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NOTES.

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—RETURN OF PAPERS UNLAWFULLY TAKEN—What has long been deemed one of the most sacred and jealously guarded rights of English-speaking people is the inviolability of their homes from illegal intrusions by officials of the government. This right is guaranteed to the people of the United States by the Fourth Amendment to the Constitution, which provides that:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no Warrant shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This right is now firmly and unquestionably established, but the courts have not always been consistent in applying it to individual cases. At times there has been a seeming tendency to interpret this amendment broadly; at others, the interpretation has been extremely narrow and restricted, with the result that some degree of confusion has arisen as to the actual state of the law.

Although many cases had arisen in the State courts under similar provisions in State constitutions, the Supreme Court was not called upon to construe, in an important case, this amendment to the Federal Constitution until 1885, when the case of *Boyd* v. *United States*[1] came before it for adjudication. In that case the question arose as to the constitutionality of an Act of Congress authorizing a court of the United States on motion of the government attorney, in proceedings other than criminal, arising under the revenue laws, to require the defendant or claimant to produce in court his private books and papers on pain of having the allegations stated in the motion taken as confessed.[2] The court, in an elaborate opinion by Mr. Justice Bradley, concluded that this act was void as being in contravention of the Fourth Amendment to the Constitution.

In its decision the court construed that amendment very broadly, being no doubt greatly influenced by the experience of the Colonies prior to the Revolution. The fear of the arbitrary exercise of power restrictive of individual liberty by executive officials of the government, was a strong incentive to a broad interpretation of the provisions safeguarding personal privileges and immunities. The court refers to the case of *Entick* v. *Carrington and Three Other King's Messengers,*[3] in which Lord Camden, in a celebrated decision, declared illegal, at common law, the general warrants issued by the Secretary of State, authorizing officers of the Crown to enter and search any house where it might be suspected that seditious libels were published;[4] and the court observed that the Fourth Amendment was adopted in order to safeguard the people against a recurrence of such practices under the new government. The court concludes that to compel a person to produce in court his private books and papers, is to accomplish in an indirect manner, what the Fourth Amendment was designed to prevent.

This, it will be seen, was a very broad application of the provision against unreasonable searches and seizures, and, if strictly adhered to would seriously restrict the usefulness of the *subpœna duces tecum;* for if to compel a person to produce in court his private books and papers, to be used as evidence by the government, is equivalent to an unreasonable search and seizure, it would seem

[1] 116 U. S. 616 (1885).
[2] Act June 22, 1874, 18 Stat. 186, Sec. 5.
[3] 19 Howell's State Trials, 1029 (1765).
[4] Cooley's Constitutional Limitations, 424-434 (7th Ed.).

that to compel a person to produce, for similar purposes, papers of a private nature of which he was custodian merely, would also be equivalent to an unreasonable search and seizure. The courts, however, have refused to carry the analogy so far, on the theory that the right sought to be protected by the Fourth Amendment is "the indefeasible right of personal security, personal liberty and personal property," [5] and that to compel a person, by use of the *subpœna duces tecum*, to produce in court papers which are in his lawful custody, but not his own private property, is not an invasion of this right. Doubtless this conclusion was inspired by motives of utility. But even the *subpœna duces tecum* must be reasonably specific as to the papers and documents to be produced, and a *subpœna* commanding an officer of a corporation to produce in court *all* of the contracts, correspondence, reports, accounts, *etc.*, of the corporation with six other firms, is analogous to an unreasonable search and seizure, because too general in its terms, and is therefore void under the Fourth Amendment.[6]

If a person cannot be compelled to produce in court, to be used against himself, his private books and papers, because in violation of the immunities guaranteed by the Fourth and Fifth Amendments, one might suppose that if such books, papers and other evidence were actually procured by an illegal search and seizure, they would not be permitted to be offered in evidence over the objection of the person from whom they were taken; for in the final result it is of little practical difference to a person accused of any offense, whether he be compelled himself to supply the evidence to be used against him or whether such evidence is taken from him by an agent of the government in an illegal search and seizure, and is then used against him over his objection. In either case his constitutional rights are violated with the same disastrous result to himself. Yet there are many decisions which hold that the wrongful or illegal means of obtaining evidence is alone no objection to its admissibility, if otherwise competent.[7]

There is, however, a well-recognized method by which a person may prevent the introduction, in evidence against him, of books and papers which have been acquired by an illegal search and seizure,

[5] Boyd v. United States, *supra*, n. 1.

[6] Hale v. Henkle, 201 U. S. 43 (1906). It is also interesting to note that the court, in a divided opinion, said: "While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand, when charged with an abuse of such privilege," thereby suggesting that perhaps the immunities guaranteed by the Fourth and Fifth Amendments, apply to natural persons only, and not to corporations.

[7] Adams v. New York, 192 U. S. 585 (1904); Bacon v. United States, 97 Fed. Rep. 35 (1899); Trask v. People, 151 Ill. 523 (1894); Commonwealth v. Dana, 2 Met. 329 (Mass. 1841).

and that is to petition the court for their return before the trial at which they are intended to be introduced.[8] It would seem that this is carrying the maxim "to the diligent belongs the reward" very far; and it suggests that a person may absolutely forfeit his substantive rights, as guaranteed by the Constitution, through a delay or misapprehension as to the proper procedure to be taken in order to protect those rights. In *Weeks* v. *United States*,[9] the court distinguishes *Adams* v. *New York*,[10] by pointing out that in the former case the accused made "seasonable application" for a return of the papers wrongfully seized, and that therefore the lower court erred "in holding them and permitting their use upon the trial."[11] In *Lum-Yan* v. *United States*,[12] the court overruled the objection of the defendant to the admission in evidence of papers which had been taken from him by an unlawful search and seizure, because, as the court observes, "it does not appear that the plaintiff in error seriously resisted the search that was made." From this it might be taken that a person's right to protection under the Constitution is made to depend upon his physical prowess in resisting any encroachemnt of his rights.

