



## Notre Dame Law Review

Volume 3 | Issue 2

Article 5

12-1-1927

# Notes on Recent Cases

William J. Coyne

Henry Hasley

Albert T. Franz

E. F. McClarnon

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

### Recommended Citation

William J. Coyne, Henry Hasley, Albert T. Franz & E. F. McClarnon, *Notes on Recent Cases*, 3 Notre Dame L. Rev. 95 (1927).

Available at: <http://scholarship.law.nd.edu/ndlr/vol3/iss2/5>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## NOTES ON RECENT CASES

**CONSTITUTIONAL LAW—Police Power—General Zoning Ordinance.** The Missouri Supreme Court by a 4 to 3 decision recently upheld the constitutionality of a Zoning Ordinance of the city of St. Louis. *State ex rel. Oliver Cadillac Co. v. Christopher, City Building Commissioner of St. Louis, et al.*, Supreme Court of Missouri, 298 S. W. 720. The ordinance in question divided the city into five use districts as follows: 1. Residence districts (including single and double houses, churches, schools, and libraries); 2. Multiple dwelling districts (including hotels, private lodges or clubs, boarding houses, and hospitals); 3. Commercial districts; 4. Industrial Districts; 5. Unrestricted districts.

The state at the relation of the Oliver Cadillac Co. brought a proceeding in mandamus against the building commissioner and director of public safety of St. Louis to compel them to issue the Oliver Cadillac Co. a permit for the erection on the corner of Lindell Boulevard and Sarah Street in St. Louis, of a two-story, fireproof, brick and stone building to be used as an automobile display building and as a place of business for the sale of automobile parts and accessories. The permit was refused because the zoning ordinance which was to go into effect two days later placed the property in question in the multiple dwelling district, and forbade the erection of places of business therein.

The Court in upholding the constitutionality of the Zoning Law stated that it followed the trend of American opinion, citing: *Village of Euclid v. Ambler Realty Co.*, 47 Sup. Ct. 114; *Miller v. Board of Public Works*, 195 Cal. 477; *State ex rel. Civelio v. New Orleans*, 154 La. 271; *Wulfsohn v. Burden*, 241 N. Y. 288; *City of Aurora v. Burns*, 319 Ill. 84; and many others. It was contended that the constitution of Missouri was peculiar in regard to its limitation on the taking of private property for public use, as it provided that "private property shall not be taken *or damaged* for public use without just compensation" The court held, however, that

the word "damaged" did not broaden the limitation of the power of eminent domain, but was merely added to assist in construction. The court further stated that to zone a city like St. Louis by means of condemnation proceedings was a practical impossibility, and that as the difference between the police power and the power of eminent domain was very slight and only one of degree, the Zoning Law represented a valid exercise of the police power.

The provisions of the ordinance were held to be reasonable, and a Louisiana case was cited in justification of Zoning Ordinances. This case reasoned that such laws permitted a reduction in the police force, decreased fire hazards, encouraged economy in paving, made a neighborhood more peaceable and enjoyable, increased the scenic beauty of the city, and prevented the breeding of rats, mice, flies, ants, roaches, etc., in the residential districts. The fact that the applicant sought a building permit two days before the statute went into effect was held to be immaterial.

Judge Graves wrote an elaborate dissenting opinion which will warm the hearts of those students who still believe that private property is a fundamental right in rem, and that the ideals of American democracy are individual liberty and individual rights rather than an ephemeral "summum bonum" in the form of aesthetic beauty. Judge Graves contends that the "present opinion extends the police power to the destruction of private property and private rights. Under this broad doctrine of police power, the city authorities could take the whole of a person's property without a cent of compensation". The dissenter waxes vituperative in his denunciation of the court's recognition of Mr. Frank B. Williams as an authority on the "The Law of City Planning and Zoning". Mr. Williams who is an avowed student of city zoning ordinances is cited by the Judge as favoring the abolition of state governments, "the Bill of Rights and similar guarantees in the State Constitutions in order to simplify procedure and lessen expense" Judge Graves also states that this decision overrules a line of Missouri cases without even mentioning them.

