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# Note and Comment

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## NOTE AND COMMENT.

RECOVERY OF THE PURCHASE PRICE BEFORE TITLE HAS PASSED.—In an action recently instituted by The General Electric Co. to recover on a contract to manufacture certain machinery for the defendant, which machinery the defendant had refused to accept, the trial court adopted the contract price as the measure of damages. The upper court approved this measure of damages, rejecting the argument that the measure should have been the difference between the market value and the contract price, and dismissed, as no longer appropriate to modern conditions, the decisions in *Bement* v. *Smith,* 15 Wend. (N. Y.) 493, and *Shawhan* v. *Van Nest.* 25 Oh. St. 490. The court recognized, however, that these decisions had been sound when rendered. As they have frequently been referred to as anomalous rulings, it may be interesting to consider the effect upon them of this recent decision. *Manhattan City, etc., Ry. Co.* v. *General Electric Co.,* 226 Fed. 173.

The rule is established, as a general proposition, that a vendor can not bring an action upon a contract of sale in indebitatus assumpsit for the purchase price until the title has passed. "The principle, concisely stated, is this—that a count for goods bargained and sold can only be maintained where the property in the goods has passed from the plaintiff to the defendant." *Elliott* v. *Pybus,* 10 Bing. 510. If the goods are not in existence at

the time of making the contract, or not then identified, no title can pass at that time. And it is settled, with but little exception, that title does not pass upon the mere identification, or bringing into existence of the goods. It is necessary that the vendor signify, in some way, his intention that the particular article so identified or manufactured be applied in execution of the particular contract. This intention may, however, be legally inferred from any facts tending to indicate it. *Moody* v. *Brown,* 34 Me. 107; *Mucklow* v. *Mangles,* 1 Taunt. 318; *Gabarron* v. *Kreeft,* L. R. 10 Exch. 274; *Rider* v. *Kelley,* 32 Vt. 268, 76 Am. Dec. 176; *Johnson* v. *Hibbard,* 29 Ore. 184, 54 Am. St. Rep. 787; *Low* v. *Austin,* 20 N. Y. 181; *Sawyer Medicine Co.* v. *Johnson,* 178 Mass. 374.

But just as mutuality of intention is necessary to create the contract to sell, so mutuality of intention is necessary to effectuate the passing of title under it. Since the vendor is permitted, subsequent to the making of the contract, to select the goods which shall pass under it, it is but reasonable that the vendee should have an opportunity thereafter to assent to that selection. So it is held, both in England and in this country, that title does not pass until there has been both an indication of intent on the vendor's part to pass title to specific property, and an indication of acquiescence in such passing by the vendee. This acquiescence may, like the intent to pass title, be expressed or implied, and it may be demonstrated in any recognizable way. *Elliott* v. *Pybus,* 10 Bing. 512; *Atkinson* v. *Bell,* 8 B. & C. 277; *Campbell* v. *The Mersey Docks,* 14 C. B., N. S. 412; *Jenner* v. *Smith,* L. R. 4 C. P. 270; *Andrews* v. *Cheney,* 62 N. H. 404; *Smith* v. *Edwards,* 156 Mass. 221; *White* v. *Solomon,* 164 Mass. 516; *Rider* v. *Kelley,* 32 Vt. 268; *Greenleaf* v. *Gallagher,* 93 Me. 549; *Funke* v. *Allen,* 54 Neb. 407; *Unexcelled Fireworks Co.* v. *Polites,* 130 Pa. 536.

A few cases have gone so far as to say that title does pass to the buyer without the necessity of an assent thereto on his part. They have not, however, so held as an actual result, for in nearly all of them the facts are such as to show a real assent. In the case, for instance, of *The Colorado Springs Live Stock Co.* v. *Godding,* 20 Colo. 249, the court says, "The weight of authority is that the appropriation by the seller of an article, when completed in accordance with the terms of the contract, passes the title without the subsequent assent of the purchaser, and an action for the agreed price can be maintained." This is certainly not the weight of authority, and it is evident from the facts of the case that the court meant only that an acceptance of the goods as distinct from the title, was not necessary. An authorization from the vendee for the vendor to make the appropriation will usually be presumed in such circumstances, however, *Johnson* v. *Hibbard,* 29 Ore. 184. A somewhat similar dictum is found in *Merchants' National Bank* v. *Bangs,* 102 Mass. 291, but the Massachusetts courts clearly follow the general rule, and in the case itself there had been such delivery to a carrier and acceptance by it as is generally held to constitute a complete specification and assent. A clear conflict with the rule as expressed appears in *Hayden* v. *Demets,* 53 N. Y. 426. Here a suit was allowed for the purchase price on

the expressed theory that title had passed through the mere specification and tender by the vendor, without any assent on the vendee's part. No authority is cited and the case can be considered only as an exception.

There is, however, in this country a line of cases which allow a recovery by the vendor of the full amount of the purchase price, despite the fact that the vendee has never in any way assented to the passing of the title. The most frequently cited of these is *Bement* v. *Smith,* 15 Wend. (N. Y.) 493. These cases are frequently referred to, by both courts and text writers, as being in conflict with the principle expressed in *Atkinson* v. *Bell, supra.* (See *Moody* v. *Brown,* 34 Me. 107.)

The principle on which such cases as *Atkinson* v. *Bell* have been decided is expressed, somewhat ineptly, in *White* v. *Solomon, supra,* as follows: "In an ordinary contract of sale the payment and the transfer of the goods are to be concurrent acts, and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass."

