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NOTES.

ACTIONS FOR DEATH IN THE ADMIRALTY COURTS.

At common law there was no right of action for injuries to the person resulting in death. The civil law doctrine, though not entirely clear, seems to have been the same in the case of a freeman.[1] Nevertheless, for several centuries nearly all the civilizations of the Continent of Europe have recognized the right to recover for death and have applied the rule both to casualties on land and at sea.[2] To remedy this defect of the

[1] *Hublin* v. *N. O. & C. R. R. Co.*, 6 La. Ann., 496. But see also *Holmes* v. *O. & C. R. R. Co.*, 5 Fed., 75.

[2] Hughes on Admiralty, sec. 110.

common law, Lord Campbell's Act[2] was passed, and similar statutes now exist in the various States of this Union. In England, however, it has, after some divergence of opinion in the courts, been settled that Lord Campbell's Act[2] does not apply to actions *in rem.* for injuries occurring on the high seas or within the jurisdiction of the High Court of Admiralty, and also that no such right of action for death exists under the general maritime law as in force in England.[4] For some time the decisions in the various Federal courts were in a hopeless conflict, some holding that there was no right of action for death under the general maritime law as in force in the United States, and others holding that such an action brought by the parent of the deceased would be entertained and recovery allowed, even in the absence of a State statute.[5] In "The Harrisburg,"[6] however, the United States Supreme Court definitely decided that the rule of the common law applied in the Admiralty, *i. e.*, a recovery for death, was no part of our maritime law. This decision has since been uniformly followed.[7]

Congress has never passed an act providing for the bringing of actions for injuries resulting in death, though it would certainly seem to have this power. The right to recovery in such cases being part of the general maritime law of the Continent of Europe, it would seem a proper subject for assimilation into our maritime law under the admiralty power granted the Federal Government in the Constitution.[8] It is, however, a well established principle that a State statute so intended can give a right *in rem.* enforceable in the Federal courts, provided that such right is maritime in its nature; *i. e.*, one over which the Federal Admiralty Courts would have cognizance.[9] It therefore becomes important to examine the various State statutes to see whether or not they give such a right of action. Statutes modelled on Lord Campbell's Act[2] have generally been held

[2] 9 and 10 Vict., c. 93.

[4] Vera Cruz, 10 App. Cas., 59.

[5] The Sea Gull, Chase 145; The Highland Light, Chase 150; The Manhassett, 18 Fed., 918.

[6] 119 U. S., 199.

[7] The Corsair, 145 U. S., 335; The Onoka, 107 Fed., 984.

[8] For a similar extension of the admiralty power of the Federal Courts in conformity with the general maritime law of the Continent of Europe compare the acts for the limitation of the liability of ship owners (Act of March 3, 1851; Secs. 4282-9 of the Revised Statutes of the U. S.; Act of June 26, 1884; 23 Statutes at Large, 57; Act of June 19, 1886; 24 Statutes at Large, 80).

[9] The Glide, 167 U. S., 606.

to give no right *in rem.* enforceable in the admiralty, and most of the State statutes have been of this character,[10] In a few cases where a right *in rem.* has been specifically provided for, it has been enforced in the Federal Courts.[11]

"The Corsair" [12] was a case where a libel *in rem.* was filed against the Corsair for negligence causing the death of a passenger. The claim was based on the Louisiana code providing for the bringing of actions for injuries resulting in death. The injury in question occurred in Louisiana waters. The United State Supreme Court held that the statute gave no right *in rem.* but intimated that an action *in personam* would have lain. In *Sherlock* v. *Alling* [13] and *American Steamship Co.* v. *Chase,*[14] actions *in personam* brought under a State statute providing for a right of action for death were entertained and recovery allowed in cases where the injury occurred within the waters of the State giving the right of action. This distinction between a suit *in rem.* and one *in personam* seems to have been followed in the recent case of the *Old Dominion S. S. Co.* v. *Gilmore.*[15] In that case the administrator of the deceased sued the owners of the Hannibal for injuries resulting in death, caused by a collision on the high seas between the Hannibal and the Saginaw—two vessels belonging to Delaware corporations. The court (per HOLMES, *J.*) applied the well-known admiralty principle that a vessel is part of the territory of the country whose flag she flies, and said that though the collision occurred on the high seas, it in law took place within the State of Delaware, both the vessels being owned by Delaware corporations, and hence part of the soil of that State. The court enforced the Delaware statute giving an action for death and allowed recovery.