Little did the French settlers of St. Louis some two hundred

years ago ever dream that by any perversion of law they might be prevented to-morrow from building a trading post on the ground on which they resided to-day. Under such liberal views St. Louis progressed; but now under the guise of progress modern reformers have halted progress. A man who owns a valuable commercial site to-day will discover that he owns a mere residence plot to-morrow. He will find that he has "bought a pig in a poke", a misdeed detested by all Missourians.

The Supreme Court of Missouri can scarcely be censured for following the Supreme Court of the land, but they might have been congratulated had they frowned upon this invasion of property rights and "condemnation without compensation", rather than encouraged it.

—WILLIAM J. COYNE

**CITIZENS—Offspring of Polygamous Marriage of Citizen in Foreign Country—Conflict.** The Circuit Court of Appeals, Ninth Circuit, recently dealt with an interesting question of citizenship. Ng Suey Hi was refused admittance to the United States by the Commissioner of Immigration at the Port of Seattle, Washington. She then petitioned the District Court of the United States for a writ of habeas corpus, the denial of which was followed by an appeal. Her contention was that, being the daughter of a citizen of the United States, she was entitled to entry into this country as a citizen. Her father had been born in California, but had lived many years in China. At the time of the hearing he was a resident of New Jersey. While in China, the father married a Chinese woman, and three years after his first marriage he married a second woman of the same race. He lived with these two women in the same household, and Ng Suey Hi was born of the second marriage while her father's first wife was also living and cohabiting with him. Under our laws, then, Ng Suey Hi was an illegitimate child.

The law applicable to marriage contracts, as a general rule, is the law of the place where the contract is entered into. This rule, however, is not applied where the contract is against the public policy of the domicile of the parties. Polygamous marriages are contrary to the laws of all Christian countries, and the

courts of this country cannot recognize such a marriage even though valid in the country where it is contracted. Petitioner was a bastard child, born abroad of a citizen, and as such was not entitled to citizenship. (11 C. J. 780). Whatever might have been the effect of subsequent legitimation upon her status was not considered, since no evidence of such legitimation was offered. As petitioner was not a citizen of the United States at birth, and no subsequent matter giving her a claim to citizenship was shown, the judgment of the District Court was affirmed. *Ng Suey Hi v. Weedén, Commissioner of Immigration, 21 Fed. (2d) 801.*

—HENRY HASLEY

**CONFLICT OF LAWS**—Sale of liquor not inherently vicious. A sale of intoxicating liquor is held not to be so inherently wicked, vicious or immoral in the recent Arizona case of *Veytia v. Alvarez*, 247 Pac. 117, that a court in this country will not enforce a contract for such sale, valid in a foreign jurisdiction where made, notwithstanding the constitution and laws of this country forbid such sale. This case is a clear and concise illustration of a well settled principle of law that a contract valid where made is valid everywhere. The law of the place where the contract is made, is prima facie that which the parties intended to prevail in the absence of circumstances indicating a different intention. The case also indicates that a contract, valid in the country where made, will be enforced in a foreign court unless so inherently vicious that comity does not require its enforcement. See 49 A. L. R. 994, 38 N. J. Eq. 219, 97 Am. Dec. 671. Contra—155 Ill. 617, 40 N. E. 839, 39 L. R. A. (N. S.) 1005.

**CRIMINAL LAW**—Insufficiency of evidence. In the case of *Thornhill v. State*, 260 Pac. 519, the defendant was found guilty of the charge of selling and delivering to one B. E. Slagle intoxicating liquor. He appealed, assigning numerous errors.

B. E. Slagle, witness for the state, testified that Thornhill had been pointed out to him, among several others, by Tony Lawrence, a German restaurant keeper, as one whom he thought was boot-legging; that he asked the defendant whether or not he could buy some liquor from him; that defendant said he would

try to obtain some for him; that defendant did deliver a pint of whiskey to Slagle at the hotel; that Slagle was doing undercover work for the city officials; and that no person had been presented during any part of the transaction between Slagle and Thornhill.

Defendant, as witness in his own behalf, testified that he heard Slagle say on several previous occasions that he was a spotter; that he saw Slagle at the Lawrence Hotel where the boys were raw-hiding him about being a spotter; and that he never sold Slagle liquor of any kind.