The legal principle to be gathered from the cases seems to be that if papers are taken by officials of the government, in an illegal search and seizure, they may be recovered by petition to the court, even though they contain evidence essential to the successful prosecution of an action against the one from whom taken. But if no effort is made to recover such papers until the trial of the action, it is no objection to their admissibility that they were seized illegally by the government.[13]

E. L. H.

EQUITY—ENFORCEMENT OF DECREES—REMEDIES FOR DISOBEDIENCE—Punishment for contempt of the King's writ was the original and characteristic feature of the processes of Court of Chancery, and for disobedience to its decrees nothing could be done but order the contumacious party to prison, there to remain until he would obey.[1] A writ of attachment first issued against his per-

[8] Weeks v. United States, 232 U. S. 383 (1914); United States v. Friedberg, 233 Fed. Rep. 313 (1916).

[9] *Supra*, n. 8.

[10] *Supra*, n. 7.

[11] See also United States v. McHie, 194 Fed. Rep. 894 (1912), and, United States v. McHie, 196 Fed. Rep. 586 (1912)

[12] 193 Fed. Rep. 970 (1912).

[13] The prohibition in the Fourth Amendment against unreasonable searches and seizures, does not apply to the States. National Safe Deposit Co. v. Stead, 232 U. S. 58 (1914).

[1] J. R. v. M. P. *et al.*, Y. B. 37 H VI, Ames' Cases in Equity, 1.

son commanding the sheriff to bring him before the Chancellor to answer for his contempt, and if he still refused obedience he might then be lodged in jail indefinitely. That equity acted only *in personam* was elementary. But the fact that other methods were soon devised to enable equity to enforce its decrees, is ample proof that the proceedings by way of contempt and imprisonment were not always efficacious in securing real relief. The first step in what might be called the earlier development of remedies for disobedience of decrees was in the adaption of the writ of assistance, an ancient possessory writ, to the needs of equity. If the decree in a suit for land required the defendant to deliver the possession to the plaintiff and he refused to obey, the writ of assistance was used to put the plaintiff in possession and keep him there. Another method devised by the court was the writ of sequestration, by means of which writ the personal property of the defendant and the rents and profits of his real property were sequestered and he was kept from their enjoyment until he cleared his contempt. The scope of this writ was gradually widened, so that any property of the defendant could be sequestered and not merely kept from him, but could also be sold to satisfy the plaintiff's claim. While the primary purpose of both writs was indirectly to compel the defendant himself to perform the decree, they provided, nevertheless, for specific execution of the decree independently of the act of the defendant. It can readily be seen that for this reason they were bitterly opposed by the common law courts, who saw in them an overstepping by equity of its jurisdiction *in personam* and an infringement of their own monopoly of proceedings *in rem*.

In England, at the present day, the writ of assistance has been superseded by the substantially similar writ of possession and is seldom, if ever, used to enforce obedience to a decree by a refractory defendant. The writ of sequestration is used principally against a corporation,[2] and, in addition, an attachment for contempt may issue against the directors or other officers to enforce obedience.[3] The ordinary procedure for compelling a recalcitrant defendant to do any act other than the payment of money, or to refrain from doing something, is by a writ of attachment or commital for contempt.[4] By statute, also, Chancery has been given permission to act *in rem* in certain cases. Thus where a party refuses to obey a decree for the execution of a conveyance or other instrument, the court may appoint a master to make the conveyance or other instrument.[5]

[2] Stancomb v. Trowbridge Urban Council (Eng. 1910), 2 Ch. 190.

[3] McKeown v. Joint Stock Institute, (Eng. 1899), 1 Ch. 671.

[4] Kerr on Injunctions, 684; D. v. A. & Co. (Eng. 1900), 1 Ch. 488; Taylor v. Plinston (Eng. 1911), 2 Ch. 608.

[5] Act July 16, 1830. Not long after, England adopted a more direct method and by its plan of "vesting orders" the court has power in a great

In our own country attempts have been made by statutes to restrict the power of equity to enforce obedience to its decrees by attachment and imprisonment for contempt, but with little success. In a recent Pennsylvania decision, *Commonwealth, ex rel., Licberum* v. *Lewis*.[6] an injunction was issued against the defendant restraining him from continuing to obstruct a right of way of maintaining a building thereon, and he was ordered to remove it. Upon his refusal to obey, he was committed to jail for contempt, the court holding that the Act of June 16, 1836,[7] regulating the power of the several courts of this commonwealth "to issue attachments and inflict summary punishment for contempts of court," has no relation to attachments to enforce decrees in equity where the object is not to "inflict punishment," but to compel performance of such decrees. Attachment and imprisonment for contempt has been used repeatedly in Pennsylvania.[8] The court also considered at length the alternative remedies existing in equity for the enforcement of its decrees against a disobedient party, and it is interesting to note that the old Chancery writs, although seldom used, still exist in this State. The writ of assistance, although having fallen into disuse in England, is still a useful weapon in this country,[9] and the writ of sequestration is used effectively in many cases.[10] Both writs have been provided for by the Pennsylvania rules of court.[11] A bill to effectuate a decree has been another method devised by the courts of equity in this country to carry into effect their decrees.[12] In addition, every State now has a statute providing for a substantial and practical enforcement of a decree for the execution of a conveyance or other instrument. Unlike the English statute, which, as we have seen, provides for the appointment of a master to make the conveyance, the typical American statute provides that in case of non-performance by the defendant, the decree recorded shall itself operate to transfer title.[13] Curiously enough, the Pennsylvania statute of 1901 adopted the English method.[14]