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[10] The Corsair, 145 U. S., 335; The Sylvan Glen, 9 Fed., 335; The Manhassett, 18 Fed., 918; The Onoka, 107 Fed., 984. See Hughes on Admiralty, p. 209, note 6, for a complete list of the decisions on the various state statutes.

[11] The Glendale, 77 Fed., 906; 81 Fed., 633, construing sec. 2902 of the Virginia Code of 1887.

[12] 145 U. S., 335.

[13] 93 U. S., 99.

[14] 16 Wall., 522.

[15] U. S. Supreme Court Reporter (Advance sheets for Jan. 15, 1908, p. 133). [Case decided Dec. 23, 1907.]

Attacking an Erroneous Judgment by means of the Writ of Habeas Corpus.

An interesting discussion of the scope of the writ of *habeas corpus*, where it is sought to be used for the purpose of attacking an excessive or an erroneous judgment, is found in the case of *ex parte Burden*, recently decided by the Supreme Court of Mississippi, and reported in 45 Southern Reporter 1. Burden, the prisoner, had been indicted by the grand jury for "assault with intent and in the attempt, to kill and murder," and the verdict of the trial jury was,—guilty of "assault and battery with intent to commit manslaughter." The Circuit Judge, interpreting the verdict as a conviction for a felony, sentenced Burden to a term of six years in the penitentiary. He appealed to the Supreme Court, and pending the appeal, sued out a writ of *habeas corpus* before the Chancellor, alleging that the conviction was a nullity, or at most a conviction for assault and battery only, which was a misdemeanor and would entitle him to release on bail. The Supreme Court, in a carefully worded opinion by the Chief Justice, Whitfield, allowed the writ. They went on the ground that, as there was no such crime known to the laws of the State as that of which Burden was convicted, the words "with intent to commit manslaughter" must be treated as mere surplusage; that the Circuit Judge, in failing to do this and in sentencing the prisoner as for a felony, had exceeded his jurisdiction, and that the writ of *habeas corpus* will lie wherever a prisoner has been sentenced in excess of the jurisdiction of the court. They held, however, that the sentence did not render the verdict a nullity, and remanded the prisoner for a further commitment under the verdict of assault and battery.

The particular distinction which the Court drew in this case was that between a judgment erroneous in its essence, as this was, and one merely successive, as for a period of time longer than that permitted by statute. The former, they said, could be attacked in this collateral manner, the latter, only directly on appeal.

The question as to just when a court exceeds its jurisdiction in the imposition of a sentence is one on which the courts have differed decidedly. All have agreed that to sentence under a verdict which does not conform to any known law is erroneous; indeed, it was upon the authority of two earlier Mississippi

cases to that effect that *ex parte Burden* was decided.[1] But it has long been questioned whether, when the court has undoubted jurisdiction of the person of the accused, and also of the offence with which he is charged, a merely excessive sentence, one overstepping the statutory limit, will be held to have been given without jurisdiction, so that the writ of *habeas corpus* may be employed to attack it, or will be held to have been a pure error and only assailable on appeal. A number of courts have adhered to the latter view;[2] others have gone to the opposite extreme and declared the judgment void *ab initio*, and the prisoner discharged[3]—a lamentable failure of justice because of a technicality—while still others (and these seem to be in the majority) declare that only the excessive portion of the sentence is void, so that the prisoner may not be released upon *habeas corpus* until he has served out the valid period of his term.[4] "The prevailing rule is that an excessive sentence is merely erroneous and voidable; that the whole sentence is not illegal and void because of the excess; that it is not void *ab initio*, and that it is good on *habeas corpus* so far as the power of the court extends, and invalid only as to the excess."[5] The great New York case of *The People ex rel. Tweed* v. *Viscomb*, 60 N. Y., 559 (1875), in which the notorious Tweed, after having been convicted on twelve counts and sentenced separately under each, obtained his liberty after serving the term prescribed for the first, follows this rule, as does also the leading case in the United States Supreme Court, *ex parte Lange*, 18 Wallace, 163 (1873). Hence, the action of the Court in the Burden case in remanding the prisoner for a proper sentence, would seem to be sanctioned by the better authority.