This principle is not denied in *Bement* v. *Smith,* nor does that case hold that a vendor has created a liquidated indebtedness in his favor without having passed the title for which he contracted. That case arose out of an understanding by the plaintiff to build for the defendant a sulky of a particular design, in return for which the defendant agreed to pay a certain sum of money. The defendant had refused to accept or to pay for the sulky when it was duly tendered by the plaintiff. In the trial court, "The judge * * * charged the jury that the tender of the carriage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties." The issue before the upper court was as to the correctness of this charge. It was claimed that the measure of damages should have been not the value of the sulky, but only the expense of tender, delay, loss of sale, etc. The court held, however, that the full purchase price was due on the ground that the contract was a special one which had been fully performed by the plaintiff, and that he need not have declared at all as for goods bargained and sold.

The only conflict with *Atkinson* v. *Bell* is as to the character of the obligation created by the contract. In *Atkinson* v. *Bell* this type of contract was held to have been a sale, obligating the vendor to transfer a title before he should acquire a right to payment by the vendee. In *Bement* v. *Smith* the contract was held to be one requiring only the performance of the work and labor agreed upon, and due tender of the result thereof.

This conflict in the interpretation of such contracts is well known. In England it is consistently held that every contract whose ultimate purpose is the transfer of title to a chattel is a contract of sale, even though work and labor are to be expended in creating such chattel. *Lee* v. *Griffin,* 1 Best & S. 272. This is approximately the rule in some of our own states.

But in New York, and a number of other states which follow the so-called "New York rule," a contract which provides for the manufacture of a chattel, even though title to it is eventually to be transferred, is held to be merely a contract for work and labor, and not to come within the Statute of Frauds as relating to sales. *Cooke* v. *Millard,* 65 N. Y. 352; *Parsons* v. *Loucks,* 48 N. Y. 17. This distinction between the right to recover damages, only, in the event of breach of a contract of sale, and the right to recover the full agreed price when a contract for work and labor has been broken, is recognized in *Gordon* v. *Norris,* 49 N. H. 376.

In these jurisdictions a contract of sale, nominally, of an article not yet in existence, being treated, legally, as a contract for work and labor, is obviously executed as soon as such work and labor is completed and tender made of the product. The so-called vendor having thus performed his obligation it is perfectly consistent to allow him an action for the contract price regardless of whether title to the chattel has been accepted by the vendee or not. This is criticized by Mr. WILLISTON (SALES, § 563), who says, "There can be no doubt that the price is promised for the completed article, not for the work and materials which have gone into its manufacture." But while this assertion might create a sound argument for holding the contract to be one for the transfer of title, and not for work and labor merely, it has been rejected by the courts of these states in reference to the Statute of Frauds. It could not, therefore, be consistently accepted by them in cases where the issue merely concerns another aspect of the same matter, namely, the conditions precedent which the vendor has undertaken to perform.

In the case of *Shawhan* v. *Van Nest,* 25 Oh. St. 490, the Ohio court approved *Bement* v. *Smith* and followed it, saying, moreover, that they found it unnecessary to commit themselves as to whether or not a real "distinction resting upon principles of law can be drawn between ordinary sales of goods in existence and on the market, and goods made to order in a particular way, in pursuance of a contract between the vendor and vendee." In Missouri, where the holdings under the Statute of Frauds are much like those in England, there is a clear conflict with *Atkinson* v. *Bell* as to the right of the vendee to recover. *Crown Vinegar and Spice Co.* v. *Wehrs,* 59 Mo. App. 493; *Walker* v. *Nixor,* 65 Id. 326.

There is another type of cases, sometimes thought to be in conflict with *Atkinson* v. *Bell,* in which a vendor, under a true contract to sell, is permitted to recover the purchase price before title has passed. But the action in these cases is sustained on the ground that the vendee has contracted to pay as a condition precedent to the passing of title, upon the tender of the property or the doing of some other act, which the vendor has performed. *Tufts* v. *Griffin,* 107 N. C. 47; *White* v. *Solomon,* 164 Mass. 516; *Burnley* v. *Tufts,* 66 Miss. 48; *Ackerman* v. *Rubens,* 167 N. Y. 405. In this type of case it is obvious that the results are not in the least at variance with the propositions of the case referred to.

A statement of principle is found in many cases to the effect that, "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three

methods of indemnifying himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price. * * *" This statement appears to have been first made in the case of *Dustan* v. *McAndrew*, 44 N. Y. 72, but has been very often quoted with approval. If it be a correct expression of principle, it is in conflict with the general proposition that a vendor can not sue for the purchase price until title has passed. (The context of the expression often shows that by "taking and paying for" is meant not merely the possession of the goods but the title itself.)

But as a matter of fact it appears usually to have been made in decisions whose holdings have not gone to such an extreme. Thus, in *Osgood* v. *Skinner*, 211 Ill. 229, a suit to recover the full amount of the contract price was allowed, on the principle as stated. But, as a matter of fact, the property had been precisely specified at the time the contract was entered into, and the vendee had very clearly assented in advance to the passing of title. The court applied its expression to instances where no delivery of possession of the goods had occurred. In *Moline Scale Co.* v. *Beed*, 52 Iowa 307, the court intimates that an action would have been allowed for the purchase price, as such, although no title had passed, if a proper tender had been made. But Iowa follows the New York rule as to what are contracts for work and labor, and the particular case would have come under that designation. IOWA CODE (1897), § 4626.