Tony Lawrence also testified that he had never pointed out any person to Slagle; that Slagle had pretended to be a demonstrator of a patent; and that Slagle had offered him a drink of whiskey, asking him (the restaurant keeper) if he knew where he could get more.

Twelve witnesses gave testimony to the effect that Slagle's general reputation for truth and veracity was bad.

It was *held* that, verdict was contrary to evidence; it was insufficient to support a conviction for the sale of intoxicating liquor.

ALBERT T. FRANZ

**CRIMINAL LAW—Writ of Quo Warranto Permitted—Sunday Baseball.** Defendant, a corporation, played a game of baseball on Sunday, August 22, 1927; to which the public was admitted on payment of an admission fee. Attorney General filed a writ of quo warranto, averring that the playing of baseball on Sunday was a violation of the Act of April 22, 1794 (3 Smiths Laws, 177). 138 Atl. 497 *Commonwealth ex rel. Woodruff, Attorney General v. American Baseball Club of Philadelphia*.

Defendant deny that playing baseball on Sunday was a violation of the Act of 1794 and averred that a writ of quo warranto would not lie; because the sole penalty as provided by the Act was the payment of the sum of four dollars.

The court below, entered a judgment that defendant be ousted from any right, privilege or authority to maintain or conduct on its grounds, a game of baseball on Sunday and directed a perpetual injunction refraining it from so doing.

Schaffer v. The Act reads "If any person shall do or perform any wordly employment or business whatsoever on the Lords

Day, commonly called Sunday (works of necessity and charity only excepted) and be convicted thereof, every such person, so offending, shall, for every such offense, forfeit and pay four dollars, to be levied by distress; in case he or she shall refuse or neglect to pay the said sum—he or she shall suffer six days imprisonment in the house of correction of the proper county. The word “wordly” as here used means “concerned with the enjoyments of this present existence; secular”, “not religious, spiritual, or holy”. The court said we cannot imagine in this sense anything more wordly or unreligious in the way of employment than the playing of professional baseball as it is played today. It is not only wordly employment which is forbidden but business. “The business is giving exhibitions of baseball (*Federal Baseball Club v. National League*, 259 U. S. 2001). Similarly the conduction a circus, or running a theater is a business. The participants are hired and the public is admitted for a price.

The court stated that Christianity is part of the common law of Pennsylvania and its people are Christian people. Sunday is the holy day among Christians, and in no way, does professional baseball partake of holiness; and must be categorized as wordly, and as such is in violation of the Act of 1794. Lack of noise, disturbance or breach of peace does not take away any guilt from the offense.

The court held that a writ of quo warranto was proper “A corporation may be ousted from the exercise of powers not granted and power forbidden to be exercised” (Pa. St. 1920 No. 18362), saying that “It would be an unthinkable proposition that the commonwealth would create organizations to break its own laws. Especially when a corporation of its own creation, avows its right and power to nullify a criminal statute.

As to the penalty provided in the statute, it does not mean that it is the exclusive remedy, and does not preclude the Attorney General from proceeding against the corporation, with the view to prohibit the misuse of a franchise granted by the state.

Judgment and decree of court below affirmed. Maschzisker C. J. and Kephart J. dissenting. On the grounds that the only penalty that could be imposed was the one provided by the sta-

tute, and that the proceedings in his case were improper, because they imposed additional punishment by way of judicial construction. Such an increase of punishment is for the legislature, and not for the courts to decide.

—E. F. McCLARNON

**DEDICATION**—In the case of *Swartwout v. Caledonia Township* 215 N. W. 293, there is the question of acceptance of a dedication after a number of years have elapsed. In 1909 a Mrs. Gerow, the owner of a parcel of land had it platted into lots. The plat was approved by the township board and a number of lots were sold. Nothing was done by the township board to show an acceptance of the dedication and the only use made of the ground was when people at times wandered over the subdivision or camped on it. During the intervening years the subsequent grantees of Mrs. Gerow obstructed the land from travel and in March 1926 the township board directed the highway commissioner to remove the obstructions and the plaintiffs filed this bill to restrain the interference by the township of its officers and agents.

It was held that persons travelling over land do not show public authorities acceptance of offer to dedicate and the sale of lots was not evidence of acceptance of offer to dedicate; also that the acceptance of an offer to dedicate streets sixteen years after it was made and after acts showing an intent to revoke had been done, was too late.