It is interesting to note certain other irregularities which have been held to admit the remedy of *habeas corpus*. Where, for example, a statute provides a punishment of fine or imprisonment, and the Court sentences the prisoner to fine *and* imprisonment, he will be dischargeable under this writ as soon as he

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[1] *Gipson* v. *State*, 38 Miss., 295 (1860); *Traube* v. *State*, 56 Miss., 153 (1878).

[2] *In re Graham*, 76 Wisconsin, 366 (1890); *Sennot's Case*, 146 Mass., 489 (1888).

[3] *Ex parte Page*, 49 Mo., 291 (1872).

[4] *In re Bulger*, 60 Cal., 438 (1882); *Ex parte Cox*, 32 Pac. (Idaho), 1971 (1893); *In re Fanton*, 55 Neb., 703 (1898).

[5] Church, "The Writ of Habeas Corpus;" sec. 373 (1893).

has paid the one or the other penalty.[6] Similarly where the Court adds a penalty, of its own motion, to that prescribed by law, such as the addition of the words "at hard labor,"[7] the writ of *habeas corpus* has been allowed; and always where the record shows the verdict to have been irregularly rendered, as by eleven jurors.[8] Generally speaking, however, the courts are very jealous of this remedy, and it has even been refused in a case in which a penitentiary sentence was imposed for an offence punishable only in the county jail,[9] the Supreme Court of South Carolina declaring this a clear case for a remedy by appeal. This particular decision would seem to be a questionable one from the standpoint of jurisdiction, but it represents the extreme reluctance of many courts to permit a collateral attack upon the judgment of a trial Judge. English courts, says Mr. Church, are particularly conservative in this respect.

There was a strong dissent delivered in *ex parte Burden* by Mr. Justice MAYES, based upon the proposition that the Circuit Judge was forced to construe an ambiguous verdict, and that a sentence imposed upon his interpretation thereof, even though erroneous, could not be assailed in this manner. This position is sustained by the decision of the Supreme Court of the United States in the case of *in re*, Eckhart, 166 U. S., 481 (1896), and under the reasoning in that case would seem to be sound, if we admit the verdict to be ambiguous. But it can hardly be said that a verdict of "assault and battery with intent to commit manslaughter" is an equivocal conviction, manslaughter being the form of homicide in which the element of intent is not found.

The decision of the majority of the court appears to be sound on principle and in consonance with the authority of the most carefully considered cases, and constitutes one more step toward uniformity in the application of the principles of justice in this somewhat confused domain of the law.

EMPLOYERS' LIABILITY ACT.

This Act (34 Stat. at L. 232 chap. 3073) was declared unconstitutional by the Supreme Court of the United States in

[6] *In re Bonner*, 151 U. S., 242 (1893); *U. S.* v. *Pridgeon*, 153 U. S., 48 (1893).

[7] *Ex parte Kelly*, 65 Cal., 154 (1884).

[8] *Scott* v. *State*, 70 Miss., 247 (1892).

[9] *Ex parte Bond*, 9 S. Car., 80 (1877).

the recent case of *Howard* v. *Illinois Central Ry. Co.* (decided January 6, 1908). A majority of the court held that the act applied to intrastate commerce as well as interstate commere, and based the invalidity of the Act on this ground. Of the justices concurring in the result of the opinion delivered by Mr. Justice WHITE, three were "not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant"—these were the Chief Justice and Justices BREWER and PECKHAM. The remaining justices affirmed the power of Congress to alter the fellow-servant rule.

The reasoning upon which this power was sustained is found in the opinion of Mr. Justice WHITE and in the dissenting opinion of Mr. Justice MOODY. The control of Congress in this matter is derived from the power to "regulate commerce with foreign nations and among the several States and with the Indian tribes;" and it is asserted that the power is "nothing less than the whole power which any government can properly exercise over either" (subject to the general restrictions imposed by the Constitution). The previous inaction of Congress is not an implication against the existence of the power, because the regulation of marine commerce had until some forty years ago absorbed the attention of that body. The test of the existence of the power in any given case is not merely the matter regulated, but whether the regulation of such matter is a regulation of interstate commerce; thus the relation of master and servant comes within the scope of Congressional regulation, when that relation directly affects interstate commerce.[1] The present subject is within this principle, since it is of primary importance in the conduct of interstate commerce that regard should be had for the safety of those engaged therein. Moreover, the power of Congress to regulate the relation of master and servant in matters directly affecting interstate commerce is supported by precedent; for in many cases it has been held that a State could affect this relation under such circumstances providing Congress had not acted, thus implying that Congress

[1] Cases are cited showing that the power of Congress to regulate commerce extends to persons as well as goods.