many cases to vest the property in the successful litigant just as effectively as if the person so decreed had obeyed the decree. Act to extend provisions of the Trustee Act, 15 & 16 Vict. Chap. 55 (1850).

[6] 98 Atl. 31 (Pa. 1916).

[7] P. L. 793, Sec. 24.

[8] Chew's Appeal, 44 Pa. 247 (1863); Tome's Appeal, 50 Pa. 285 (1865); Wilson v. Wilson, 142 Pa. 247 (1891); Patterson v. Wyoming Valley, *etc.*, 31 Pa. Super. 112 (1906). ffi ffi

[9] Comm. *ex rel.* Lowry v. Reed, 59 Pa. 425 (1868); Root v. Woolworth, 150 U. S. 401 (1893).

[10] Comm. *ex rel.* Tyler v. Small, 26 Pa. 31 (1856); Hosack v. Rogers, 11 Paige 603 (N. Y. 1844).

[11] Rules 86 and 87.

[12] Winton's Appeal, 97 Pa. 385 (1881); Root v. Woolworth, *supra*, note 9.

[13] Statutes of this kind were enacted in America even before the English Act of 1830. The earliest is that of Maryland in 1785.

[14] Act of April 19, 1901, P. L. 83.

It will be seen from these statutes that the courts of equity have made a marked departure from the fundamental idea that their jurisdiction is exclusively *in personam* when attempting to enforce obedience to their decrees. The statutes are the result of the feeling which has been persistently growing, that equity itself should have some method of enforcing and carrying out a decree which an obstinate defendant has refused to perform. This tendency is further illustrated by the new Equity Rule eight of the Supreme Court of the United States, the latter part of which provides that: "If a mandatory order, injunction, or decree for the specific performance of any act or contract be not complied with, the court or a judge, besides or instead of, proceeding against the disobedient party for a contempt or by sequestration, may by order direct that the act required be done, so far as practicable by some other person appointed by the court, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him."[15] Turning for a moment to the Pennsylvania decision [16] before cited, it is obvious that the case would have been far more effectively disposed of had the court directed the building to be removed by some appointee of their own, in accordance with this rule, instead of allowing their hands to be tried by the dogged contumacy of a defendant who preferred jail to obedience to the decree. No legislation is necessary to enable courts of equity to exercise this power of acting through third parties at the cost of the disobedient defendant, since it is a power inherent in all courts. It is hoped that the definite recognition by our highest court of the existence of such a power will not only have a salutary effect upon the courts in blazing a way for future judicial development, but may also result in a statutory enactment expressly granting this power to courts of equity and thereby satisfying even the most conservative tribunals.

P. H. R.

PROPERTY—DAMAGES FOR "SPITE" WALL—The right to the full and complete enjoyment of an absolute dominion over one's own property has for ages been most jealously guarded by our legal system, and any attempt to encroach by legal means upon this right has been met with instant and determined opposition. That when a man owns property he owns to the heavens above and to the centre of the earth below, and that within this rather definite region he may do what he pleases so long as he does not violate the public law or commit a nuisance, is insisted on as one of the essential attributes of this absolute dominion. It is, therefore, interesting to note the

[15] The English Rules of the Supreme Court, Order XLII, Sec. 30, provides practically the same thing.

[16] *Supra*, note 6.

apparent change in legal sentiment with regard to this right, as shown by the various statutes and many of the late cases dealing with so-called "spite" fences. Although generally having their inception in trifling quarrels or petty hatreds, these cases bring out the issue squarely, whether this absolute dominion is to exist for all purposes, regardless of who may be injured by its exercise.

The recent case of *Hibbard* v. *Haliday* [1] is an excellent illustration of the view taken by a number of late cases and enacted into law by many State statutes. The plaintiff had erected an apartment building close to the dividing line between his property and the defendant's lots, with a dozen windows overlooking the lots owned by the defendant. The declaration stated that the defendant thereupon erected and had since maintained a high brick wall along the boundary line, extending along the whole length of the plaintiff's building and to within a few feet of its roof in height, and for no other purpose than maliciously to injure the plaintiff in the enjoyment and use of his property. On demurrer the declaration was held to state a cause of action, which ruling was affirmed by the Supreme Court.

It is conceded that in all cases where the structure complained of serves some useful or ornamental purpose, even though malice may have been the predominating motive for its existence, the owner of the property on which it rests is strictly within his rights in erecting it, and whatever harm results to the other party is *damnum absque injuria.* Wherever an easement of light and air exists or the doctrine of ancient windows prevails, if a spite fence interferes there is no doubt as to the remedy. But in America, generally these doctrines do not exist.

