTIONS—PORCHES AND PORTE-COCHERES EXCEPTED.—A deed prohibited the grantee from erecting any building "except a division fence of [*sic*] porte-cochere or porch within five feet from the side line of said lot." The grantee erected a structure over the drive way within the five foot limit, which had, for the lower part, solid side walls, and removable hanging doors for the front and rear openings, and the grantee used this for housing his automobile. Above this as a second story, he erected a room, inclosed on the three exterior sides mainly by windows and containing a hot water radiator, which room he used as a sleeping porch. All of this structure was attached to the house. *Held*, that this was a porte-cochere below and porch above within the exception to the building restriction, and not a violation thereof. *Conrad* v. *Boogher* (Mo., 1919), 214 S.W. 211.

In the matter of building restrictions the courts have had to deal with the problem as to whether a certain structure is a part of the "building," as intended by the restriction; or whether it is a porch, porte-cochere, or bay window and not a part of the building. These cases may be divided into two classes; first, where no express exception of porches, porte-cocheres and bay windows is made in the deed, and second, where such an express exception is made. The same principles apply, however, to both classes of cases. In the first class, an early Illinois case, *Hawes* v. *Favor*, 161 Ill. 441, held an open wooden porch not to be a part of the "building," and so not within the restriction as to placing a building within a certain limit. However in a later case *O'Gallagher* v. *Lockhart*, 263 Ill. 489, 52 L. R. A. N. S. 1044 (Note), when the court encountered the proposition of the modern three-story, brick, apartment house porch, they held it to be a part of the "building" and so a violation of the building line restriction. This same view has been taken by other jurisdictions where the appendage or construction practically frustrates the intention of the parties to the building restriction. *Bagnall* v. *Davies*, 140 Mass. 76; *Ogontz Land Co.* v. *Johnson*, 168 Pa. St. 178; *Supplee* v. *Cohen*, 81 N. J. Eq. 500; *Alderson* v. *Cutting*, 163 Cal. 503. Also see comment on *O'Gallagher* v. *Lockhart*, *supra*, in 13 MICH. L. REV. 162 for this phase. In the second class of cases where porches, porte-cocheres and bay windows are expressly excepted Illinois has held, contra to the principal case, that a solid, closed-in

porch, over the line, was a violation of the building restriction, and was really part of the building and not a porch. *Brandenburg* v. *Lager*, 272 Ill. 622. But even in Illinois they held that a projection in the nature of a bay window, built up solid from the ground, came within the exception of "bay windows." *Keith* v. *Goldsmith*, 194 Ill. 488. The true ground for these decisions, holding such structures as part of the building and not within the exception of porches, seems to be to carry out the intention of the parties, in reserving an easement to light, air and vision. *Loomis* v. *Collins*, 272 Ill. 221, and not to let mere architectural, technical phraseology defeat that intention. *Marsh* v. *Marsh*, 89 N. J. Eq. 110. In the principal case the court relied on the technical phraseology and the expert evidence of architects in arriving at their decision, which accounts for its variance with the Illinois and New Jersey cases. See 11 ILL. L. REV. 576 for a discussion of the Illinois cases on this point.

FIRE—ACCIDENTAL—LIABILITY FOR.—P occupied rooms over a garage, part of which was let to D, who kept a motor car there. D's servant, an unskilled chauffeur, having occasion in the course of his employment to move the car started the engine, and without negligence on his part, and from some unexplained reason, the petrol in the carburetor caught fire and burned the car, the garage, and P's rooms and furniture. If the servant had promptly turned off the tap from the carburetor to the petrol tank, the fire would have done no harm; but he failed to do this. P sued for damages. The English statute of 1774, substantially re-enacting 6 Anne; C. 31, S. 6, provided "No action shall be maintained against any person in whose building any fire shall accidentally begin, nor any recompense be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding." *Held*, this act did not apply and D was liable. *Musgrave* v. *Pandelis* [1919] 2 K. B. 43.

The court argues that at common law one was liable for fire originating on his own property: (1) for its mere escape; (2) or if the fire was negligently or wilfully caused; or (3) on the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330, that he has brought a non-natural and dangerous thing on his premises which gets away from him and does harm. The Statutes of Anne, and of 1774, were to meet the liability under (1) above, and did not apply when the fire was caused either deliberately or negligently, under (2) above. *Filliter* v. *Phippard*, 11 Q. B. 347; if that is true as to (2) why should it affect liability under (3) the principle of which existed long before *Rylands* v. *Fletcher* was decided? The question then is, is a motor car with its petrol tank full or partially filled with petrol, a dangerous thing to bring into a garage, within the principle of *Rylands* v. *Fletcher*? Lush, J., in the trial court, and Bankes, Warrington, and Duke L. JJ. in the Court of Appeal, all agreed that it was. The question then is, Did *the fire* accidentally begin? The fire in the carburetor did accidentally begin; but it did not destroy the garage and the plaintiff's property. It would almost immediately have burned out without damage except for the negligence of D's servant. The fire that did the damage was the raging fire from the petrol tank; this did not accidentally

begin, but was the direct result of the servant's negligence in not turning off the petrol tap. All judges concur. The statute exempted from liability any one "on whose estate any fire shall accidentally begin." In *Vaughan* v. *Menlove* (1837), 3 Bing. N. C. 468, it seems to have been taken for granted, and in the *Filliter* case above, in 1847, it was decided that "accidentally" did not include *negligently,* and so left one liable, if a fire shall negligently begin on one's premises. It was then urged that the statute applied only to accidental *origin* of the fire (e. g.—lightning) and would not relieve from liability for the accidental escape of a fire not accidentally originating. For instance, if the owner lighted a lamp, and it then accidentally exploded, and burned his property and his neighbor's, the owner would be liable. Mr. Salmond, TORTS, 4th Ed. 247, thinks otherwise. He also thinks there is no sufficient authority for saying that at common law there was any liability for the escape of fire without negligence was shown. Still further he also thinks there is no liability for negligently failing to prevent the escape of a fire started on one's premises by a stranger. The case above does not seem to have cleared up this matter to any great extent, and apparently unnecessarily brings in *Rylands* v. *Fletcher,* to support a liability for a fire due to the negligence of defendant's servant.