The expression quoted is also used in *Kinkead* v. *Lynch*, 132 Fed. 692. Here the action was really for damages for breach of contract and the full amount of the agreed price was allowed, not as such, but on the ground that there was no market value determinable for the goods manufactured. See also, *Habeler* v. *Rogers*, 131 Fed. 43.

In the Missouri case heretofore referred to (*Crown Vinegar and Spice Co.* v. *Wehrs*) the statement of principle was actually followed. This was done on the ground that inasmuch as the vendor could not recover the cost of making a resale, to require him to make a resale would put him to unavoidable and irrecoverable expense; that a recovery of the full purchase price could do no one any harm, and that such recovery would be allowed. Only Missouri cases were cited as authority.

The only real conflict, therefore, among the cases, appears to be in the expressions used, and in the holdings of very occasional cases. They are all agreed that even when title has not passed an action may be brought to recover damages for breach of the contract. As said in *Unexcelled Fireworks Co.* v. *Polites*, 130 Pa. 536, "In the case of an executory contract for the sale of goods not specific, the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery." The only real issue is as to the market value, in the special case, of the goods contracted for, by which the amount of damage is to be fixed. The principal case, probably the latest word on the subject, expresses the essence of the rule to which all the cases trend. The correctness of its finding that all the elements necessary to a decree of specific performance are present may well be doubted, but the propriety of allowing the full purchase price must

be conceded. The court's statement is as follows: "To allow the seller to recover the full purchase price of an article, and compel the buyer to accept it whether he wants it or not, is to grant specific performance of a contract for the sale of personal property in favor of the seller, when no such relief could or would be granted in favor of the buyer. This is against the well-established doctrines of courts of equity. * * * When the article is really a special manufacture to meet the peculiar needs of the buyer, and having no sale in the market, then every consideration which supports the specific performance of a contract for the sale of real property is present." "Whether the article is staple or not cannot be determined wholly by the form of the contract," and the court should receive evidence as to whether or not it has a probable market value. J. B. W.

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THE NEED FOR RE-DEFINING "FREEDOM."—Again a statute attempting to limit the hours of labor has been held unconstitutional as depriving the parties to the labor contract of liberty and property without due process. This time the question arose in Massachusetts in reference to a statute that limited the hours of station employees of railways to nine hours a day. *Commonwealth* v. *Boston & M. R. R.*, 110 N. E. 264. The decision and reasoning of the court was based entirely upon the famous case of *Lochner* v. *New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133. The reasoning of that case was declared to be "decisive." The court here implied, just as was implied in the *Lochner* case, that considerations for the health of the employees were the only reasons that could bring the statute beyond the condemnation of the Fourteenth Amendment; and since it was admitted that the employment in question was not "inherently unhealthy," the case of the state necessarily failed. The reasoning of the court seems to suggest that the courts are unwilling to justify labor legislation of this sort upon any other ground than was assumed in the case of *Holden* v. *Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, namely, that the health of the laborer needs to be protected.

That the police power of the state is far more comprehensive than this would seem to be too clear for doubt. It is not impossible that the legislature may have thought a shorter working day would indirectly contribute to the enlightenment of the masses, to the increase of their efficiency, to their moral and mental development, to their enterprise or mechanical ingenuity. All of these ends and more are emphasized in a great mass of current literature and are no doubt accepted by no small part of our people as results to be gained by this sort of legislation. And it would be difficult to say that a legislature could not enact laws to accomplish those ends. It is extremely doubtful whether the average person would say that the law in question is so clearly without relation to public welfare, that there could be no "honest difference of opinion" as to its unconstitutionality.

But that the case is supported by the *Lochner* case and by a number of other cases, which are there cited in the margin, is beyond doubt. There is also a large mass of cases, touching legislation somewhat akin, which are

based upon the same reasoning and principle and which reach the same result. Important among these are *In re Opinion of the Justices,* 220 Mass. 627, 108 N. E. 807, a statute giving employees a right to be heard before discharge; *Adair* v. *United States,* 208 U. S. 161, 52 L. Ed. 436, passing upon a statute that made it unlawful to discharge an employee because of membership in a labor union; *Coppage* v. *Kansas,* 236 U. S. 1, 35 Sup. Ct. 240, involving a statute making it a misdemeanor to require non-membership in a union as a condition to employment; *State* v. *Loomis,* 115 Mo. 307, where the court considered a statute which required miners and manufacturers to pay their labor in money or orders redeemable in cash; and in the same general class of these cases see, *Atchison, etc., Ry.* v. *Brown,* 80 Kan. 312, 102 Pac. 459; *Gillespie* v. *People,* 188 Ill. 176; *Braceville Coal Co.* v. *People,* 147 Ill. 66; *Commonwealth* v. *Perry,* 155 Mass. 117.

The dominant note of these cases is the freedom of the employer and employee to contract with reference to the terms of the employment. As was said in the *Lochner* case, "The act is * * * an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual." It is a repetition of the doctrine expressed, in another connection, by JESSEL, M. R. in the last century, "If there is one thing more than another that the policy of the law requires, it is that men of full age and competent understanding be allowed the utmost freedom of contract." Upon grounds such as those the courts have very generally condemned a great amount of labor legislation.