Before the opinion of Mr. Justice Morse, of the Michigan Supreme Court, in the case of *Burke* v. *Smith,*[2] the majority of courts and the undoubted weight of authority favored the application of the maxim *cujus est solum ejus est usque as coelum* to its fullest extent. They permitted the erection of spite fences, while deploring the necessity to do so, on the ground that it would be an unwarranted interference with a person's right to the full enjoyment of his own property, and insisted that the remedy, if any, should be through legislation.[3] But Mr. Justice Morse took the position that

[1] 158 Pac. 1158 (Okla. 1916).

[2] 69 Mich. 380 (1888).

[3] Pickard v. Collins, 23 Barb. 458 (N. Y. 1856); Levy v. Brothers, 4 Misc. 48 (N. Y. 1893); Mahan v. Brown, 13 Wend. 261 (N. Y. 1835), a leading case; Lapere v. Luckey, 23 Kan. 534 (1880); Guest v. Reynolds, 68 Ill. 478 (1873); Ransom v. McAlister, 9 Ky. L. Rep. 495 (1887); Letts v. Kessler, 54 Ohio St. 73 (1896); Giller v. West, 162 Ind. 17 (1904); Bordeaux v. Green, 22 Mont. 254 (1899); Metzger v. Hochrein, 107 Wis. 267 (1900), criticising the Michigan cases severely as a judicial trespass on the legislative authority.

no man should have the right maliciously to injure his neighbor under the guise of exercising a legal right, when his sole purpose in exercising that right is to injure his neighbor and in no way to benefit himself or others.[4] His opinion was given in a divided court and did not become the law of Michigan until some time later, when it was several times unanimously affirmed.[5] The opinion has been quoted at length in almost every case following the view expressed therein, and has probably determined the noticeable drift in opinion in such cases, toward a broader interpretation of the maxim *sic utere tuo, ut alienum non laedas.*[6]

A number of States have enacted statutes forbidding the erection of "spite" fences where the sole motive for erection is to spite or injure the adjoining property owner and where the fence does not benefit the builder either by way of protection, use or ornament.[7] The remedy under these statutes is generally by injunction, and in proper cases penalties or damages are allowed. It is necessary that malevolence be the predominating motive for its erection;[8] and that the fence or wall be on the boundary line itself or very close to it.[9]

It is submitted that the position adopted by the principal case and those like it, is the better view and does not involve any great deprivation of legal rights, such as is feared by the ultra-conservative legalists.

T. L. H.

[4] "But it must be remembered that no man has a legal right to make a malicious use of his property, not for any benefit to himself, but for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property, of one's neighbor, for no other than a wicked purpose, which in itself is—or ought to be—unlawful. The right to do this cannot, in an enlightened country, exist either in the use of property or in any way or manner." Mr. Justice Morse, in Burke v. Smith, note 2, *supra.*

[5] Flaherty v. Moran, 81 Mich. 52 (1890); Kirkwood v. Finegan, 95 Mich. 543 (1893); Peek v. Roe, 110 Mich. 52 (1896).

[6] Rideout v. Knox, 148 Mass. 368 (1889); Barger v. Barringer, 151 N. C. 433 (1909); Norton v. Randolph, 176 Ala. 381 (1912); Bush v. Mocket, 95 Neb. 552 (1914); Metz v. Tierney, 13 N. M. 363 (1906); and the Michigan cases in note 5, *supra.*

[7] California, Stat. 1885, p. 45; Connecticut, Rev. St. 1902, Secs. 1013, 1107; Maine, Rev. St., Chap. 22, Sec. 6; Massachusetts, Rev. Laws, 1902, Chap. 33, Sec. 19; New Hampshire, Pub. Stat., Chap. 143, Secs. 28, 29, 30; Vermont, Pub. Stat., 1906, Tit. 22, Chap. 179, Sec. 4150; Washington, Rem. & Bal. Code, Sec. 720, 2 H. C. Sec. 268.

[8] Whitlock v. Uhle, 75 Conn. 423 (1903); Healey v. Spaulding, 104 Me. 122 (1908); Rideout v. Knox, 148 Mass. 368 (1889); Karasek v. Peier, 22 Wash. 419 (1900).

[9] Ingwersen v. Barry, 118 Cal. 342 (1897); Brostrom v. Lauppe, 179 Mass. 315 (1901).

PROPERTY—EASEMENTS—CONTINUOUS AND APPARENT—The question of what constitutes a continuous and apparent easement is one that has vexed the courts for a number of years. The confusion has arisen not so much in finding a definition—though even in this respect the courts are far from unanimous—as in properly classifying those uses or *quasi* easements, which, on a severance of an estate, pass to the grantee or devisee, by way of implication and become actual easements. This difficulty is well illustrated in a recent case [1] in England. The owner of two adjoining villas, Bracton and Malta, in 1893, laid a pipe across the latter to supply the former with water for drinking and garden purposes. The source of the water was a well on the land of a third person. In 1894, drinking water was obtained for Bracton Villa from a water company; but the pipe line was used for the garden, and had been so used up to the time of this suit. The owner died in 1902, and the devisee of Bracton leased to the plaintiff; while the devisee of Malta sold it to the defendant, Cotton. Although there was a tank on the grounds of Bracton, into which the water flowed, yet the new owner of Malta seems to have been ignorant of the fact that the pipe ran through his premises; and the well had been overgrown with weeds for a number of years. In 1914, while laying out a new carriage road, workmen discovered the pipe and on the orders of the defendant, cut it. The plaintiff thereupon brought this suit, asking that the pipe be restored and that the defendant be enjoined perpetually from interfering with it, on the ground that it constituted an easement which passed to the devisee, under the words, "of Bracton and its appurtenances."