FISHING.—VIOLATION OF STATUTE AGAINST PURSE SEINING.—In a prosecution for violation of a statute prohibiting fishing for salmon with a purse seine east of a certain line in the Columbia river, the facts were stipulated to be as follows: defendant was fishing with a purse seine outside forbidden portion of the river when the tide carried his net towards such line; before reaching same he closed his net completely, and allowed it to drift into the forbidden area with the fish in it; when about 100 yards inside said line he pulled the seine on to his boat and removed the fish. Parties further stipulated that, in such fishing, the act of removing the net from the water and emptying same is a necessary part of the fishing operation; also that no fish were caught in the seine inside said line. *Held:* since such act was a necessary part of the fishing operation, defendant was guilty of a violation of the statute. *State* v. *Marco,* (Ore., 1919), 183 Pac. 653.

The court quotes extensively from, and largely bases its decision on, the case of *"The Gerring"* v. *Queen, 27* Canada Sup. Rep. *271.* In that case, by treaty, the United States had renounced the right to "take, dry, or cure fish" within three miles of the coast of British possessions in America. The "Gerring," a U. S. fishing vessel, had been fishing outside the three-mile limit, had pulled in its seine, and "pursed" same, attaching it to the boat, and the crew was engaged in bailing out the fish. While so engaged, the vessel drifted within the three-mile limit and was seized. By a 3-2 vote the Canadian court condemned the vessel as having been fishing in violation of the treaty and Canadian law. While the majority of the court in that case did decide that such acts were "fishing," and a violation of the treaty, the decision of condemnation appears to have been influenced by certain other circumstances. The words of the treaty—"take, dry or cure fish"—were interpreted as intended to embrace all the intermediate acts (as the bailing here) between the

taking itself and the preparing for human consumption; also the treaty provided that foreign fishing vessels might enter into the territorial waters for wood, water, shelter or repairs, and for no other purpose; so, on this ground, even the entry itself may have been sufficient to decide the question; further, the court seemed to have been influenced by the fact that this kind of fishing was considered contrary to public policy, as tending to annihilate the fish-food supply, and hesitated to give immunity to the vessel under these circumstances. On the above-mentioned grounds it seems that this case may be distinguished from the case at hand. Probably the Oregon court based its decision on the stipulation of the parties that the act of removing the seine from the water was a necessary part of the fishing operation,—otherwise it is difficult to see on what grounds the case should be sustained; and it may be noted that this court, also, was influenced by the fact that this kind of fishing is looked upon with disfavor. These courts lay some stress upon the fact that, until the fish are actually in the boat, there is still a chance of escape and that therefore the operation of fishing is not complete; granting this, certainly in these two cases no more fish could enter the net, and that would seem to be the true prohibition of such a statute against fishing. The fish are undoubtedly reduced to possession and ownership when completely enclosed in the net—*State* v. *Shaw*, 67 Ohio St. 157, 60 L. R. A. 481,—and it would seem that, for ordinary purposes, the act of fishing should then be considered as complete, and certainly so as against a statute such as the one here, the purpose of which would seem merely to be to prevent the catching of fish out of the waters in question.

INJUNCTION—CRIMINAL PROCEEDINGS—Where a United States attorney was sought to be restrained by injunction from instituting criminal proceedings under the War-Time Prohibition Act, upon the ground that he had transcended his authority through misconstruction of it. *Held*, That he cannot be so enjoined. *Hoffman Brewing Co.* v. *M'Elligott* (C. C. A. 2d Circ., 1919), 259 Fed. 525.

In America the rule that a criminal prosecution will be enjoined where it is based on an unconstitutional statute and property rights are threatened with irreparable injury, is firmly established. *Debbins* v. *Los Angeles*, 49 L. Ed. 169. Ward, J., in the principal case recognizes and endorses this rule, but will not allow an extension of judicial power as sought by the petitioner here, saying that such an extension would result in an injury to our system of jurisprudence far more serious than could be counterbalanced by the equity effected. In support of his position he quotes *Arbuckle* v. *Blackburn*, 113 Fed. 616, 65 L.R.A. 864, "that for equity to entertain a bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no power to punish the parties if found guilty, an enlargement of jurisdiction opposed to reason and authority." Upon this reasoning, Hough, J., in the principal case, disagrees with Ward, J., saying that the matter is one of degree, not of kind or power, and questions the distinction between unlawful acts of a prosecutor done under color of

an unconstitutional statute and his unlawful acts committed under unlawful usurpation of authority, pointing out the fact that a prosecutor's act may be so preposterously unlawful (though not unconstitutional) as to justify intervention by equity. In further answer to this reasoning we may observe that no more in a case of this kind is there sanctioned an inquiry by a court of equity into disputed questions of fact than in cases for injunction against proceedings under unconstitutional statutes, so that the field of criminal litigation in which the jury is the sacrosanct tribunal is avoided. And again, Hough, J's position is allied with the spirit of modern legislation providing for declaratory judgments. Mich. P. A., 1919, Sec. 150. See applying declaratory judgment to a criminal question, *Dyson* v. *Attorney General,* (1912) 1 Ch. 158.