That the freedom of contract is a valuable right, one protected by the constitution, is of course not open to doubt. And it has at least not been disproved that freedom of contract, if properly defined, is eminently sound as a general social and political principle. On those points there is no occasion for dispute. But to admit that principle is by no means to reach the conclusion which is reached in the cases referred to. Between the principle itself and the facts to which it is applied is the difficulty of reducing the principle from a mere dry formula into the terms of a living industrial organization. Freedom under one set of conditions and at one time may mean another thing than freedom under a different set of conditions and at a different time. While the general principle of freedom may be admitted, the actual realization of it is dependent upon, and cannot be separated from, all the circumstances under which it is sought to be attained. Freedom is not a thing apart, but is organically bound up with the workings and organization of society. Thus a law at one time may secure perfect freedom to the individual, and the same law at another time may amount to a denial of freedom, or conversely a law which to one may deny freedom of contract may to another, differently situated, be the means of securing the same freedom. The idea of freedom of contract is at best a mere legal concept whose

meaning and import must always be defined by the social conditions in which it is to operate.

Let us suppose a law is passed by the legislature attempting to fix the price at which a vendor may sell his horse. We must assume, if the conditions be usual, that the vendor is perfectly capable of protecting his rights, and that the purchaser is equally capable. Under such conditions the law supposed would clearly be a deprivation of the freedom of contract. But if we could suppose that because of his condition in life every vendee or most vendees would be at a disadvantage in knowledge respecting horses, then the law would perhaps have some justification. Or take the still clearer cases of infancy and insanity, where the common law itself denies freedom of contract, because to persons in that situation freedom means another thing than it does to those mature and sane. Wherever a statute or rule of law involves the freedom of contract, that concept must be understood by referring it to the circumstances of the persons upon whom it is to operate. No formal acceptation of the term will suffice, nor one which had reference to a different condition of affairs.

It may be admitted that at one time a law limiting the hours of labor would be an infringement upon individual liberty and freedom. At the time when individualistic doctrines were beginning to gain great currency, industry was local and individual; as a general rule the same persons owned the instruments of production and performed the labor. There was no such separation of capital and labor as we find in modern industry. So far as persons engaged in manufacture they were their own masters, and any attempt to limit the hours during which they should work would be an invasion of the freedom of the individual. As applied to those conditions the concept of freedom would no doubt preclude a law such as the one in question: it would in most cases be a purely arbitrary interference. That definition of freedom, hammered into shape by the stress of those social conditions, seems still to be the accepted one by the courts. This definition had its birth under circumstances which no longer exist, and it assumes a state of society which can now be found only in the theoretical reasonings of the followers of orthodox eighteenth century economics. The social analysis of Adam SMITH and John Stuart MILL is still recognized by far too many courts.

The idea of freedom of contract, as developed in the eighteenth century and the early part of the nineteenth, could take no account of the changes wrought by the industrial revolution—the introduction of machinery, the separation of capital and labor, large-scale production, the world-market. These created the entirely new relation of employer and employee as we know it to-day; there developed on the one side great strength and on the other side comparative weakness in dictating the terms of the labor contract. The individual laborer of to-day seeking employment finds the terms of the labor contract determined by great industrial forces with which he has little connection and upon which he exercises no influence at all. The market fixes the wages for him, and to some extent for the employer; the same great force determines how long he shall work in a day and to a certain

degree the conditions under which he shall perform his labor. To say that he shall have the power of bargaining freely with respect to those matters is mockery. Modern industrial organization has him inexorably in its bonds, and fixes his contract for him very largely regardless of his will. To leave him without the protection of law is in effect to deny him the very freedom which the constitution seeks to guarantee. If this view of the situation is correct, the legislation dealing with the labor problem, rather than denying freedom of contract, is an aid to its attainment. Such enactments to some degree relieve the laborer of the pressure of a vast economic superstructure. It is certainly a serious question whether the legislature cannot seek that end without violating the constitution.

Of course it may be admitted that the analysis of industrial conditions which we have just attempted may not be true at all times and places in this country. There is certainly room for difference of opinion as to the true situation and disadvantage of the laborer. But while it may be true that all laborers are not always at such a great disadvantage in bargaining for favorable terms in the labor contract, yet we believe that it would be impossible to go to the other extreme and say there is absolutely no ground for such a view of his disadvantage. There is undoubtedly some ground for saying that under modern conditions the laborer must take what he gets, and that his freedom to contract avails him nothing, and often even works to his harm. A significant fact is that much of the labor legislation is procured in the legislature through the efforts of labor organizations, and that most often it is defeated on objection made by employers. The latter would seem to be more concerned about the laborer's liberty than the laborer himself.

But whatever we may believe about conditions being or not being exactly as described, there can be little doubt that they are not as primitively simple as the courts assume. The day is past, if it ever existed, when the laborer can meet his employer and "bargain freely" over the terms of the labor contract. If that is true, the problem has a new face. The courts must now consider this question: Is it not competent for the legislature to secure to labor some of the benefits which labor would secure for itself if it enjoyed a real freedom of contract, but which it cannot really secure because, in the opinion of the legislature (and this opinion we have seen is not without foundation), present industrial conditions have deprived it of its freedom?

In dealing with legislation of this sort the courts can make far less use of precedent than in ordinary cases. Freedom in its concrete manifestation is a variable term, and each application must be tested with reference to the then existing conditions. Cases of this sort are preëminently of the kind where the courts must at all times be astute to prevent the principle of law from becoming formal, and they must always test it and shape its meaning and application by reference to the varying needs of society. As matters now stand it seems that the courts have adhered too closely to precedent and have failed to reshape their concepts in the light of new conditions. Our idea of freedom needs to be redefined in the terms of a new industrialism.