—MARC WONDERLIN.

**EVIDENCE**—Autopsy privileged as confidential communication between physician performing autopsy and dead man. In an action on an insurance policy by the plaintiff as beneficiary of a deceased's policy, a physician who performed the autopsy on the deceased, was permitted to testify over objection of the plaintiff as to the result of the autopsy performed by him, which testimony was so damaging that it removed liability from the insurance company. The physician was employed by the hospital in which the deceased was a patient at the time of his death, but the physician had never seen nor attended him prior to the performance of the autopsy. *Mathwes v. Rex Health and Accident Insurance Company*, 157 N. E. 467, Indiana (1927).

It must be noted that this case was based on the statute of



Indiana which prescribes that doctors are not competent witnesses "as to matters communicated to them, as such, by patients, in the courses of their professional business or advice given on such occasions". Ind. Ann. Stat. Burns, 1926 Par 550. The statute clearly states "by patients" it will be observed. Two courts have passed upon the question as to whether or not a dead person can be a patient. In *Crmody v. Capitol Traction Company*, 43 App. Cas. D. C. 245, (1915); *Harrison v. Sutter St. Ry.*, 116 Calif. 156, 47 Pac. 1009 (1897). These two courts held that a dead person could not be a patient for purposes of autopsy if the physician performing the said autopsy had no relation with the person before death, because when a person dies "his body is of clay for grave diggers and undertakers".

It is a well settled rule that an autopsy performed by a physician who attended deceased before death is the subject of communication because the autopsy was part of the treatment. *Thomas v. Township of Byron*, 168 Mich. 593, 134 N. W. 1021 (1912).

Privilege is given to physician and patient to protect confidential disclosures in the practice of medicine, and it is stated in 5 Wigmore Evidence (edition 1923) paragraph 2380, that extension of this rule of privilege should be narrow, and it is not expedient to extend it. In *Borosich v. Metropolitan Life Insurance Company*, 210 N. W., 829 (1926); *Chadwick v. Beneficial Life Insurance Company*, 191 Pac. 448, it was held autopsy not privileged unless physician performing autopsy also attended the deceased as a patient which is the general rule.

The majority of these cases involving autopsy and privileged communication are actions on an insurance policy where the policy holder's health was misrepresented at the time of the issuance of the policy and all the medical testimony available should be procured for the jury. In a majority of these insurance cases where facts are withheld tenaciously there is an element of fraud to be considered and such procedure should not be encouraged by statute or decisions which extend the privilege beyond its narrow limits.

—THOMAS V. HAPPER.

**HABEAS CORPUS**—Cannot be substituted for a writ of Error. The Defendant was convicted of the crime of rape, which under the statute was punishable by imprisonment in the state penitentiary for not exceeding 20 years. He was given an intermediate sentence of not less than 10 nor more than 20 years. The warden and the boards of charities and correction later fixed the term at ten years. The Defendant then sued out a writ of Habeas Corpus to secure his release. The Supreme Court of South Dakota in *State ex rel. Anderson v. Jameson, Warden*, 215, N. W. 697, denied the writ saying that it was a rule that where the court had jurisdiction of the person and of the offense, and errs merely in regard to the punishment imposed, relief will not be granted by habeas corpus. The remedy in such case is a writ of error. The writ deals only with such radical defects as render the proceeding or judgment absolutely void. See 11 Ann. cases 1055, 151 U. S. 242, 208 N. W. 224, 268 U. S. 442, and 12 R. C. L. 1207.

**MORTGAGES**—Removal of mortgaged property from state. A chattel mortgage was given on personal property located in Minnesota. Later the Mortgagor removed to Iowa, where he gave a mortgage to the Appellant in Iowa on some of the identical property previously mortgaged in Minn. Both of the mortgages were duly recorded according to the laws of the states wherein the property was located at the time the mortgage was given. The Sheriff was about to sell the property for the benefit of the Iowa mortgagee when this action was brought to restrain the sale. The question was whether the Iowa court should recognize the Minn. mortgage. The Iowa court in *First Nat'l Bank of Elsworth v. Ripley, Sheriff, et al*, held that the validity of a chattel mortgage is determined by the law of the situs of the property at the time of the mortgage. Rights created under a valid mortgage will be recognized in another state as against the mortgagor or his creditors or subsequent purchasers from him. The rights of the mortgagee must be protected. This decision represents a very just and reasonable rule of law which is well established by judicial precedent. See collection of cases 64 L. R. A. 365 note; 35 L. R. A. (N. S.) 386, 176 Mich. 216, 141 N. W. 827, and II Corpus Juris, p. 424.