INJUNCTION—MASTER AND SERVANT—INJUNCTION TO ENFORCE RESTRICTIVE COVENANT DENIED.—Defendant was an ordinary employee of complainant, engaged in operating a film-coating machine, and possessed of no peculiar skill except such as he acquired because of his specialized employment in complainant's service. He terminated his employment with complainant and started to work for competitor in violation of his restrictive covenant that he would not work for competitor in the United States for two years after leaving complainant's employ, except in Alaska. Complainant seeks injunction restraining him from so working, and from revealing trade secrets. *Held,* no grounds for injunction restraining defendant from working for competitor; but restrained defendant from revealing trade secrets of complainant. *Eastman Kodak Co.* v. *Warren,* (1919) 178 N. Y. S. 14.

This court assimilates this covenant to those of indirect enforcement of personal service contracts, and therefore denies the injunction because the employee has no special skill. *Oppenheimer* v. *Hirsch,* 5 App. Div. 232; *Osius* v. *Hinchman,* 150 Mich. 603; *Sims* v. *Burnette,* 55 Fla. 702, 16 L. R. A. (N. S.) 389 and note, 15 Ann Cas. 690 and note. According to what seems to be the better view, on the other hand, such covenants are treated like similar covenants in restraint of trade connected with the sale of business, and injunctive relief is given to the employer without reference to the skill of the employee. *Marvel* v. *Jonah,* 83 N. J. Eq. 295, Ann. Cas. 1916 C 185 and note; *Freudenthal* v. *Espey,* 45 Colo. 488, 26 L. R. A. (N.S.) 961 and note; also 15 Ann. Cas. 694, and *Eureka Laundry Co.* v. *Long,* 146 Wis. 205. These courts proceed upon the theory that the covenantee's remedy at law is inadequate,—the damages accruing from day to day, and it being impossible to ascertain the money loss sustained with any degree of accuracy. Such covenants must be construed with reference to the object sought to be secured by them,—and obviously here it was to prevent the employee from using the skill, gained in complainant's service, for the benefit of his competitor, and to help complainant maintain its monopoly in the trade. In these cases of valid contracts in restraint of trade we are not confronted with the difficulty found in cases of indirect enforcement of personal service contracts, such as *Lumley* v. *Wagner,* 1 De. G. M. & G. 604, where only partial performance can be decreed, and the damages at law being at best a mere conjecture, an injunction will generally be given. But, in giving such an injunction, equity will often stop to weigh the incon-

venience and hardship on the defendant against the benefits and advantages to the plaintiff, and the court's decision in this case showed that the scales were carried in favor of the defendant. See also 16 MICH. L. REV. 647.

INTERNAL REVENUE—FEDERAL ESTATE TAX—CHARGE ON RESIDUARY ESTATE.—Suit for instructions by executors against the trustee under testator's will, and others. *Held,* The Federal Estate Tax imposed by Act of Congress Sept. 8, 1916, as amended by Act March 3, 1917, and Act October 3, 1917, is chargeable entirely against the residuary estate and not apportionable pro rata among all devisees and legatees. *Plunkett* v. *Old Colony Trust Co.* (Mass., 1919), 124 N. E. 265.

The court in this case based its decision on the fact that the tax is characterized, in the titles of the relevant sections of the statutes, as an "Estate Tax," and that it is "imposed upon the transfer of each net estate of every decedent," and is to be paid out of the estate before distribution; fortified by two further considerations, viz. (1) the contrast between the terms of these acts and those of the War Revenue Act of 1898, (30 U. S. Stats. at Large 464), which imposed a tax on legacies and distributive shares; and (2) the design to establish an estate tax rather than a legacy tax, as clearly manifested in the report of the Ways and Means Committee of the House of Representatives, to which the bill had been referred. Though the present case treats the tax as a charge upon the residue, the suggestion in the final paragraph of the opinion that the testator might have provided in his will for its ultimate incidence at some other point seems deserving of greater consideration. In the case of a will executed before the passage of an act, giving legacies to collateral relatives, and naming testator's children as residuary legatees, it was held unjust to the latter to deduct the tax *in toto* from he residue as in the case of administration expenses, and accordingly the tax was apportioned among the several legacies—*In re Douglass' Estate,* 171 N. Y. S. 956. This point was also given great consideration by the lower court *In re Hamlin,* 172 N. Y. S. 787, where the tax was charged to the residuary estate because the will contained no specific directions for apportionment; affirmed in 226 N. Y. 407, where the decision was based chiefly, as in the principal case, on the intention of Congress. In *Fuller* v. *Gale,* 78 N. H. 544, the tax was directed to be paid out of the estate and charged pro rata to each beneficiary, though the court indicates that it would have given effect to an express direction by the testator to the contrary. It is submitted that this decision was wrong, inasmuch as the legacies were for definite amounts, which seems inconsistent with an intention to give these definite amounts less the tax.