W. W. S.

WHAT IS AN INJURY BY ACCIDENTAL MEANS?—What is an accident within the meaning of the phrase in accident insurance policies which limits recovery to those cases where the accident is effected "solely and exclusively by external, violent and accidental means"? The words external and violent add little, if anything, to the word accidental, since if an injury is caused by accidental means, it follows almost as a matter of course that such means were extreme and violent. 3 JOYCE INS. 2864, note; *Pickett* v. *Pac. Mut. Life Ins. Co.*, 144 Pa. St. 79. So that the question really is: what is an injury by accidental means?

Strictly speaking, a means is accidental only when disassociated from any human agency, but this extremely narrow view has never been followed or recognized in the law of accident insurance. 4 COOLEY INS. 3156. Webster defines accident as an event which takes place without one's foresight or expectation; chance; casualty: and many courts, following this popular meaning of the term, hold an injury to be sustained by accidental means, when the injury is sustained because of an unusual and unexpected result attending the performance of a usual act. *Williams* v. *U. S. Mut. Acc. Assn.*, 60 Hun. 580; *U. S. Mut. Acc. Assn.* v. *Barry*, 131 U. S. 100, affirming 23 Fed. 712; *Paul* v. *Travelers' Ins. Co.*, 112 N. Y. 472; *Richards* v. *Travelers Ins. Co.*, 89 Cal. 170; *Newman* v. *Ry. Off. & Emp. Acc. Assn.*, 15 Ind. App. 29; *Omberg* v. *U. S. Mut. Acc. Assn.*, 101 Ky. 303; *Providence Life Ins. & Inv. Co.* v. *Drummond*, 56 Neb. 235; *Atlanta Acc. Assn.* v. *Alexander*, 104 Ga. 709; *Harsfall* v. *Pac. Mut. Ins. Co.*, 32 Wash. 132.

The other view is found in the statement that although the result be unexpected, if nothing out of the ordinary occurs except the injury itself, such injury is not caused by accidental means. *Southard* v. *Ry., etc., Assur. Co.*, 34 Conn. 574; *Fidelity Co.* v. *Stacey*, 143 Fed. 271; *Lehman* v. *Gt. West. Acc. Assn.*, 155 Ia. 737; *Hastings* v. *Travelers' Ins. Co.*, 109 Fed. 257; *McCarthy* v. *Travelers' Ins. Assn.*, 8 Biss. 362; *Niskern* v. *United Bro. of Carpenters & Joiners of Am.*, 87 N. Y. Supp. 640; *Cobb* v. *Preferred Mut. Acc. Assn.*, 96 Ga. 818; *Feder* v. *Iowa State Traveling Men's Assn.*, 107 Ia. 538. The theory underlying this doctrine being that the acts of the insured were wholly natural and voluntary, so as to exclude the idea of accident. *Appel* v. *Aetna Life Ins. Co.*, 86 App. Div. 83, 83 N. Y. Supp. 238. These cases hold to the doctrine that in the act preceding the injury there must be something unforeseen, unexpected, or unusual, otherwise the injury is not caused by accidental means; the court in the *Lehman* case, supra, saying, "We have recognized the necessity of proximate connection between some accidental means and the injurious result complained of; and such proximate connection must appear. It is not sufficient that there be an accidental —that is, an unusual and unanticipated—result. The means must be accidental; that is, involuntary and unintended." The courts following this stricter doctrine criticize the previous doctrine on the ground that it is, in short, allowing the result to determine the cause, since the unlooked for result makes the event an accident and the injury one sustained by accidental means.

The English courts have had the same difficulty presented to them. *Clidero* v. *Scottish Acc. Ins. Co.*, 29 Scottish Law Reporter 303. In this case the court decided in favor of the stricter interpretation, saying, "The question is, in the words of the policy, whether the means by which the injury was caused were accidental means. The injury being accidental in a sense that it was not anticipated, and the means which led to the injury as accidental, are two quite different things. A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental injury, but the means are exactly what the man intended to use and did use, and was prepared to use. The means were not accidental, but the result might be accidental. This does not fall within the description in the policy." This view is supported in *In re Scarr* [1905], 1 K. B. 387, 2 B. R. C. 358, and the English doctrine may now be regarded as settled in accordance with these two cases.

The most recent case on the subject, *New Amsterdam Casualty Co.* v. *Johnston* (Ohio 1915), 110 N. E. 475, follows this doctrine. In that case insured was accustomed to taking cold baths after exercising, and following a horseback ride took a cold plunge. Acute dilation of the heart resulted and he sues on his accident policy claiming that the injury is one effected solely and exclusively by external, violent and accidental means. The court held that the injury was not an accident within the meaning of the term, inasmuch as nothing occurred which the insured had not planned or anticipated, excepting the dilation and its consequences. The court in this case follows the reasoning of the English cases, saying that the contrary view is untenable, as it allows the result to determine the cause, and taking the stricter view, states that the injury cannot be regarded as caused by accidental means, as the injury resulted from ordinary acts, and was the natural consequence of those acts, and no unusual circumstance intervened.

R. H. N.

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WHEN DO INJURIES "ARISE OUT OF" ONE'S EMPLOYMENT?—In the recent case of *De Filippis* v. *Falkenberg*, 155 N. Y. Supp. 761, the Appellate Division of the Supreme Court of New York was confronted with the question: are accidental injuries, arising from the sportive act of a co-worker, compensatable as injuries "arising out of the employment"?