—EDWARD P. MCGUIRE.

**MONOPOLIES**—Restraint of interstate commerce not justified because ultimate object was to secure lawful ulterior benefit. The conflict between labor and capital is probably the oldest conflict in the world with the exception of the conflict between man and man. Every decision handed down by the courts of justice is bound to be criticized by the adherents of the two factions, and most of the decisions are swayed by political views, not unaturally because this is a political question. The Stonecutter Case has not escaped criticism pro and con by the economic wagers of battle, capital and labor. Labor has especially criticized this case vehemently as another invasion on the security of organized labor. (*Bedford Cut Stone Co. v. Journeyman Stone Cutter Ass'n*, 47 Sup. Ct. Rep. 522).

The case arose with a bill in equity to enjoin the defendants and the members of the union from combining and conspiring together to commit various acts that were a restraint of interstate commerce of the petitioners trade, in violation of the Sherman and Clayton acts. The petition was not to compel the defendants stonecutters to return to work for the employers against whom they struck, but was merely an action to obliterate the so-called conspiracy to refuse to work on the non-union cut stone of the petitioners.

The petitioner's and nearly two dozen others were engaged in the quarrying of limestone in the state of Indiana, near Bloomington, three-fourths of their business being interstate and one-fourth intra-state. The defendants are stonecutter's organized in the form of a union with a membership of nearly five thousand persons, this particular union is particularly potential and the petitioners had formerly respected the power the defendants had over the building trade and fell in line with them and co-operated with them, in their policies on the closed shop. Later the petitioners deviated from the policy and the defendants union ordered its members not to handle the petitioners stone. The result of this action was that many neutral parties that used the petitioners stone who were not involved in the controversy were struck against by the union workers of the defendant. The Supreme Court of the United States by a vote of 7 to 2 decided in favor of the petitioner basing the opinion on the authority of *Duplex v. Deering*, 41 Sup. Ct. 172. The court held that the ultimate

object of the union was lawful, for the purpose of unionizing the workers in the stonecutters trade at the quarry, nevertheless the means did not justify the end, namely, destroying the market for those products in other states. That it was a violation of the acts prohibiting the restraint of trade.

Justices Brandies and Holmes dissented and refused to follow the Duplex case as prior authority for the present proposition. Their contention was that refusal to work can not be enjoined in a court of equity and that the Sherman and Clayton laws were never meant to be applied to deny the members of a small craft of workmen the right to co-operate by refraining from work, when such means was the only method of surviving a combination of oppressive and powerful employers. The justices who dissented evidently believed the case dangerously near one of enforcing involuntary servitude, but this was not the case.

Theoretically there is a neutral balance point between capital and labor and the court was called upon in this case to decide the proper balance of power, whether a body of men could quit work in concert or not when such conspiracy clogged the channels of economic progress and was a means to a restraint of trade. The court decided the case on strong principles. Involuntary servitude should never be enforced against an individual or a group of individuals and the court did not decide to that effect. The court admitted the means to the end to be lawful and did not declare that the unions as a means to a good end were unlawful or should be enjoined. But the Supreme Court did declare that a union could not restrain the channels of trade, a bad end by a perfectly good means. The constitutional rights to protection against involuntary servitude are not invaded by the *Stonecutters Case*. The individual can still quit any employment but he can not conspire with others to co-operate with him, such co-operation in the end resulting in a restraint of trade. The methods employed by the defendants approaches almost a secondary boycott and consequently could be correctly decide on the principle of the *Duplex Case*.

This case exemplifies the progressive tendencies of the courts to recognize the facts that a large co-operating body of men must have some limit placed on their actions in procuring their ultimate ends.

—THOMAS V. HAPPER.