LIBEL AND SLANDER—QUALIFIED PRIVILEGES—COMMENT ON PUBLIC ACTS OF PUBLIC OFFICIALS.—The defendant publishing company published comments and criticisms in its newspaper upon the punishment of prisoners in the penitentiary of which the plaintiff was warden. This included the publication of a convict's letter, stating that a person had been strung up with his hands above his head to force a confession. Action for libel brought by the plaintiff warden and the court found, that the evidence showed the matter to be

substantially true and not actuated by any actual malice. *Held,* that there exists a qualified privilege of free comment upon public acts of public officials, which are of public interest and an action for libel will not lie. *McClung* v. *Pulitzer Publishing Co.* (Mo., 1919) 214 S. W. 193.

There is a great difference between criticism, even harsh and severe, whether in regard to a candidate for office, or misconduct of public officials in office, and the statement of *facts* against such a candidate or public official in office. There are cases which fail to observe this distinction, but *Post Publishing Co.* v. *Hallam,* 59 Fed. 530, and *Burt* v. *Advertiser Co.,* 154 Mass. 238 have clearly pointed this out. As said by Justice Holmes in the Massachusetts case, "we agree with the defendant that the subject was of public interest and that—the defendant would have the right to make fair comment, etc." But later he says "it is enough to say that it is not a justificaion that the defendant had reasonable cause to believe its charges to be true." There is a further question in this type of case, where the matter, published as facts, is not substantially true. In the principle case, as *dicta,* the court cited with approval a statement made in an earlier Missouri case, *Cook* v. *Pulitzer Publishing Co.,* 241 Mo. 326, "that where a defense of privileged comment on a matter of public interest is presented by the issues, the plaintiff may overcome the privilege pleaded, either by proof that the publication was inspired by actual malice, or that the facts published and commented upon were false." In this view they are sustained by many other jurisdictions, including an early Missouri case. *Smith* v. *Burrus,* 106 Mo. 94; *Burt* v. *Advertiser Co., supra; Post Publishing Co.* v. *Hallam, supra; Foster* v. *Scripps,* 39 Mich. 376; *Eviston* v. *Cramer et al.,* 57 Wis. 570; *Hamilton* v. *Eno,* 81 N. Y. 116; *People* v. *Fuller,* 238 Ill. 116. But there is a growing number of authorities toward the view that a public officer is amenable to criticism in a public newspaper on matters of public interest, without any liability on the part of the newspaper company, even if the facts were not substantially true, as long as there was probable cause to believe them to be true, and there was no improper motive in publishing. *Palmer* v. *Concord,* 48 N. H. 211; *O'Rourke* v. *Lewiston Daily Sun Publishing Co.,* 89 Me 310; *Evening Post Co.* v. *Richardson,* 113 Ky. 641; *Neeb* v. *Hope,* 111 Pa. St. 145; *Ferber* v. *Gazette and Bulletin Publishing Co.,* 212 Pa. St. 367; 8 MICH. L. REV. 345. This same problem has also received much attention and debate in relation to candidates for office. 7 MICH. L. REV. 351; 18 MICH. L. REV. 1, 104; 23 HARV. L. REV. 413.

MASTER AND SERVANT—WORKMAN'S COMPENSATION LAW—"INJURY ARISING IN COURSE OF EMPLOYMENT"—ANTHRAX.—Servant's neck was slightly cut while being shaved at a barber shop, and on the following day, while working in a tannery handling hides, symptoms of anthrax first appeared, from which disease his death resulted. *Held,* his death was due to accidental injury "arising out of and in the course of his employment," and that his widow was entitled to compensation. *Eldridge* v. *Endicott, Johnson & Co., et al.* (1919) 177 N. Y. S. 863.

This decision seems to be a reversal of the result reached in this case in the lower court, reported in THE BULLETIN, N. Y. Vol. I, No. 8, p. 8 (cited

in HONNOLD, WORKMEN'S COMPENSATION, p. 493). The courts appear to be a state of change in regard to these workmen's compensation cases. The modern tendency seems to favor making the master an absolute insurer against all risks incidental to the course of employment. *Hiers* v. *Hull & Co.*, 178 App. Div. 350; *Horrigan* v. *Post Standard Co.*, 224 N. Y. 620; *Dove* v. *Alpena Hide and Leather Co.*, 198 Mich. 132, where servant in tannery, handling hides, died from septic infection, resulting from deceased's inhaling dust from the hides; *Blaess* v. *Dolph*, 195 Mich. 137, where undertaker's assistant died from a virulent type of streptococcus infection, which he contracted, in the course of handling a dead body, through a slight unexplained cut on his ring finger. It appeared in evidence in this last case that the only probable source of deceased's infection was through contact with the dead body of a person who had such an infection. So, too, in the case at hand it is a matter of common knowledge that "anthrax is primarily a disease of animals, such as sheep" (*McCauley* v. *Imperial Woolen Co., et al.*, 261 Pa. St. 312) and that it is almost universally contracted from handling infected hides or wool, and therefore it seems the court was justified in holding deceased's death was caused by accidental injury "arising out of and in course of his employment." At first sight it might appear that the case of *Chandler* v. *Great Western Ry. Co.*, [1912] 106 L. T. 479, is in conflict with these decisions, but there is really an essential point of distinction between them. There a railway fireman, while at home, cut his finger, sucked the wound, bound it up and went to work. While working, coal dust, oil, grease and other matters worked through the bandage into the cut, and septic infection resulted which necessitated amputation of his finger. The court held he could not recover, because to attribute this infection to his employment was at best a mere "surmise, conjecture, or guess," there being many possible sources of such infection. He might have gotten it from the cut alone, from sucking the cut, from dust in the road, or from various other imaginable sources which might give rise to such an infection. This case is distinguishable from the general line of cases, here set out, in that this fireman's septic infection, unlike anthrax or streptococcus infection, was attributable to no one specific probable source, as was true in the case of the wool-sorter and of the undertaker, and therefore the court did not have sufficient grounds of probability on which to base a decision that it was an accidental injury "arising out of and in course of his employment." See other articles as to accidents "arising out of and in course of employment" in 12 MICH. L. REV. 614, 688; 14 MICH. L. REV. 525; 15 MICH. L. REV. 92, 606; 16 MICH. L. REV. 179, 462; 18 MICH. L. REV. 72; 25 YALE L. JOUR. 333; 26 YALE L. JOUR. 76.