After a very thorough discussion of what easements pass by implication, the court decided that this was of the class known as "continuous and apparent," and that the plaintiff was right in his contentions. That the court was correct as far as the continuousness is concerned, there is little doubt. "The test of continuousness is, that there is an alteration or arrangement of a tenement, which makes one part of it dependent in some measure upon another. This alteration or arrangement must be intended to be permanent in its nature." [2]

There also enters into the definitions the idea that it may be enjoyed without the further necessity of human interference, once it has been established,[3] but there is a limitation on the doctrine that has caused many diverse opinions—namely, the degree or necessity. The general rule, as far as one exists, seems to make "reasonable" necessity, or even convenience, the criterion; [4] and this in cases of

[1] Schwann v. Cotton & Hayles, 114 Law Times 780 (1916).

[2] Jones, Easements, Sec. 143.

[3] Fetters v. Sumphreys, 18 N. J. Eq. 260 (1867), at p. 262; Washburn, Easements, 2d Ed., p. *13.

[4] Nicholas v. Chamberlain, Croc. Jac. 121 (1607); Watts v. Kelson, L. R. 6 Ch. App. 166 (1871); Tiffany, Real Property, Sec. 317.

continuous and apparent easements. Combining these ideas, it might be said that a continuous easement, reasonably necessary, will pass by implication. It should be noted, however, that at least two jurisdictions, Massachusetts and Maine, hold that there must be a *strict* necessity, regardless of whether the easement is continuous or not.[5]

What easements, then, are considered "continuous"? A complete enumeration would be impossible with any hope of universal approval, but there are some about which there is little, if any doubt: ". . . the best of a running stream, an overhanging roof, a pipe for conveying water, a drain, or a sewer."[6] It will be noted that rights of way are omitted; this is generally true, they being classed as "non-continuous," and a distinction being made between the two classes.[7] There seems to be a tendency, however, to regard this distinction with some disfavor, and to put the implied creation on another ground than mere continuousness. This is evidenced in a number of cases,[8] although more or less in the way of *dictum.* If the doctrine indeed rests on the supposed intention of the grantor,[9] this distinction should be abandoned. Speaking of the doctrine of easements by implication in *Dalton* v. *Angus,*[10] Lord Blackburn said:

"Those who framed the Code Napoleon had to make one law for all France. To facilitate this task, they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil, Arts., 688, 689).[11] Those divisions and the definitions were, as far

[5] Buss v. Dyer, 125 Mass. 287 (1878); Stevens v. Orr, 69 Me. 323 (1879); Washburn, Easements, pp. 108 and 109.

[6] Fetters v. Humphreys, *supra.*

[7] Polden v. Bastard, L. R. 1 Q. B. 156 (1865); Boone, Real Property, Vol. II, Sec. 306; Washburn, Easements, p. 105, *et seq.*

[8] Ewart v. Cochrane, 5 Law Times 1 (1861); Bayley v. Great Western Ry., L. R. 26 Ch. Div. 434 (1884), at p. 452; Martin v. Murphy, 221 Ill. 632 (1906).

[9] Morrison v. Marquardt, 24 Ia. 35 (1867).

[10] L. R. 6 App. Cas. 740 (1881), at p. 821.

[11] Code Napoléon, Art. 688: "Les servitudes ou sont continues, ou discontinues. Les servitudes continues sont celles dont l'usage est ou peut être continuel sans avoir besoin du fait actuel de l'homme: tels sont les conduites d'eau, les égouts, les vues et autres de cette espèce. Les servitudes discontinues sont celles qui ont besoin de fait actuel de l'homme pour être exercées: tels sont les droits de passage, puisage, pacage et autres semblables." Art. 689: "Les servitudes sont apparentes, ou non apparentes. Les servitudes apparentes sont celles qui s'annoncent par des ouvrages extérieurs, tels qu'une porte, une fenêtre, un aqueduc. Les servitudes non apparentes sont celles qui n'ont pas de signe extérieurs de leur existence, comme, par exemple, la prohibition de bâtir sur un fonds, ou de ne bâtir qu'à une hauteur déterminée." While it does not affect the seeming disapproval of these distinctions to be found in Lord Blackburn's opinion, yet it must be noted that they *do* occur prior to the Code Napoléon. Merlin, Répertoire

as I can observe, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it is certainly not to be found in any English law authority before Gale on Easements in 1839."

While not actually denying the distinction, it would seem that Lord Blackburn disapproved of it. In a comparatively recent American case,[12] the court notes that the distinction is borrowed from the civil law and criticizes it rather severely. It is interesting to note that in Pennsylvania the earlier cases make no distinction on these grounds between rights of way and other easements more strictly continuous.[13] Their decisions are based on the assumption that a right of way may be perfectly open and permanent; and the doctrine is summarized by Justice Thompson as follows:

"It is not to be understood by this doctrine, that any temporary convenience, adopted by the owner of property is within it. By all the authorities it is confined to cases of servitudes of a permanent nature, notorious, or plainly visible, and from the character of which it may be presumed that the owner was desirous of their preservation as servitudes, evidently necessary to the convenient enjoyment of the property to which they belong, and not for the purposes of mere pleasure." [14]