"Congress may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that (interstate) commerce." Field, *J.*, in *Nashville Railway* v. *Alabama*, 128 U. S., 96. See also statements of Mr. Justice Harlan to effect that Congress could regulate "the whole subject of the liability of interstate railroad companies for the negligence of those in their service," in *Pierce* v. *Van Dusen*, 78 Fed., 693.

had the power to act;[2] and also that the safety-appliance act—the constitutionality of which has been sustained by this court—is a regulation of the relation of master and servant in connection with the rule of *"volenti non fit injuria."*

The second point involved—the decision of which differentiates the majority and minority opinions—is whether the Act was intended to apply to intrastate as well as interstate commerce. This was the only mooted question, for it was conceded by all, that if the Act purported to include intrastate commerce, that it was unconstitutional. It was, moreover, admitted that if such was the intent of the Act that the court could not give the Act a narrower meaning;[3] nor could the Act be saved in so far as it applied to the District of Columbia and the Territories, for the provisions of the Act were "single and incapable of separation."

The grounds upon which the majority concludes that the intention of Congress was to embrace intrastate commerce were: that the words of the first section of the statute clearly manifested such an intention, in that the Act was to apply to "every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several States, etc.;" and that in defining the servants to which the Act should extend, the words used are *"any* of its employees" (italics not in the statute).

We pass to the reasoning of the minority opinion. The presumption is in favor of the validity of an act of Congress, and "every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."[4] The enumeration of territorial, interstate and foreign commerce and the omission of the internal commerce of the State, show that Congress was conscious of its limitations and inteded not to exceed them.[5] Regarded from this standpoint, the words "any of its employees" applies to any of its employees while engaged in interstate commerce.[6]

Several minor points were raised against the unconstitu-

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[2] *Smith* v. *Ala.*, 124 U. S., 465.

[3] Trademark Cases, 100 U. S., 82.

[4] Waite, *C. J.*, in Sinking Fund Cases, 99 U. S., 700, at p. 718.

[5] Marshall's, *C. J.*, remarks as to the scope of the interstate commerce clause are cited as applicable to the construction of this statute. "The enumeration presupposes something not enumerated; and that something, if we regard the language * * * must be the exclusively internal commerce of the state." *Gibbon* v. *Ogden*, 9 Wheaton, 194, 195.

[6] A striking parallel is made between the present case and the case

tionality of the statute, which are not passed upon in the opinion, announcing the decision of the Court, although with one exception they are summarily disposed of in the opinion of Mr. Justice MOODY. That exception is the provision of the statute "forbidding the employee to make a contract releasing his employer from the consequences of his negligence." On this question Mr. Justice MOODY does not pass, but states that, being a separable provision, the determination of its validity cannot affect the decision of the case before him, which arises under other provisions of the Act.

RECOVERY FOR DAMAGES FOR MENTAL SUFFERING IN TORT AND IN CONTRACT.

The right to recover for damages for mental suffering, in actions arising *ex delicto* and *ex contractu*, is a question in the law concerning which there is a diversity of judicial opinion.[1] There is an apparent reluctance to grant recovery in such cases, due chiefly, perhaps, to the difficulty of definitely ascertaining the true measure of damage from a pecuniary point of view.[2]

In actions arising *ex delicto* the weight of authority is in favor of a recovery for anguish of mind, but the right is limited to three well defined classes of cases, viz., first, where some physical injury has been inflicted;[3] second, where the plaintiff has been subjected to personal indignity, as in defamation, malicious prosecution, or seduction;[4] and third, where a

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of *McCullough* v. *Virginia*, 172 U. S., 102. Mr. Justice Brewer's language is cited: "However broad and general its (a statute's) language it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the Legislature to reach," p. 112. Note, however, that the statute there referred to was a state statute. It would seem that such statutes are more leniently treated than acts of Congress in that the mere fact that on their face they apply to objects in general, some of which are outside the power of state control, invadidates them only *pro tanto;* the explanation, perhaps, is that the Federal Government, in contradistinction to that of the state, is a government of limited powers.