NAVIGABLE WATERS—RIPARIAN RIGHTS—ACCRETION.—From 1885 to 1895 the bottom of the river in front of the plaintiff's property was used as a dumping ground under the direction of government officials. The effect of such deposits was to accelerate deposit of alluvion, whereby fifty-four acres of new land were formed on the plaintiff's riparian front. Plaintiff contracted to convey this land to the defendant who refused to perform on the ground that he would be getting a doubtful title. Plaintiff sued for the purchase price.

The court treated the action as if it were a bill for specific performance, and *held,* that since the formation of the new land was not due solely to *natural* processes, the plaintiff's title was doubtful; hence, the court would not compel defendant to acept it.—*Black* v. *American International Corporation,* (Pa. 1919) 107 Atl. 737.

That land formed by the gradual and imperceptible deposit of alluvion in a stream belongs to the owner of the adjacent land to which it is attached was settled long ago.—*Gifford* v. *Yarborough,* (1828) 5 Bing. 163; *Warren* v. *Chambers,* 25 Ark. 120. The cases are agreed that the riparian owner acquires no new land which was not formed gradually and imperceptibly, but there has been some discussion as to whether or not the deposit of alluvion must have been caused solely by natural processes; i. e., as to the effect of the presence of artificial conditions aiding the accretions. In *Halsey* v. *McCormick,* 18 N. Y. 147, the court said *obiter,* "I find no such distinction in the books. If by some artificial structure or impediment in the stream, the current should be made to impinge more strongly against one bank, causing it imperceptibly to wear away, and causing a corresponding accretion on the opposite bank; I am not prepared to say that the riparian owned would not be entitled to the alluvion thus formed, especially as against the party who caused it." It was held in *Tatum* v. *St. Louis,* 125 Mo. 647, that the "riparian owner is entitled to the land formed by gradual and imperceptible accretions from the water, regardless of the cause which produced it. This right he cannot be deprived of by the acts of others over whom he has no control and for which he is in no way responsible." And Mr. Justice Swayne in *St. Clair County* v. *Lovingston,* 23 Wall. 66, referring to accretions caused by artificial obstructions, said, "The proximate cause was the deposits made by the water. * * * Whether the flow of the water was natural or affected by artificial means is immaterial." To the same effect is *Adams* v. *Frothingham,* 3 Mass. 352. And the Supreme Court of Tennessee decided that a riparian owner is the owner of accretions to his banks, even though those accretions are caused, or greatly accelerated, by the action of the city and the public in making such banks its dumping grounds. *Memphis* v. *Waite,* 102 Tenn. 274. It should be noted that all of the above cases were ones in which the artificial obstructions or deposits were made by persons other than the riparian owner who was claiming the newly formed land. It is clear that the riparian owner will not be permitted to increase his estate by creating an artificial condition for the purpose of effecting such increase. *Halsey* v. *McCormick, supra; Attorney General* v. *Chambers,* 4 D. G. & J. 55, 69; and see *Lovingston* v. *St. Clair County,* 64 Ill. 56. It is also evident that the major portion of the new land must be formed by the deposit of alluvion, and must not consist of the artificial matter deposited by human agencies. Just what proportion of the new land must consist of alluvion is, of course, incapable of determination by any rule of thumb, and for this reason the court in the principal case was justified in refusing the plaintiff relief. See *Sebring* v. *Mersereau,* 9 Cow. (N. Y.) 344.

PAUPERS—"POOR PERSONS"—CONTRIBUTION FOR SUPPORT.—In a proceeding to make defendants, parents of an alleged pauper, contribute money for his

support, where it appeared that the son owned an undivided one-eighth interest in farm lands worth $6,600, free from all incumbrances save a life estate of a woman 58 years old and in ill health, and that he had made no effort to borrow on or sell such interest, *held*, that, under Section 2252 of the Iowa Code, the trial court should have set aside the verdict against defendants, or have sustained their plea in abatement and deferred the question of contribution until said property was disposed of under direction of the court, or it became apparent that disposition was impossible. *Polk County* v. *Owen*, (Ia., 1919), 174 N. W. 99.