The claimant was employed by the defendant as an operator of a buttonhole machine. Connected with the factory were two adjoining toilet rooms, with a partition between. Claimant employee entered one of the toilets at about two o'clock in the afternoon, which was during the regular working hours, and while there felt something strike her on the shoulder, whereupon she looked through an aperture in the partition, into the next room, and another employee thrust a pair of scissors through the aperture and into claimant's eye, destroying the sight. She brings this action under the WORKMEN'S COMPENSATION LAW, the material part of which is as follows: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this

article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment." (LAWS OF NEW YORK, 1914, Ch. 41, Art. 2, § 10.) The lower court gave judgment for the plaintiff under this statute, but the decision was reversed on appeal, on the ground that the injury, although accidental and in the course of employment, did not "arise out of" the employment of the claimant.

Since the New York law is practically an adoption of the English WORKMEN'S COMPENSATION LAW, it would logically follow that their interpretation of the phrases used should be governed by the English decisions as precedent, at least to a certain degree. An early case in England, still authority, in holding that an injury caused to C by the malicious act of A in throwing a piece of iron at B, which hit C, did not "arise out of employment," said: "the legislature did not intend to give compensation to the workman for injuries occasioned to him, while engaged in his employment, by an accident arising from any act which might be done by another workman engaged in the same employment, which might have no relation whatever to that employment. * * * An accident caused by the tortious act of a fellow workman having no relation whatever to the employment cannot be said to arise out of the employment." *Armitage* v. *Lancashire R. R.*, [1902] 2 K. B. 178. Accord, *Andrew* v. *Failsworth Industrial Soc.*, [1904] 2 K. B. 32; *Challis* v. *London R. R.*, [1905] 2 K. B. 154; *Rowland* v. *Wright*, [1908] 1 K. B. 963; *Fitzgerald* v. *Clark*, [1908] 2 K. B. 796; *Craske* v. *Wigan*, [1909] 2 K. B. 635. See 25 HARV. L. REV. 401-530. A recent work defines acts arising out of employment and gives the circumstances under which the employer shall be held liable as follows: "It arises 'out of' employment when there is apparent to the railroad mind upon consideration, a causal connection between the conditions under which the work is required to be performed and the resulting injury. The causative danger need not be foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence." I BRADBURY, WORKMEN'S COMPENSATION LAW, 400. The few American cases upon this subject seem to follow the English decisions in holding that an injury such as the one in the principal case, meets the requirement "arising in the course of 'employment,'" but does not meet the further requirement "arising out of" the employment. *Gaun* v. *Great Southern Lumber Co.*, 131 La. 400; *Niece* v. *Farmers' Coöperative Co.*, 133 N. W. Rep. 878. A notable exception to this line of cases is *Halley* v. *Moosburger*, 93 Atl. 79, a New Jersey case decided in February, 1915, which held that an injury to one employee as the result of a playful act of another employee during working hours, was an injury arising both "in and out of" the course of employment. The basis of the decision was that, since it was only natural to expect young men and boys, full of life and activity, to play pranks upon one another, the injury was the result of a risk reasonably incident to the employment, and hence the accident was one "arising out of" the employment.

The case is opposed to the English decisions cited above, and seems an extreme holding, as there is no proof of any causal connection between the injury and the conditions under which the work was to be performed. The judge in the principal case attempts to distinguish this New Jersey holding from the case in hand. He bases his distinction on the fact that the floor where the injury occurred was improperly constructed. In any case, this was only the remote cause of the accident, the act of the fellow employee being the proximate cause, and as the proximate and not the remote cause governs, the distinction is without foundation.

The two cases are clearly in conflict, and although the New Jersey holding appeals to the sympathies, yet it must be admitted that it places an undue burden on the employer and one for which there is no legal justification. The principal case seems to express the better and more logical rule.

H. L. B.

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IS A MEMORANDUM ADMISSABLE TO CORROBORATE A WITNESS' ORAL TESTIMONY WHEN IT IS NOT NECESSARY TO REFRESH HIS RECOLLECTION?—In a recent Vermont case—*Taplin & Rowell* v. *Clark*, 95 Atl. 491—after two witnesses had testified as to the items included in a sale, the plaintiff introduced (in one case over, and in the other without, the objection of the defendant) memoranda as to which the witnesses testified that they were made by them at the time of the sale, that they were correct, and that they did not refresh their memories. The court held that the memoranda were properly received as auxiliary to, or confirmatory of, the evidence of the witnesses.

While the holding of the Vermont court in this case is undoubtedly in accord with its previous holdings in *Lapham* v. *Kelly*, 35 Vt. 195, *Cheney* v. *Town of Ryegate*, 55 Vt. 499, and *Stillwell* v. *Farewell*, 64 Vt. 286, there is some question as to whether it is in accord with the weight of authority, and whether it is the better view.

A memorandum such as was introduced in the instant case is not evidence *per se*, for it is merely written hearsay, and is, therefore, within the principle of the hearsay rule. CHAMBERLAYNE, § 2756. Nor is this proposition controverted by the Vermont court. *Vide, Lapham* v. *Kelly* and *Stillwell* v. *Farewell, supra.*

Nevertheless, it is now a well-established rule that, when a witness testifies that he made a memorandum at a time when he had knowledge of the facts therein contained, and that it is correct, this memorandum becomes evidence as the embodiment of his testimony, even though it in no way serves to recall to his mind the facts which were once there. WIGMORE, § 754. This may be regarded as an exception to the hearsay rule based upon the necessity of the case. The admission of the memorandum in evidence is, however, accompanied by a guarantee of its trustworthiness which, together with the necessity of the case, form a basis for most of the various hearsay exceptions.