**NEGLIGENCE**—Contributory Negligence As a Matter of Law. On October 20th, 1927, the case of *Baltimore and Ohio Rd. v. Goodman* was argued before the Supreme Court of the United States and ten days later Justice Holmes handed down a short decision which was contrary to a long line of decisions which have been universally recognized as the law in both the state and federal courts heretofore. (*Baltimore and Ohio Ry. Co. v. Goodman*, 48 Ct. 24).

The facts of the case are relatively simple, concerning which, there was much contradictory testimony. Nathan Goodman was driving a Ford truck in the village of Whitfield, near Dayton Ohio. The Baltimore and Ohio Railroad Company has a right of way running through the village and upon approaching its tracks Goodman retarded the speed of his truck to a rate of five or six miles an hour. A building which was situated on the corner of the railroads right of way and the road upon which Goodman was driving obstructed his view so that it was impossible for him to obtain a clear vision of the tracks unless he approached to a distance of eighteen feet from the rails. To the North of the intersection approximately 240 feet down the railroad's right of way there stood an obsolete boxcar adjacent to the track which also obstructed Goodman's view to the extent that it was a physical impossibility to see beyond this structure. A fast passenger train travelling at least sixty miles an hour or more, boomed down from behind the boxcar and struck Goodman's car, completely demolishing it, and killing him instantly. It was an undisputed fact that the deceased was not going in excess of five miles an hour when he reached a point about eighteen feet from the track. It was also uncontroverted that the deceased could not have seen the train until it reached some point beyond the boxcar which was approximately 200 feet from the intersection at which the accident occurred, Goodman heard no signal or warning as he approached the track. The court of appeals therefore took into consideration that when Goodman in his position was eighteen feet from the track, the front of his machine was nine and one-half feet from the danger point, and at five miles per hour, he would cover the distance in one second. The Supreme Court disregarded the Court of Appeals con-

sideration and held Goodman guilty of contributory negligence as a matter of law, for that he could or could not do in one second's time. It seems incredible that such a learned body as the Supreme Court would deem a man led into such a death trap without a warning, guilty of contributory negligence as a matter of law, because of failure to do the correct act at the proper time. To merely state the proposition is to answer it.

The leading case of *Flannelly v. Delaware and Hudson Rd. Co.* states the rule governing negligence cases thus: "The law requires that one going upon or over a railroad crossing the exercise of such care for his protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences may be reasonably drawn from it." This case was decided in the year of 1912 and has been the leading case on the subject of negligence (255 U. S. 597, 603). The court in the case of *Grand Trunk Ry. v. Ives*, 144 U. S. 408, 433, adhered to this rule generally. The case of *Wise v. D. L. & W.* 81 N. J. L. 3, 397, the court commented in the decision to the effect, "But when the evidence shows (or so the jury might find) that he employed every moment after passing the obstructions in looking and listening for the danger upon the rail, it cannot be said as a matter of law that he was guilty of contributory negligence because he looked in one direction rather than in the other when it may be said he had not time to properly examine the track in both directions." See also, *L. E. Ry. v. Summers*, 125 Fed. 719.

The true meaning of this case is well stated in the opinion of the trial court thus, "In effect, the contention of the railroad company goes to the extent of urging that in no case of a daylight automobile crossing accident, in which a view of the track can be had even though but a short distance from the rails, can there be a recovery." In the *Ives* Case the court was asked to rule on a standard of law but it refused saying, "There is no fixed standard in the law by which the court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and

prudent, and what shall be considered ordinary care under any and all circumstances. The impossibility of establishing a standard rule today is as apparent as it was when the Supreme Court spoke in the Ives Case but evidently the Court accomplished the impossible in the case of *Baltimore and Ohio v. Goodman*.