It will be noticed that the court did not reverse its former holdings that where the alleged pauper is possessed of some property it will be a question of fact whether, despite such ownership, he is a poor person within the meaning of the statute. *Jasper County* v. *Osborn*, 59 Ia. 208. Here the court simply sets aside a verdict as being against the evidence. No doubt the decision was partly influenced by the presence of a statutory definition of "poor persons," who are stated to be "those who have no property, exempt or otherwise, and are unable, because of physical or mental disabilities, to earn a living by labor." Yet the courts have inclined to relax the rigidity of the statute by holding that the test is whether one be without property which can aid in his support or out of which funds may be realized for his maintenance. *Hamilton* v. *Hollis*, 141 Ia. 477; *Wallingford* v. *Southington*, 16 Conn. 431. Cf. *Peters* v. *Town of Litchfield*, 34 Conn. 264. The rule has been laid down in some cases that, where a person is possessed of property not absolutely indispensable for daily use, he must apply it to his support by sale or security, and cannot, while possessing such property, be regarded as a pauper. *Ettrick* v. *Bangor*, 84 Wis. 256. In 30 Cyc. 1065 appears the above rule together with what is said to be a different one, but it is submitted that in the last analysis the two rules mean practically the same thing. This may account for the apparent lack of harmony in the Connecticut cases therein cited. For a different statement of the rule in the *Ettrick* case, *supra*, see *Poplin* v. *Hawke*, 8 N. H. 305.

Sales—Unplanted Crops Subject to Sale.—By agreement purporting to be a present and absolute sale, Klinke contracted, on March 3rd, 1917, to deliver to Hamilton his entire crop of 1917 beans from 30 acres of a certain tract, at a stipulated price, by October 30, 1917. The beans were not planted until the following June; K. failed to deliver same to H. as agreed, but executed a chattel mortgage on the crop to Hatton, the other defendant herein. The price having advanced, plaintiff, Hamilton, brings this action, after having the sheriff seize the beans. *Held*: the future crop was subject to sale and title passed. *Hamilton* v. *Klinke et al*, (Cal., 1919), 183 Pac. 675.

A sale is defined in the California Code as a "contract by which, for a pecuniary consideration called a price, one transfers to another an interest in property." Defendant here submitted that, as the property did not exist, title to it did not exist, and therefore could not be transferred, again quoting the California Code: "the subject of sale must be property the title to which can be immediately transferred from the seller to the buyer." The court

found that the intention of the parties was undoubtedly to pass title, especially in view of a term of the contract that "it is mutually understood that this contract—constitutes an absolute sale." In deciding that title passed the court must have proceeded upon the theory of potential interest. But, on this question, "the better view seems to be that a sale of a certain crop—made before the seeds were planted passes no title to the buyer, for the reason that nothing can be the subject of bargain and sale which has no actual or potential existence at the date of sale, and, until the crop is actually growing, or at least until the seeds are planted, the crop cannot be said to have even a potential existence." RULING CASE LAW, Vol. 23, p. 1248, citing numerous cases, as, *Long* v. *Hines,* 40 Kan. 216. Such transaction does seem, by authority of many cases, to pass an equitable interest which will attach when the crop comes into existence. RULING CASE LAW, Vol. 23, p. 1248,—*Mayer & Co.* v. *Taylor & Co.,* 69 Ala. 403. But, on the other hand, some cases seem to hold that such crops have a potential existence and can be the subject of sale or mortgage. *Arques* v. *Wasson,* 51 Cal. 620, and that title will pass when the crop comes into existence. *Baxter* v. *Bush,* 29 Vt. 465. The court in the case at hand has apparently adopted this latter view, but seems to have extended it at least, in intimating that present title passes; possibly this may be in accordance with a theory suggested in WILLISTON ON SALES, § 133, as follows: "It seems to be assumed that title passes as of date of bargain. Accurately expressed this means that when the goods come into existence title to them passes free from any defects of title due to rights which have accrued since the time of the original bargain." Holding as the court does here that title passed, they nevertheless subject this title to the mortgage to Hatton, made after the beans came into existence; it does not clearly appear from this report whether or no Hatton had notice of the plaintiff's claim. It would seem that if K. vested in plaintiff all his potential interest at the time of the original bargain, no interest would have ever been in K. sufficient to enable him to make a valid mortgage of same; and that this differs from a sale of goods in existence with no delivery and a subsequent mortgage to a purchaser for value by the vendor remaining in possession. *Hull* v. *Hull,* 48 Conn. 250.

TENANCY IN COMMON—LEASE BY COTENANT BY METES AND BOUNDS VOIDABLE NOT VOID.—Defendants took a lease by metes and bounds of a portion of premises of which the lessors were tenants in common with plaintiffs. Plaintiffs did not join in the execution of the lease and sued in ejectment. *Held,* that the lease was not void, but voidable at the option of the cotenants who did not participate in the execution of the lease; but that even after said cotenants elected to avoid the lease, the defendants were entitled to occupy the portion described in the lease as tenants in common with them until partition.—*Pastine et al* v. *Altman et al,* (Conn., 1919), 107 Atl. 803.

The question involved in the principal case has arisen usually in cases of conveyance in fee, and courts have not agreed upon it. The oldest doctrine in the United States was that such a deed was absolutely void; (*Porter* v. *Hill,* 9 Mass. 34; *Griswold* v. *Johnson,* 5 Conn. 363) but this was modified in *Johnson* v. *Stevens,* 7 Cush. (Mass.) 431 and *Hartford & Salisbury Ore Co.*