This view has been somewhat modified by a later case,[15] which classes a right of way as a non-continuous easement, but admits that it may pass by implication—aside from a way of necessity—under proper circumstances, though deprecating the further extension of the doctrine of the earlier cases.

universel et raisonné de Jurisprudence, 5th Ed., Vol. XXXI, p. 46, also notes the distinctions between "servitudes visibles" and "servitudes cachées," "servitudes continues" and "servitudes discontinues"; and again on pp. 50 and 51, he enters into a more minute description of these servitudes and their characteristics. In Brodeau's Commentary on La Coutume de Paris, Vol. II, top of p. 498, there is mention of the various easements: "Mais cette distinctions est inutile, par ce que la Coutume, soit l'ancienne ou novuelle, requiert titre, sans lequel elle rejete indifferemment la prescription en toute sorte de Servitudes, urbanes et rurales, *continues et perpetuelles, ou discontinues et interrompues, soit visibles et apparentes, ou occultes et latentes. . . .*" And in Vol. II of de Ferriere's commentary on the same body of law, p. 1541, reference is made to La Coutume d'Anjou, Art. 454, where the distinction is mentioned. In addition, Denisart, Collection de Décisions nouvelles et de Notions Relatives à la Jurisprudence actuelle, Vol. IV, p. 393, reports a case in 1756, which refers to a "servitude apparente." From these sources it would appear that the framers of the Code Napoléon did not invent the distinctions, as intimated by Lord Blackburn, but based the two articles in question, upon certain of the customary laws and upon distinctions originated by the courts.

[12] Baker v. Rice, 56 Ohio St. 463 (1897), at p. 477.

[13] Phillips v. Phillips, 48 Pa. 178 (1864); Overdeer v. Updegraff, 69 *id.* 110 (1871).

[14] Phillips v. Phillips, *supra*, at p. 185.

[15] Francies's Appeal, 96 Pa. 200 (1880); Washburn, Easements, p. 110.

There remains to be considered the question of "apparent" as raised in the principal case. There are not a few decisions which go so far as to say that to be "apparent" the easement must be perfectly obvious and visible; and some of them directly classify drains as "non-apparent."[16] When the nature of such easements is considered, however, it would appear that the cases which put a less strict interpretation on "apparent," are more logical.[17] These cases probably represent the great weight of authority[18] and moreover appeal to one's sense of justice. The court in the principal case seems to have been greatly influenced by the language in *Pyer* v. *Carter*,[19] and *Wheeldon* v. *Burrows*.[20] Justice Astbury says at the conclusion of the opinion: "If, in a case like the present . . . it is necessary in implying a grant of an easement for it to be 'apparent' as well as continuous, the expression in my judgment means or includes easements 'apparent' on the premises granted." This is at least an ingenious definition to fit the facts of the case; and it seems authorized by the language of the earlier cases.[21] Indeed, an American jurist,[22] has resolved the difficulty in much the same way, saying, "The easements which he (the grantee) sees on the tenement that he buys, must be held to be apparent." There is this flaw in both definitions: that the existence of the easement is made to depend on something visible on the dominant tenement, rather than on the servient; and in the American case, it is said in so many words that the easement is on the dominant tenement. Of course, these are technical objections; but they go to show the difficulties facing a court in determining the meaning of "apparent." These objections are obviated by following a definition which makes the terms "continuous" and "apparent" practically synonymous. "All continuous or apparent easements—in other words, all easements necessary to the reasonable enjoyment of the premises granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted—will pass to the grantee under the grant."[23] It is to be noted that practically, and

[16] Carbrey v. Willis, 7 Allen 364 (Mass. 1863); Sellers v. Texas C. R. Co., 81 Tex. 458 (1891); Scott v. Beutel, 23 Grattan 1 (Va. 1873).

[17] Seymour v. Lewis, 13 N. J. Eq. 439 (1861); Kelly v. Dunning, 43 *id.* 62 (1887); and the principal case.

[18] Gale, Easements, 9th Ed., p. 114; Tiffany, Real Property, Sec. 317.

[19] 1 H. & Norm. 916 (Eng. 1857). For an interesting discussion of the authority of this case cf. Washburn, Easements, p. 72, *et seq.* In Suffield v. Brown, 10 Jur., N. S., 111 (Eng. 1864), the court went out of its way to attack the decision in Pyer v. Carter; but in Ewart v. Cochrane, *supra*, it was expressly approved.

[20] 41 Law Times 327 (1879).

[21] Pyer v. Carter, *supra*, and Wheeldon v. Burrows, *supra*.

[22] V. C. Pitney in Larsen v. Peterson, 53 N. J. Eq. 88 (1894), at p. 93; cf. also Jones, Easements, Sec. 149.

[23] Boone, Real Property, Vol. I, Sec. 140. This definition is practically a quotation from Lord Justice Thesiger in Wheeldon v. Burrows, *supra*.

taking the words in their literal sense, this definition could include the so-called "non-continuous" easements, whenever the latter were "necessary to the reasonable enjoyment of the premises." Aside from that, however, its principal advantage would appear to be the emphasizing of "continuous" rather than "apparent," thereby avoiding difficulties which occur in connection with the latter.