It is an equally well-established rule that a witness may use a writing to refresh his present hazy recollection, upon a showing that a reference to

the writing in question will have such a tendency; but in such case, the general rule is that the writing is not admissible in evidence to corroborate his testimony. WIGMORE, § 763. The reason underlying the refusal to admit the writing in evidence when it is used merely as an aid to the memory of the witness would seem to be indicated either in the nature of the writing itself or in the absence of the element of necessity. The writing need not be of such a nature that it would be admissible as evidence of the facts it asserts if it did not refresh the witness' recollection; and if it is not, it should not be admissible. And the courts generally further hold that even though the memorandum fulfills all of these requirements, the evidence of the facts therein contained having been obtained from the witness' oral testimony, there is no necessity for the admission of the memorandum. The Vermont court is, however, in this respect consistent with its holding in the principal case and admits the memorandum for the purpose of confirming the oral testimony of the witness. *Lapham* v. *Kelly, supra.* In the instant case, that court has merely taken the next logical step in holding the memorandum admissible independent of the fact as to whether or not it refreshes the witness' memory. Those courts which hold the memorandum inadmissible when used to refresh the present hazy recollection of the witness, *a fortiori,* would exclude it as clearly within the principle of the hearsay rule where it is not necessary for that purpose—*i.e.,* under the circumstances of the instant case.

It remains to be considered whether any argument based upon principle and reason can be made to sustain the holding of the Vermont court. The exclusion of the memorandum is based upon the hearsay rule. The objection offered by the hearsay rule would, however, seem to be met by the requirements of the Vermont court, for it must be shown that the memorandum was made by the proper person, with the proper knowledge, at the proper time, and it must be guaranteed by him under oath and he can be examined as to the truth of the facts therein embodied, whereas he cannot be in the case where he has no present recollection, in which case the memorandum is admissible. And it would further seem that the writing under these circumstances would be better evidence of the facts contained therein than the mere uncorroborated account of the witness based upon an independent present recollection of those facts which lie in his mind more or less hazily and dimmed by lapse of time, and it ought to be admissible in evidence in confirmation of that account. Surely in every-day affairs the average person would give to it more weight and consider it as worthy of greater consideration. *Contra, Wightman* v. *Overhiser,* 8 Daly (N. Y.) 282.

W. F. W.

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JURISDICTION OVER NON-RESIDENT DEFENDANT.—While judicial inability to comprehend the rationale of a given authoritative pronouncement is not exactly uncommon, it is rarely that so glaring an illustration of it is encountered as in a case recently decided by the District Court of the United States for the Northern District of California, Second Division. The case, which

was decided by Judge VAN FLEET, is *Fry* v. *Denver & R. G. R. Co.*, 226 Fed. 893.

In that case the court came to the extraordinary conclusion that the courts of a state cannot acquire jurisdiction over the person of a foreign corporation *doing business in the state,* unless the action arises out of the business so done in the state, or unless the corporation voluntarily waives its right to object to the jurisdiction. The bare statement of the proposition, divorced from the reasoning which evolves it, is positively shocking in its disregard for every fundamental principle of jurisdiction. But when the cases upon which the court purports to have relied in reaching its conclusion are examined, one is forced to wonder how so able a jurist as Judge VAN FLEET could have missed the mark so completely.

As a matter of fact, not only is the proposition clearly unsound in principle, but it is without a syllable of support in the Supreme Court cases from which it is supposed to be deduced (*Old Wayne Life Assn.* v. *McDonough,* 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; *Simon* v. *Southern Ry. Co.,* 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492, noted in 13 MICH. L. REV. 520).

The facts of the principal case were simple: Plaintiff was injured in Colorado while a passenger on one of defendant's trains; suit was brought in the State Court of California, the complaint alleging that the defendant was "doing business" in California; the defendant removed the suit to the Federal Court on the ground of diversity of citizenship and then demurred for want of jurisdiction of the court over the person of the defendant. The demurrer was sustained on the ground that the action did not arise out of the business defendant was doing in California, and that therefore the objection to the jurisdiction was well taken. Defendant was a Colorado corporation.

The report does not show clearly how or upon whom service was made, but the clear implication (from the court's language in applying the Supreme Court cases) is that it was made *upon an agent of the defendant corporation.*

By way of contrasting the situation thus presented, it is interesting to note the facts of *Simon* v. *Southern Ry. Co., supra,* which was one of the two cases relied upon by the defendant in its argument and by the court in its opinion. The cases differed in many respects, but we shall state only so many of the facts as illustrate the precise distinction we are making.

Plaintiff, a resident of Louisiana, started a suit in a State Court of Louisiana, claiming to have been injured by reason of a collision while he was a passenger on a train of the defendant, a Virginia corporation; and he alleged that the defendant had failed to comply with § 1 of the Louisiana foreign corporation act, requiring foreign corporations to file a written declaration setting forth the places in the state where they were doing business, and the names of their "agents in this state upon whom process may be served." Another section of the foreign corporation act provided as follows: "Whenever any such corporation shall do any business of any nature in the state without having complied with the requirements of § 1 of this act, it may be sued for any legal cause of action in any parish of the state

where it may do business, and such service of process in such suit may be made upon the secretary of state the same and with the same validity as if such corporation had been personally served." Ostensibly acting under that statute, a summons was issued and served on the Assistant Secretary of State of Louisiana. No notice of the service of the summons or of the pendency of the suit was given to the defendant, and it was only after the plaintiff had recovered a judgment that the defendant learned of the suit. The case which terminated in the Supreme Court of the United States was a suit to enjoin the enforcement of the judgment.