It is true that railroads are many times, "held up" by the injured person and this case seems like the forerunner of protection against such despicable practice; but at its best it is a poor means to a worse end. The case places on the auto driver the absolute duty to alight from his car and scan the tracks thoroughly in both directions then proceed across them. Such a duty if followed to the letter might be more negligent in some cases than the acts done by Goodman. To carry this mandate into effect on many crossings where the view is obscure would be absolute folly because of the consideration that a train travelling at the rate of sixty miles an hour is travelling 88 feet per second and also that the time consumed looking up and down the track returning to the car and shifting gears would consume as much as twenty or thirty seconds. If such procedure took thirty seconds for example, the train could have travelled in excess of a quarter of a mile. If the driver under those circumstances could not see down the track for at least a quarter of a mile he would not have been any better off than Goodman's widow was in the case decided against her. Can the reader imagine a crowded highway on a Sunday afternoon with each and every driver of an automobile stopping at each crossing, alighting, then peering down the railroads right of way in both directions and finally re-entering the car he drives across the tracks amid the squawking din of irate motorists waiting their turn to do watchman duty. It sounds absurd but nevertheless is plausible.

The decision of Justice Holmes does not place any duty on the railroads which if deviated from would amount to negligence as a matter of law. There is a statute in Ohio requiring railroads to give proper warning by whistle and bell at all crossings and omission of such requirement amounts to negligence *Per Se*. The most credible witnesses in this case testified that either there was no whistle blown as prescribed by the statute, or that if the whistle was blown it was inaudible. Surely such test-

imony coming from the lips of eyewitnesses should not be disregarded as facts showing the proximate cause of the accident.

The Supreme Court correctly unshackled the railroads from the responsibility under which they were impressed when horse and carriage was the chief means of conveyance. A driver of an auto enjoys much more control over the progress of his car than the driver of a horse experienced in attempting to fathom its equine propensities and the former should be charged with a stricter degree of care and prudence. However, the violent reaction to the abuse railroads had forced upon them by no means justified such a violent departure from the laws of negligence. It is certain that the state courts will not follow the doctrines in the Goodman Case. The old adage "The king can do no wrong" seems to be with us again with the railroads as his most honored guests.

—THOMAS V. HAPPER.

**NEGLIGENCE**—Damages too conjectural in action arising after passing of year. In the case of *Hirst v. Chevrolet Motor Co.* Supreme Judicial Court of Massachusetts October 21, 1927, there were separate actions by four plaintiffs, Elizabeth, Isabella, Sarah, and James Hirst, for damages. The causes were tried in one case resulting in a verdict for the defendant.

The facts of the case were; the plaintiff Elizabeth Hirst bought a car from the Summer Street Garage at Malden. The vendor being the local distributor of defendant's cars. The purchase was made June 21, 1923. The plaintiff Elizabeth drove the car from that time and had several accidents which were not of a dangerous nature. Each time the car had the necessary repairs and experts had given their opinion that the car was in good repair. However the plaintiff stated that from the time of purchase the car had been hard to steer. This she claimed was due to a defect in the knuckle joint in the steering gear. While descending a hill, on July 16, 1924 the steering-gear gave way and the car escaped from the plaintiff's control and colliding with an obstacle, it was wrecked, injuring the plaintiffs. The plaintiffs now contend that the motor company should be liable for the injuries, because there was negligence in allowing the car



to leave the factory in a dangerous condition, due to improper assembling of the steering knuckle. Court held that the evidence was too conjectural and that the cause stated for the injury was so remote the defendant could no be held liable for the injuries to the various plaintiffs. *See*: 154 N. E. 860., 157 N. E. 581.

—JOHN P. BERSCHIED.

**NEGLIGENCE**—Tort action by guests of auto owner. This was an action of tort by Emma Gaboury and another to recover damages for injuries received due to an automobile accident. The verdict was for the defendant and the plaintiff excepted. The exceptions were overruled. *Gaboury et al v. Tisdell*. Supreme Judicial Court of Massachussets. October 15, 1927.

The plaintiffs were sisters of the defendant's wife and lived in the home of the defendant. The defendant had invited the plaintiffs to ride in his car on the day of the alleged accident. Accompanied by the plaintiffs his wife and his son the trip was started. Plaintiffs contend that they were not overly anxious to make the trip as it was Sunday and consequently the traffic was heavy and in the estimation of the plaintiffs rather dangerous. However, the defendant had persuaded them to accompany him. The plaintiffs were injured and now contend that though the defendant was not guilty of gross negligence, he was guilty of some negligence and as a result should be liable for damages. But *Massaletti v. Fitzroy* 228 Mas. 487, holds that when a guest in a drivers car is injured he is liable for the guests injuries only when guilty of gross negligence. In the present case the invitation and conversation from and between defedant and plaintiffs did not in any way alter his liability so as to make him liable for anything less than gross negligence.