v. *Miller,* 41 Conn. 112, holding such a deed voidable. The great majority of courts will give effect to the deed so far as this may be done without prejudicing the rights of partition and joint occupation of the non-assenting cotenants. *Soutter* v. *Porter,* 27 Maine 405; *McKey* v. *Welch,* 22 Tex. 390. And the courts are inclined to protect the purchaser as far as possible. *Furrh* v. *Winston,* 66 Tex. 521. Accordingly, the great weight of authority holds that, if upon partition, the grantor acquires an estate in severalty in the premises described in the deed, or any part thereof, this subsequently acquired estate vests in the grantee because of the doctrine of estoppel. *Kenoye* v. *Brown,* 82 Miss. 607; *Great Falls Co.* v. *Worster,* 15 N. H. 412; *Cressey* v. *Cressey,* 215 Mass. 65. However, the grantee can under no circumstances, acquire any interest in any part of the common property not described in his deed. *Great Falls Co.* v. *Worster, supra; Soutter* v. *Porter, supra.* What has been considered a different view was taken in *Lessee of White* v. *Sayre,* 2 Ohio 110, where it was held that since a cotenant can convey his interest in the entire common property, he can do so with regard to a specifically described part of that property. This view was approved in *Robinett* v. *Preston's Heirs,* 2 Rob. (Va.) 278; and *Stark* v. *Barrett,* 15 Cal. 361. Of course, this interest which he conveys is merely an undivided one, for he had no other to convey. *Gates* v. *Salmon,* 35 Cal. 576. But see *Barnhart* v. *Campbell,* 50 Mo. 597. However, upon analyzing the practical results of the Ohio doctrine, it will be seen that it differs little, if any, from the general view. The grantee acquires the same rights, although the court travels a different route in arriving at the result. The Ohio court says, in effect, that such a deed is valid, and therefore the grantee acquires the same rights in the particularly described premises as the grantor had; while other courts, supposedly following a different doctrine, say, in effect, that such a deed is voidable at the option of the other cotenants; if they confirm it, the grantee gets an estate in severalty in the part described, but if they elect to avoid it, the grantee has, nevertheless, the same rights in the described portion as the grantor had. It seems, therefore, that nearly all courts are agreed upon the result which should be attained in such cases, and that the court in the principal case achieved that result, and unknowingly made a decision practically in accord with the weight of authority. See 47 L. R. A. (N. S.) 573, note; FREEMAN ON COTENANCY AND PARTITION, secs. 199-288.

TREASON—EVIDENCE—OVERT ACT.—In a case where defendant was indicted for treason and the overt act was proved by the testimony of one witness plus circumstantial evidence so that proof of the overt act was well-nigh conclusive in fact and where it was *held* that it is necessary for conviction of treason to produce two witnesses to the whole overt act, there was the following *dictum,* "It may be possible to piece together bits of the overt act, but if so, each bit must have the support of two oaths." *United States* v. *Robinson* (D. C., S. D., N. Y., 1919), 259 Fed. 685.

The probable attitude of the courts on the point raised in the above *dictum* of Hand, J., has long been a matter for speculation in cases suggesting it, but no case directly involving it has arisen in any of our courts. The

application of a rule thus broadening the method of this matter of proof, so guardedly conceded by Hand, J., would assuredly render conviction of treason possible in many cases where no reasonable doubt is left as to the defendant's guilt, but where strict adherence to the letter of the Constitution would not allow conviction. Indeed, the debates over Article 3, Sec. 2, relative to treason as chronicled in MADISON'S JOURNAL (Doc. Hist. of U. S., Vol. 3, pp. 568-571) show that there was not unanimity of opinion as to the wisdom of narrowing the methods of proof of the overt act. If the framers were themselves doubtful as to the limits of such proof, it seems justifiable that when circumstances arise revealing an imperative necessity for broadening the methods of proof of the overt act (lest persons unquestionably guilty go unscathed), it should be done if the addition or increase allowed be not inharmonious or repugnant to the reason for the two-witness rule in treason trials. The real reason basing the requirement of this rule is that in view of the great weight of the oath or duty of allegiance against the probability of the fact of treason, it has been deemed expedient to provide for conviction only by the method prescribed. 1 GREENL. EV., Sec. 255. Keeping in mind this reason, it is evident that while a lessening in the authenticity and solemnity of the proof of the overt act would be repugnant to the rule, a change in the method of proof of the same act which in no way impaired its solemn and authentic establishment would not come within its condemnation. Upon this reasoning it is possible to reconcile the departure of the same court in which the principal case came up from the letter of the Constitution in the case of *United States* v. *Fricke* (D. C., S. D., N. Y., 1919), 259 Fed. 673. Here, Mayer, J.. decided that in a prosecution for treason where the overt act is single, continuous and composite, though made up of several circumstances and stages, satisfaction of the Constitution does not require the testimony of two witnesses to each circumstance in every stage. This judge also intimated, however, that where, as in the principal case, the overt act was not continuous and composite, the testimony of two witnesses would be necessary to prove each circumstance going to establish the commission of the overt act. Thus perhaps the *dictum* in the principal case may be taken as indicative of the modern tendancy of the law relative to proof of the "overt act" designated in the Constitution, Art. 3, Sec. 3.

WILLS—TESTAMENTARY CHARACTER OF INSTRUMENT—CONTINGENT WILL.—An instrument duly executed according to the statute read, "In case of any serious accident, after my just debts are paid, I direct that my aunt, Miss Mary E. Clark, take entire charge of my estate for disposal as she sees fit." At the trial it appeared that the decedent, a resident of Iowa, contemplated a visit to California. He met with no serious accident, and died a natural death. *Held,* instrument was testamentary in character, not a contingent will, and so entitled to probate. *In re Tinsley's Will* (Ia., 1919), 174 N. W. 4.