R. T. B.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURIES ARISING IN THE COURSE OF THE EMPLOYMENT—The various terms which have been used in compensation acts to delimit the precise scope of a workman's employment have proved fruitful sources of litigation. A large number of the cases decided under the English Act seek to define the phrase, "personal injury by accident arising out of or in the course of his employment," almost every word of which has been under repeated fire in the courts. Nor do most of the American statutes seem to have clarified the law on this point.[1]

In a very recent case [2] a plumber's assistant was found dead on the road near his employer's wagon, with which he had started to work. The head and shoulders of the deceased were covered with cuts and bruises; death had been caused by a hemorrhage of the brain. Upon these facts the Committee of Arbitration found that the deceased had met his death in the course of his employment.[3] The decision was affirmed by the Industrial Board,[4] only to be reversed by the Supreme Court.[5]

[1] Western Indemnity Co. v. Pillsbury, 151 P. 398 (Cal. 1915); Spooner v. Saturday Night Co., 153 N. W. 657 (Mich. 1915); Klavinsky v. Lake Shore and M. S. Ry. Co., 152 N. W. 213 (Mich. 1915); Rongo v. Waddington & Sons, 87 N. J. L. 395 (1915); Smith v. Price, 153 N. Y. S. 221, 168 App. Div. 421 (1915); Moore v. Lehigh Valley Ry. Co., 154 N. Y. S. 620, 169 App. Div. 177 (1915).

[2] *In re* Sanderson's Case, 113 N. E. 355 (Mass. 1916).

[3] "The Committee further found: 'That there was no direct evidence tending to show how or in what manner Sanderson fell from the wagon. There was no positive evidence as to whether the hemorrhage did occur before or after the fall from the wagon, but from the circumstances as disclosed by all the evidence, we find as a fact that Sanderson either fell or was thrown from his wagon while he was in the employ of Black . . . and that the black and blue spots were made by the fall.' . . ." *In re* Sanderson's Case, *supra.*

[4] "The weight of all the evidence showed that he was thrown by an accident and not by a stroke of apoplexy or other natural causes; and that he was thrown from the wagon by the sudden moving or starting of the horse. . . ." *In re* Sanderson's Case, *supra.*

[5] "While there was ample evidence from which it could have been found that so far as could be ascertained, the employee was in a normal and healthy condition, without any impairment of his arteries or disease of any

No wording of a statute can resolve the narrow question of fact—or inference based upon a fact, presented in such cases. The principle of *stare decisis* can rarely be invoked, and until a court of last resort has spoken, the result must be doubtful.

An essentially similar problem arose early in the law of agency. In one of the early cases [6] the decision turned on whether a servant had acted within his authority. The court after discussing the point at length,[7] finally affirmed by the action of the trial court in holding that in a close case the question was for the jury. The cases upon this point are limitless and there has been resort to many rules to cover the ever-varying concatenation of circumstances.[8] Many of the modern decisions grapple with the problem, but in a doubtful case [9] it is usually asserted that the question is for the jury. With this statement the common law started in 1834; therewith it has ended in 1916.

The point to be noted is not that litigation is more difficult in these cases, but that only by litigation and the decision of the highest court, can they be settled at all. The question, when an employee is within the scope of his employment, or when an injury can be said to arise out of the employment, has become one of increasing frequency and importance under the various compensation acts. The purpose of these acts has been judicially expressed:[10]

"As an endeavor to provide a way by which employer and employee may, if they so choose, escape entirely from that troublesome and economically absurd luxury, known as 'personal injury litigation,' and resort to a system by which every employee not guilty of wilful misconduct may receive *at once* a reasonable recompense for injuries accidentally received in his employment *under certain fixed rules, without a law suit and without friction.*"[11]

of the organs of his body, and that it was unusual for a man of his age to suffer a cerebral hemorrhage unaccompanied by some physical injury, still, there seems to have been an entire absence of evidence to show that the hemorrhage was caused by the fall from the wagon. It could have been found that the blow upon the head was sufficiently severe to have caused the hemorrhage, but there is no evidence to show that such injury did produce the hemorrhage. . . ." *In re* Sanderson's Case, *supra.*

[6] M'Kenzie v. M'Leod, 10 Bing. 385 (Eng. 1834).

[7] "The question is whether the finding of the jury was correct under the direction of the chief justice that the defendant was not liable unless the injury was occasioned by something done within the scope of the servant's duty. Now the words, 'the servant's duty,' may convey several meanings. They may mean cases where the duty is defined by precise orders; or where something is directed to be done, and the manner of doing it is left wholly in the discretion of the servant, or where the manner of doing it is only partly left in his discretion." Per Alderson, J.

[8] See Labatt: "Master and Servant" (2d Ed.), Vol. 6, p. 6851 ff.

[9] Cf. McDermott v. Griffiths, 190 Ill. App. 53 (1915).

[10] Chief-Justice Winslow in Borgnis v. Falk Company, 147 Wis. 327, 337 (1911).

[11] The italics are the writer's.

If such be the purpose of the act the large number of cases which are indeterminable until passed upon by the highest court, constitute a serious menace to its successful operation.

The effect of most of the acts [12] as exemplified by the Sanderson case has been merely to substitute the conjecture of a commission for the conjecture of a jury, leaving the result conjectural until passed on by the Supreme Court. The Pennsylvania Act of 1915 has sought to avoid the notorious vagueness [13] of its predecessors, notably the English Act, by extended definition.[14] The result seems to have justified the expectations of its framers. While a number of litigable questions have arisen, which are not expressly covered by the act and must be decided in each particular case by an accelerated common-law procedure,[15] the problem of exactly what injuries merit compensation seems to be met in almost every instance by the express provisions of the statute.[16] Such questions were raised in nearly one-half of the cases that arose under the act during the last ten months, exclusive of those settled by agreement between the parties. In most of these every doubt was resolved by reference to the words of the act.[17] But though the act has gone far, too far it is submitted,[18] in order to reduce to certainty the injuries which fall within its beneficial provisions, there still remains a number of cases, not inconsiderable, whose speedy adjustment seems hopeless.[19] In these the act has provided a more summary procedure,[20] but the human equation which makes such a case doubtful until passed on by the Supreme Court, still remains. To that extent the uncertainties and delays of the old system still exist.