[1] See *Beaulieu* v. *Great Northern Ry. Co.*, 114 N. W. Rep. (Minn.), at p. 353 (Dec. 27, 1907).

[2] *Ibid.*, at p. 355.

[3] 8 Am. and Eng. Enc. Law, 658; Cent. Dig. (Am. Ed.), vol. 15, Col. 1756, sec. 100.

[4] 8 Am. and Eng. Enc. Law, 668; Cent. Dig. (Am. Ed.), vol. 15, Col. 1756, sec. 100.

clear legal right of the plaintiff has been invaded in such a wilful or malicious manner as would naturally cause mental distress, regardless of the preceding elements of physical injury or personal indignity.[5] It does not follow, however, that this is a proper element of damage in all tort actions, and it has been held that there could be no recovery for mental suffering which resulted to a mother from the death of a child by a wrongful act;[6] nor for libeling the dead;[7] nor for mere fright resulting in a nervous disorder;[8] nor for anxiety for safety of one's self or family during a blasting operation;[9] nor from threats or duress by means of which property was unlawfully procured.[10] The better rule would seem to be that recovery for mental pain in this class of cases is restricted to those in which there is an accompanying invasion of a legal right, physical bodily injury, malice, insult or inhumanity.[11]

As a general rule, pain of mind is not a subject of damages in actions arising *ex contractu*, except where the breach of a contract amounts in substance to an independent, wilful tort.[12] Exceptions to the general rule are actions for breach of promise to marry,[13] and actions against carriers for wilful or malicious injuries to passengers, in violation of their contract to carry safely.[14] The great weight of authority is against a recovery for mental suffering through failure to deliver telegrams.[15] Some courts, however, hold *contra*, in accordance with the so-called "Texas doctrine." [16] Where this doctrine has been followed it has been adhered to consistently, and an extreme case is found in North Carolina,[17] where recovery was allowed for fright and worry incident to a father's failure to meet his young daughter at a railroad station, because of the non-

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[5] *Lesch* v. *Railway Co.*, 97 Minn., 503 (1906).

[6] *State, Coughlan* v. *Railway Co.*, 24 Md., 84 (1865).

[7] *Bradt* v. *New Nonpareil Co.*, 108 Iowa, 449 (1899).

[8] *Porter* v. *D. L. & W. R. R. Co.*, 73 N. J. Law, 405 (1906).

[9] *Wyman* v. *Leavitt*, 71 Me., 227 (1880).

[10] *Wulstein* v. *Mohlman*, 57 N. Y. Super. Ct., 50 (1889).

[11] *Morse* v. *Duncan*, 14 Fed. Rep. (C. C.), 396 (1890).

[12] See *Beaulieu* v. *Great Northern Railway Co.*, *supra*, at pp. 354, 355; *Wilcox* v. *R. R. Co.*, 8 U. S. App., 118 (1892).

[13] *Coll* v. *Wallace*, 24 N. J. Law, 291 (1854).

[14] *Craker* v. *Railway Co.*, 36 Wis., 657 (1875).

[15] See *Beaulieu* v. *Great Northern Railway Co.*, *supra*, at p. 354.

[16] *Ibid.*, at p. 355; Cent. Dig. (Am. Ed.), vol. 15, Col. 1759, sec. 105.

[17] *Green* v. *Telegraph Co.*, 136 N. Car., 506 (1904).

delivery of a telegram advising him of her arrival there at a scheduled hour, and the terror which ensued during a lonely ride at midnight to her home.

Recovery has also been allowed for mental pain resulting from the mutilation of a dead body;[18] from the breach of contract to carry a dead body safely, where such breach constituted a wilful tort;[19] and from the breach of contract of an undertaker to keep safely the body of a dead child.[20] The Supreme Court of Minnesota, however, has recently refused a recovery for mental distress where a railroad company negligently failed to carry a dead body to its destination according to the usual train schedule, the delay interfering with the funeral plans and causing anxiety, humiliation and other anguish of mind.[21] The case holds that the facts establish a breach of contract only, and in the absence of a wilful tort incident to such breach, mental suffering is not an element of damage. It would seem to be in exact accord with the general rule, and commends itself to the legal mind as a sound view of the question involved. The subject is thoroughly reviewed, and the authorities fully stated, in the opinion of the Court.