The holding of this paper to be a will illustrates the length to which courts will go in construing informal documents as testamentary in character. The tendency is to find the *animus testandi* if there is any reasonable way possible. Accordingly, in form the writing may be a series of diary entries (*Reagan* v.

Stanley, 79 Tenn. 316), an indorsement on the back of a promissory note (*Hunt* v. *Hunt*, 4 N. H. 434), a letter to the donee (*Byers* v. *Hoppe*, 61 Md. 206; *High's Appeal*, 2 Doug. 515), or a certificate of unorthodox orthography (*Mitchell* v. *Donohue*, 100 Cal. 202). As to the other point in the instant case, namely, whether the instrument was conditional or not, the decision appears to be consonant with the policy of the courts to be averse to hold such wills conditional. In a leading case the following rule of construction was laid down: "When the event which constitutes the contingency expressed in the instrument can be reasonably construed to have been the occasion for making the will at a particular time rather than as the reason for making it in a particular way, it should be so construed; and * * * that, unless it clearly appear from the instrument itself that it was not to operate in a certain event, it will be entitled to probate." *Forquer's Estate*, 216 Pa. St. 331, annotated in 8 Ann. Cas. 1150. See also to the same effect: *In the Goods of Dobson* (1866), L. R. 1 P. D. 88; *In the Goods of Mayd*, 6 P. D. 17; *In the Goods of Spratt* (1897), P. D. 28; *Likefield* v. *Likefield*, 82 Ky. 589; *Damon* v. *Damon*, 8 Allen 192. The question is, does the language show why decedent made a will, or does it show the condition on which he desires it to be operative as a will? The tendency is to hold the former unless the latter is clear from the language; and in that case he has made a will, and the reason why he did it is unimportant. In the latter case, he has not, as events have fallen, made any will. The noticeable lack of harmony in both the English and American cases is due to the particular circumstances surrounding the particular instrument construed. In fact, as was said by Mr. Justice Holmes in *Eaton* v. *Brown*, 193 U. S. 416, "Each case must stand so much on its own circumstances and words." On the whole, the decision in the principal case appears unassailable, and the words, "in case of any serious accident," seem to be rightly deemed to have indicated a contemplation of death.

WORKMEN'S COMPENSATION LAW—HERNIA—REFUSAL TO UNDERGO OPERATION.—A workman, in the course of his employment, suffered an accidental injury which resulted in a slight hernia. The evidence showed that the disability could be removed only by a surgical operation under a local or general anæsthetic. He refused to undergo the operation tendered him by his employer. *Held*, his refusal was unreasonable and there should be no award of compensation until he submitted to the operation, which was not "attended with danger to life or health." *O'Brien* v. *Albert A. Albrecht Co., et al.* (Mich., 1919), 172 N. W. 601.

Undoubtedly the test applied by the court in the instant case is correct, *i. e.*, "whether the workman in refusing to undergo the surgical operation acted unreasonably". HONNOLD, WORKMEN'S COMPENSATION, 526. Yet, on almost identical facts, another court of last resort has held that a refusal to undergo an operation for hernia is not unreasonable. *McNally* v. *Hudson & Manhattan R. Co.*, 87 N. J. L. 455. Such a refusal on the part of a plaintiff in a personal injury case is not prejudicial. *Blate* v. *Third Ave. R. R. Co.* (N. Y.), 44 App. Div. 163. The fact that the hernia can be cured by an operation does not preclude the recovery of damages as for a permanent injury, (*Id.*, also,

Guild v. *Portland Ry. L. & P. Co.*, 64 Or. 570), or of compensation as for permanent disability (*Feldman* v. *Braunstein*, 87 N. J. L. 20). If only a trifling operation is in question, British and American courts unquestionably support the decision in the principal case: *Dowds* v. *Bennie & Son*, 40 Scottish L. R. 239, (massage of ankle); *Anderson* v. *Baird & Co.*, 40 S. L. R. 263, (slight operation on thumb); *Donnelly* v. *Baird & Co.*, 45 S. L. R. 394, (amputation of finger); *Lesh* v. *Ill. Steel Co.*, 163 Wis. 124, (removing nodule on leg); *Kricinovitch* v. *Am. Car & Foundry Co.*, 192 Mich. 687, (loosening up tissue of leg). On the other hand it appears settled that a refusal to undergo a "major" operation is reasonable, *Jendrus* v. *Detroit Steel Products Co.*, 178 Mich. 265, (serious abdominal operation). The apparent difficulty is to determine whether "herniotomy" is a "major" operation. It is analogous to the frequently recurring question in Army Courts Martial, *i. e.*, whether the operation "involves risk of life." W. D., 1906, G. O. 43, Par. II. Some courts hold that slight danger of death is no excuse for refusal, even if the operation may be considered "serious". *Joliet Motor Co.* v. *Industrial Board of Ill.*, 280 Ill. 148, (removal of cataract from eye). But in *McNally* v. *Hudson & Manhattan R. Co.*, *supra*, the court says, "Although the peril to life seems to be very slight, forty-eight chances in twenty-three thousand, nevertheless the idea is appalling to one's conscience that a human being should be compelled to take a risk of death, however slight that may be, in order that the pecuniary obligation created by the law in his favor against his employer may be minimized." See note to *McNally case*, *supra*, 10 N. C. C. A. 185; note to *Joliet Motor Co. case*, *supra*, 15 N. C. C. A. 75; 26 YALE LAW JOUR. 160; L. R. A. 1916A, 139, 259; 1917D, 174; Anno. Cas. 1915D, 482.