[12] The Acts of California and Wisconsin provide for the compensation of all injuries growing out of the employment, unless the injury was the result of the wilful misconduct of the injured employee. In most cases an employee has a right of appeal from an adverse ruling of the administrative board to the highest court.

[13] See article by Francis H. Bohlen, entitled, "A Problem in the Drafting of Workmen's Compensation Acts," 25 Harvard Law Review, 328-348 and 401-427.

[14] Art. 3, Sec. 301, P. L. 738 (1915).

[15] See Stanley v. Wethervill, 2 Dep. Rep. 2153 (1916); Proper v. Union Ice Co., 2 Dep. Rep. 1100 (1916).

[16] Cf. the definition of "contractor" in Sec. 105.

[17] Cf. Ward v. Thompson, 2 Dep. Rep. 507; Maufler v. Brenner, 2 Dep. Rep. 1234.

[18] Tomazezki v. Carnegie Steel Co., 2 Dep. Rep. 2176, where compensation was awarded to dependents of an employee killed by lightning, apart from whether his employment contributed in any way toward the accident.

[19] Murray v. Cunningham and Murray, 2 Dep. Rep. 2043; Kruth v. Metropolitan Life Ins. Co., 2 Dep. Rep. 2045. Cf. Roller v. Drueding Bros., 2 Dep. Rep. 1236; Sawiskey v. Foederer, 2 Dep. Rep. 835, and Beaton v. Hess Mfg. Co., 2 Dep. Rep. 845.

[20] Cf. the power of the Compensation Board to dispense with the usual rules of evidence, to enlist the services of a physician, *etc.*

Administrative efficiency has been the goal of the framers of the act.[21] To secure it the common-law defenses of "contributory negligence," "assumption of risk," and "the fellow-servant rule" were discarded. Economic consistency was cast aside. The economic theory underlying the Pennsylvania Act seems to have been expressed by the Wisconsin Court:[22] "Personal injury losses incident to industrial pursuits, as certainly as wages, are part of the cost of production of those things essential to or proper for business consumption, and the more directly they are incorporated therein, the less the enhancement of the cost and the better for all."[23]

If such is the economic basis of the act, and it is submitted that only upon such basis can the various features of the act be reconciled, economic consistency was sacrificed in the quest for administrative efficiency by a provision refusing compensation for occupational diseases.[24] Yet because compensation is restricted to "injuries," and only to such "injuries" as are in a sense due to the employment, a large number of cases inherently litigable, and covered by no fixed rule of law, still remain to hinder the rapid adjustment of claims under the act.

Only by extending the Workmen's Compensation Act to cover all injuries, in fine, by making it an Industrial Insurance Act, can such cases be avoided.[25] Nor would such a far-reaching legal and economic measure obviate every perplexing question of fact and opinion. *Mala fide* claims for compensation, based upon pretended injuries, would loom large to vex the administrator.[26]

It would seem therefore, that where a claim rests upon a disputed question of fact, litigation can be avoided only by entrusting

[21] See address of Francis H. Bohlen before the Law Association of Philadelphia, November 15, 1912, p. 15 ff., printed by the Law Association of Philadelphia.

[22] Borgnis v. Falk Co., *supra*, note 10.

[23] See also, Frankel and Dawson, "Workmen's Insurance In Europe," p. 9; Henderson, "Industrial Insurance," p. 18, quoted by Boyd in "Workmen's Compensation," p. 43.

[24] Art. 3, Sec. 301, *supra*, note 14.

[25] The economic basis of such a measure is obvious. Several of the text writers have given as the basis of the Compensation Acts, an economic theory which pertains to industrial and old age insurance. "The object of giving an injured workman a cause of action for injuries is not only to compensate the workman, especially in the case of death or total disability, but principally to furnish some compensation to his dependents who might become public charges when their means of support are cut off by such an accident." "Workmen's Compensation," James H. Boyd, p. 58. On p. 59 it is stated: "The effect on the dependents is just the same whether the cause of the injury was due to the negligence of the employee, to that of the employer, or to the natural hazards of the business." Or, it may be added, whether the employee dies of typhoid fever. See also "State Insurance," A. F. Lewis, p. 7, for the sociological and economic argument for such a measure.

[26] Proper v. Union Ice Co., *supra*, note 15.

the ultimate decision of the point to an adminisrative officer. Such seems to be the trend under the Pennsylvania Act. The decision of a referee is accorded the weight of the verdict of a jury, and will be reversed by the Compensation Board only when manifest error has been made.[27]

B. IV.

[27] Cf. Desarno v. Del. and Lackawanna R. R., 2 Dep. Rep. 510, affirmed in 2 Dep. Rep. 1272; Calderwood v. Altoona, 2 Dep. Rep. 748, affirmed in 2 Dep. Rep. 1274; Agney v. Ginsburg, 2 Dep. Rep. 595, affirmed in 2 Dep. Rep. 848.