The Supreme Court held that the judgment was void for want of jurisdiction in the State Court; for the reason that service *on the Secretary of State,* under the statute, did not constitute due process of law so far as it related to an action not connected with the business the defendant was doing in Louisiana.

The ground of the decision by the Supreme Court is explicitly limited by the Court, which says:

> "We * * * put the decision here on the special fact, relied on in the court below, that in this case the cause of action arising [?] within the State of Alabama, and the suit therefor, was served on an agent designated by a Louisiana statute."

The court not only addressed its whole argument to the effect of service upon an "agent" designated by a statute compulsory in form, but it expressly refrained from "discussing the right to sue on a transitory cause of action and serve the same on *an agent voluntarily appointed.*"

Nevertheless the court in the *Fry* case construed the opinion in the *Simon* case to cover a case in which service was regularly had on an agent, voluntarily appointed, of the defendant, and to make it impossible to sue a foreign corporation in any state, other than the state of its residence, on a cause of action not connected with the business done in such foreign state.

Thus the court said, at page 895: "While, as indicated, service of process in that case was had upon a designated official of the state, and not an agent of the corporation, the language employed by the court is, as suggested by counsel for defendant, obviously as applicable to the latter case as to the former, since manifestly, under the principles announced by the court, the basis of all process on a foreign corporation is its actual or implied assent, by entering the state and doing business there, to its being served in accordance with the statute of the state, whether such service be had on an officer of the state or an agent of the corporation. In either case, such assent without the voluntary appearance of the defendant may only be implied as to process in actions founded on contracts originating within the state of service."

In a limited sense, what the court says is sound. It is true, for instance, that the liability of a corporation to suit elsewhere than at its domicile is only such as is created by statute; and it is likewise true that the power of the legislature of a state to impose such liability has its origin in a contract relationship. It may exclude foreign corporations from its state entirely or admit them on such terms as it may see fit to impose.

When the legislature has spoken, declaring the conditions it wishes to impose, the corporation, if it desires to do business on those conditions, either *expressly* assents to the conditions, or, by doing business in the state, *impliedly* assents.

In either case the corporation comes into the state and is there by its agents—the only way in which a corporation can be anywhere. It has consented to be sued in the state. As to certain business—the business done in the state—it may be served in any mode that the statute has designated; as to other business it may still be sued in the state, but in such case it must be *personally* served—that is, service must be made on one of its agents, not thrust upon it by the state and only impliedly assented to, but *appointed by the corporation voluntarily.*

Any other doctrine would give a foreign corporation a distinct advantage over an individual. For instance, a citizen of Colorado may commit a tort in Colorado and then go to California. Of course such a *cause of action* is cognizable in the courts of California, and the defendant, if served personally, cannot complain that he was deprived of due process of law.

All that the Supreme Court has said is that *implied* assent to service on an agent *designated by the state,* which is given in exchange for the right to do business in the state, and which does not expressly extend to business done outside the state, will not be extended by implication to business so done; that therefore as to *such* business service on such an agent is not due process of law; and that a judgment procured on such service without a voluntary appearance is void for want of jurisdiction of the court. Doubtless, since the whole question of the right of a foreign corporation to do business is a question of *contract,* even the difficulty raised by the *Simon* case could be obviated—at least as to corporations which *expressly* assent to the statutory provisions by formally complying—by broadening the language of the statute so as to make the statutory agent a proper person to serve *in all actions,* whether connected with business done in the state or elsewhere.

In any event the question raised by the *Simon* and *Wayne* cases is purely a question of what constitutes due process of law—a point which the court in the *Fry* case completely overlooked. It is not at all a question of the jurisdiction of a particular cause of action; but rather of what service is necessary to confer jurisdiction of the person of the defendant. The character of the cause of action, and the nature of the business from which it originates, are wholly immaterial except as they bear upon the question of the sufficiency of what may be termed "substituted" service. If the business was done in the state, then service on a state officer named by the statute is sufficient, *since as to such business the defendant has consented to such service;* otherwise, service must be had in the regular way on one of the corporation's *own officers or agents.* For in either case due process of law requires service upon an agent of the corporation; and the authority of the implied appointee, a state officer, as such agent is held to be limited by the purpose of his appointment.

In addition to the foregoing considerations raised by *Fry* v. *Denver & R. G. R. Co.,* the case presents another curious feature (if the statement

in the syllabus that the plaintiff was a non-resident is correct) which suggests that possibly even as to the point we have discussed the court did not receive as much aid from counsel for the plaintiff as it should have had.

The action, it will be recalled, was brought in a State Court of California, against a Colorado corporation. The first syllabus paragraph suggests that the plaintiff too was a non-resident of California, although the opinion itself discloses no facts from which the correctness or incorrectness of this suggestion appears.

Nevertheless the defendant removed the action to the Federal Court on the sole ground of diversity of citizenship. Clearly, if both plaintiff and defendant were non-residents of California, the District Court in California was without jurisdiction, and a motion to remand to the state court would have had to be granted. But no motion to remand seems to have been made, although in a case such as the *Fry* case the State Courts almost certainly would have constituted a forum more favorable to the plaintiff than would the Federal Courts. Since the requirement that suit shall be brought in the district of which either the plaintiff or the defendant is a resident is one of "venue" more accurately than of jurisdiction, the plaintiff waived his right to object by proceeding on the merits and the court properly undertook to decide the questions involved—even if it did, according to the view hereinabove expressed, decide the case incorrectly.

C. E. ELDRIDGE.