The Scope of the Remedy of Discovery.

The usefulness of a bill of discovery in eliciting evidence to forward the ends of justice and render more difficult the successful perpetration of fraud is illustrated in a case recently decided by the United States Circuit Court for the District of Kansas. The case is that of the *Mutual Life Insurance Company of New York v. Griesa et al.*, 156 Fed. 398. One Perkins, who had taken out a policy with the complainant company for $100,000, in addition to several other policies aggregating nearly a million dollars with other companies, had been killed by accidentally falling from the roof of his house, shortly after having paid the first premium on the policy. The circumstances accompanying the accident were highly suspicious, pointing to a deliberate suicide; indeed, the coroner thought that such was the case. Perkins had purchased mor-

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[18] *Larson* v. *Chase*, 47 Minn., 307 (1891).
[19] *Lindh* v. *Railway Co.*, 99 Minn., 408 (1906).
[20] *Reinhan* v. *Wright*, 125 Ind., 536 (1890).
[21] *Beaulieu* v. *Great Northern Ry. Co., supra.*

phine the day of his death; his eyes showed effects of morphine poisoning; and the doctor who examined him hinted at such a cause. He was, however, buried without any examination having been made on the part of the insurance companies. There was a clause in complainant's policy which prevented recovery if death occurred through suicide within two years from the payment of the first premium; a clause to which Perkins had strongly objected, but which he had finally accepted under protest. When action was brought against the complainant for the insurance, this bill was filed petitioning the court to grant an order to have the corpse exhumed and examined by physicians for traces of morphine poisoning. Mr. Justice McPherson granted the order, reviewing the authorities with care, and announcing that in such a case, where the ends of justice required it, and where a possible fraud was to be guarded against, no questions of delicacy should enter into the case; adding dryly that such arguments certainly would not have been advanced had it been necessary to take such a proceeding for the executor to obtain the money.

The case is a novel one in the length to which it goes, though by no means and illogical conclusion, considering the development of the usefulness of this form of relief during the past century. Originally, as is well known, the bill of discovery lay only when books or documents material to the cause were wholly in the control of one of the parties, and the other could show the court that the evidence they contained was a necessary link in the framing of his action.[1]

There soon arose analogous cases, however, in which this form of producing evidence was the only adequate one. "In chancery, under the same wholesome principle and practice by which bills of discovery were allowed for ascertaining the opponent's testimony and the documents in his possession, the inspection of chattels and premises in his possession or control was obtainable wherever fairness seemed to demand it."[2] Hence we find Lord Eldon allowing the bill in 1815, where an injunction was asked for to restrain the infringement of a patent, and the inspection desired was of the machine in which the alleged piracy was worked out;[3] and again, in 1819, in the case of *Kynaston* v. *The East India Co.*, 3 Swanston 248, where the petition asked for an order of inspection of certain houses

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[1] Pomeroy, Equity Jurisprudence, Sec. 191.

[2] 3 Wigmore's Evidence, Sec. 1862.

[3] *Bovill v. Moore*, 2 Cooper's Chan. cases 56 (1815).

in order to determine the value of the titles to which the plaintiff was entitled.

The examination has been most frequently allowed, both in England and the United States, in mining cases, where there was a dispute as to the boundary, or as to the amount of mineral extracted from the plaintiff's mine by the adjoining owner, and a survey was desired.[4] In *Reynolds* v. *Burgess Sulphite Fibre Co.*, 71 N. H. 332 (1902), Judge Chase, of the Supreme Court of New Hampshire, in a well-reasoned opinion, allows the bill where an inspection of a machine is asked by the administratrix of a workman who was killed by reason of a defect in it, the principal action being one in tort for the death. Cases in some jurisdictions have gone the other way, notably in New York,[5] where the Code Practice seems to be an obstacle, and in Michigan,[6] where the order was refused; in each case, however, upon some other than the jurisdictional ground. But the general law in this country, as well as in England, seems to be that a bill of discovery will be allowed where the evidence sought is contained in property within the defendant's control, whether that property be books, documents, chattels or real estate. All that the plaintiff need show is a definite interest, an interest which, in the language of Story (Equity Jurisprudence, Sec. 1493a) "will, if he is plaintiff at law, constitute a good ground of action, or, if he is the defendant at law, show a good ground of defense, in aid of which the discovery is sought." And in cases of doubt, he adds, the court will grant the discovery, and leave the court of law to adjudicate upon the legal rights of the parties.