—JOHN P. BERSCHIED.

**WORKMEN'S COMPENSATION ACT**—Liability for sickness arising as result of improper place of work. Action brought by the plaintiff for injuries received in defendant's employment. *De Pre v. Pacific Coast Forge Company*. It appears that the plaintiff was engaged by the defendant to work in a room which contained a large vapor tank in which quantities of sulphuric acid and muriatic acid were mixed, and that the vapors from these acids escaped and so influenced and affected his

lungs, and physical resistance to such an extent that as a result, the plaintiff contracted tuberculosis, which rendered him permanently incapacitated. It was further averred that the defendant had promised to provide proper ventilation for the working room, but he had not done so, and negligence had lain with accused.

The defendant demurred to the complaint and the demurrer was sustained. The plaintiff excepted and appeal followed.

Upon appeal, in upholding the trial court's judgment, the respondent insisted that the Workmen's Compensation Act is a complete defense, and that the appellant by its term is entitled to compensation from the state. The respondent further urged that the appellant assumed the risk; because under the allegations of the complaint he remained at work for a period of five months after the promise to remedy the situation (to ventilate the room).

The court held that it is a matter of common knowledge, of which judicial notice was taken, that lessening the resistance to tuberculosis by working in vapors from acids has never been recognized as within the Workmen's Compensation Act.

Failure to amend the Compensation Act raises the assumption that its administration is in accord with the legislative intent. For this action to come under the protection of the act, it is necessary that the injury be within the category of "accident", since injury is dependable, to be within the scope of the statute, upon some fortuitous event. Fortuitous is defined as, occurring by chance, coming or taking place without any cause, accidental, casual. To receive compensation from the state there must be some unexpected or sudden happening from which a report or claim can be made which is referable to a definite time, place, and cause.

The court, in answer to respondent's argument of assumption of risk, held that the point was too briefly argued, and too indefinite as to the facts.

It may be of interest to note the conflict of opinion on this question. It appears that the two coastal regions hold in direct opposition. The Maryland Court of Appeals in *Victor Sparkler and Specialty Co. v. Maucks*; 147 Md. 368; 128 Act. 635; 44 A. L. A. 363, held when the plaintiff, a young girl, who had contracted

phosphorous poisoning by inhaling fumes negligently permitted to accumulate in the room where she worked, held this to be an accident and within the scope of the Workmen's Compensation Act.

The Supreme Court of Washington met this case with the answer that it was not the weight of authority. But to the writer, it seems to be the more just and equitable rule, and within the scope of the law.

The Workmen's Compensation Act is remedial and should be given a liberal construction, so as to give the most beneficial operation. See 28 R. C. L. 755. The salient purpose of the act is to put to an end private litigation and controversy. In other words, the statute has given to labor what it never had before, and has taken away from capital what it had always enjoyed and has compensated the latter by limiting its liability.

The legislative intent was to include within the act every injury which could be suffered by any worker in the course of his employment. *Boggot Co. v. Illinois Commission*, 290 Ill. 530; 7 A. L. A. 1011.

Nor can the fundamentally accidental nature of the injury be altered by the consideration that the infection was gradual—throughout an indefinite period. The infection is the accidental injury and whatever follows in casual connection are but consequences which measure the duration and effect of the injury. As suggested by Lord Berkenstrand in *Grant v. Kynosh*, A. C. 765; 7709 B. R. C. 478—"The infection of the disease which is the injury, the assault being deemed the accident.

The adjective accident is not a technical term, but a common one, whose popular would not necessarily mean that the words "accidental injuries" indicate the existence of an accident, but rather the idea that the injury was either unintended or unexpected. See *Har. L. R.* pp. 338—342.

In jurisdictions where an accident was the test, compensability and disease were excluded, there has been a tendency toward a more liberal theory of compensation since the decision of *Brenton v. Genvey* A. C. 230: 2 Ann. case 137. Also for list of cases in accord. see Ann. 371, 44 A. L. R.

—T. J. JONES, JR.