There is considerable conflict as to whether discovery should be allowed in one class of cases: those in which it is sought to compel a witness to permit his person to be examined, in order to determine the extent of an injury. The Supreme Court of the United States, in *Union Pacific R. R.* v. *Botsford*, 141 U. S., 250 (1890), refused to grant such an order, holding it a violation of the natural right of every man to the inviolability of his person," though later, in a case brought in a jurisdiction where a statute provided for such examination, they admitted that the Federal Courts should recognize the

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[4] *Henszey* v. *Langdon-Henszey Coal Min. Co.*, 80 Fed. 178 (1897); *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80 (1869); *Thomas Iron Co.* v. *Allentown Mining Co.*, 28 N. J., Eq. 77 (1877).

[5] *Ansen* v. *Tuska*, 1 Robertson (N. Y), 663 (1863).

[6] *Newberry* v. *Carpenter*, 31 L. R. A. 163 (1895); *Martin* v. *Elliott*, 31 L. R. A. 169 (1895).

statute.[7] The very existence of such legislation would indicate that the tendency of the law is to compel a party to submit to such inspection, or else forfeit his right to the benefit of the law, and such seems to be the case.[8]

The writer has succeeded in finding only one other case in which the bill was brought for the same purpose as in the *Insurance Co.* v. *Griesa.* That is the case of the *Grangers' Life Insurance Co.* v. *Brown,* 57 Miss. 308 (1829), in which the court refused the order on the ground that the facts were not strong enough to warrant it. "We are not prepared to say," the opinion reads, "that in a proper case the court, in the interests of justice, should not compel the exhuming and examination of a dead body which is under the control of the plaintiff, if there is a strong reason to believe that without such examination a fraud is likely to be accomplished, and the defendant has exhausted every other method known to the law of exposing it. We are prepared to say, however, that such an order should be made only upon a strong showing to that effect."

Under the facts as shown in the report there was as much reason to grant the bill here as in the Griesa case, and the failure of the court to do so can only be explained by the fact, as shown by the portion of the opinion quoted, that the principle that discovery may be cumulative is not recognized.

It is true that there was a time when the auxiliary bill of discovery was constantly and often needlessly presented, as an easy means of obtaining valuable evidence, and hence the United States Supreme Court decision in *Brown* v. *Swann,* 10 Peters, 497 (1836), denying the bill where the facts may be proved in any other way. But the practice has changed so materially that this rule is no longer necessary, and *Brown* v. *Swann* may be said not to represent the general law.[9] Discovery will not be refused because the same facts can be proved by other testimony, but discovery will be granted in order to confirm or even to dispense with such other proofs.[10]

The authorities seems to present no valid reason why such a case as this should not have been decided long ago. Indeed,

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[7] *Camden & Suburban Ry. Co.* v. *Stetson,* 177 U. S. 172 (1899).

[8] *Dimenstein* v. *Reichelson,* 34 W. N. C. (Pa.) 295 (1903); *Graves* v. *Battle Creek,* 95 Mich. 266.

[9] *Earl of Glengall* v. *Frazer,* 2 Hare, 99; *Peck* v. *Ashley,* 10 Met. (Mass.) 478; *Vance* v. *Andrews,* 2 Barb. Ch. (N. Y.), 370, 2 Story Equity, Sec. 1483. Pomeroy, Equity Sec. 196.

[10] Merwin, Equity and Equity Pleading, Sec. 854.

aside from the question of delicacy, which has doubtless oftentimes stopped the proceeding in its inception, the grounds for denying the bill are slighter here than elsewhere, for such refusal is most frequently based on the argument that to grant discovery would be to violate a property right, and no one has a property right in a buried corpse.[11] The decision is an interesting one, particularly in the light of the recent proceedings in England in the matter of the Druce succession.

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[11] 2 Blackstones' Commentaries, 429.