RECENT CASES.

ACCIDENT INSURANCE—INJURY IN A FIGHT—SELF-DEFENSE.—The plaintiff was in his office when a man entered and without provocation began talking to him abusively, finally making demonstrations with his fists and rushing at him as if to attack him. The plaintiff struck the first blow, and in the struggle was knocked against an iron safe and sustained severe injuries. He held an accident policy from the defendant company, which insured him against injuries caused by "external, violent, and accidental means." *Held:* The injury was "accidental" within the meaning of the policy, the plaintiff having acted in self-defense, notwithstanding the fact that he struck the first blow. Travelers' Insurance Co. v. Dupree, 82 So. 579 (Ala. 1919).

Where the policy insures against "accidental" injuries, the insured cannot recover for injuries resulting from a voluntary fight or one in which he was the aggressor. Taliaferro v. Travelers' Protective Association, 80 Fed. 368 (1897); Meister v. General Accident Corp., 179 Pac. 913 (Ore. 1919); even though the injury was not directly inflicted by his opponent, as where the insured, having started a fist fight, slipped on the floor and fractured his leg. Hutton v. State Accident Insurance Co., 267 Ill. 267 (1915).

But where the insured was not the aggressor, but acted in self-defense, injuries sustained are "accidental." Phelan v. Travelers' Insurance Co., 38 Mo. App. 640 (1890); Allen v. Travelers' Protective Association, 143 N. W. 574 (Iowa 1913).

One of the questions in the principal case was whether the insured was the aggressor. The answer can best be found in cases outside of the field of insurance.

In assault and battery cases, civil or criminal, the fact that a man struck the first blow does not necessarily make him the aggressor, nor deprive him of his plea of self-defense, where the blow was struck to ward off an impending blow from his opponent. Beavers v. Bowen, 80 S. W. 1165 (Ky. 1904); Harrison v. State, 85 S. W. 1058 (Tex. 1905); Marker v. Hanratty, 97 A. 904 (Del. 1916). Thus where the plaintiff had raised and cocked his gun when the defendant fired, the defendant was justified in using such force as was necessary to protect himself. Moran v. Vicroy, 74 S. W. 244 (Ky. 1903).

A few cases have gone so far as to hold that even if the insured was clearly the aggressor, the injury was "accidental," if it was an unusual and unexpected result of the fight, as where the insured attempted to eject a man from a hotel, having no reason to anticipate more than a fist fight, and was shot by his opponent. Loveface v. Association, 28 S. W. 877 (Mo. 1894); Erb v. Commercial Mutual Accident Co., 232 Pa. 215 (1911).

This case is undoubtedly sound, its only novel feature being the application of the doctrine, that one need not wait until actually hit before striking in self-defense, to the particular field of accident insurance law.

DAMAGES—WRONGFUL DISMISSAL—GRATUITIES.—An assistant in a hairdressing establishment, wrongfully dismissed, claimed that damages for breach of his contract should include gratuities which he would have received from

customers, had he continued under the contract. *Held:* The gratuities should be included, since this loss necessarily flowed from the breach, and was within the contemplation of the parties. Manubens v. Leon, 120 Law Times 279 (1918).

This case apparently comes well within the rule that damages for breach of contract should be such as arise naturally therefrom, and may reasonably be supposed to have been in the contemplation of the parties when the contract was entered into. Hadley v. Baxendale, 9 Exch. 341 (1854). But it is more doubtful whether it conforms to the principle that damages claimed must be reasonably certain, and that damages which are uncertain, contingent, and speculative are not recoverable. Rogers v. Bemus, 69 Pa. 432 (1871); Briggs v. N. Y. C. & H. R. R. Co., 177 N. Y. 59 (1903).

The cases involving loss of commissions present circumstances very similar to the principal case, and the degree of uncertainty appears to be about the same in both. It has been held that the loss sustained by a servant whose dismissal deprives him of the opportunity of earning commissions on new transactions is too speculative and conjectural to be included in damages. Ex parte Maclure, 5 Ch. App. 737 (1870); Raphaels Claim, 2 Ch. 309 (1916); Beck v. West, 87 Ala. 213 (1888); Hair v. Barnes, 26 Ill. App. 580 (1888). But some courts hold that such commissions can be taken into account in damages. Spencer Medicine Co. v. Hall, 78 Ark. 336 (1906).

The common practice by the courts of allowing damages to be shown approximately would seem to require no extension in order to include the principal case. Gratuities to be expected in a steady trade like hair-dressing seem to be more certain than the amount of fish likely to be caught within a definite time, as was allowed to be reckoned in damages for an assault and battery upon a fisherman who was thereby prevented for a time from earning his regular living. Lund v. Tyler, 115 Iowa 236 (1901). But the commission cases, decided contrary to the principal case, present a considerable body of authority against it.

MARRIAGE—PRESUMPTION OF VALIDITY OF EXISTING MARRIAGE—ESTOPPEL.—The appellant asserted her right as widow to letters of administration in the estate of decedent under a marriage in 1881. Marriage licenses of appellant and another man dated 1905, and of present widow and decedent dated 1895 were proven. *Held:* That the presumption of the validity of the second marriages was not overcome by sufficient evidence; and that every principle of decency and morals, as well as of law, should combine to estop the appellant from asserting her rights under her first marriage by setting up the invalidity of her second. *In Re* Hilton's Estate, 106 Atl. 69 (Pa. 1919).

The presumption of the validity of existing marriages, which collaterally involves a presumption of innocence from the crime of bigamy, places such a burden of proof upon the party questioning it, that he must conclusively prove his point, Best on Evidence, Sec. 346, even where this is only possible by the proof of a negative, Greenleaf on Evidence, Sec. 35; for example that a divorce had not taken place, Wile's Estate, 6 Pa. Super. 435 (1898); or that the first husband was not dead at the time of the second marriage, McCausland's Estate, 213 Pa. 189 (1906); Vreeland v. Vreeland, 79 Atl. 336 (N. J. 1911). In the principal case the evidence was held not to be sufficiently weighty because the general moral character of the appellant rendered her testimony of doubtful veracity;

because the important witnesses were interested; and because evidence of discontinued divorce proceedings did not preclude the possibility that they had been discontinued for the reason that the first marriage had been found invalid.

The dictum finding an estoppel under the doctrine "ex turpe causa non oritur actio" is questionable law. Similar dictum is found in Richardson's Estate, 132 Pa. 292 (1890), cited by the court, but the better rule is that in Sloan's Estate, 50 Wash. 86 (1908), which held that the husband was not estopped from defeating the right of his second wife's heirs to certain community property by proving the invalidity of the second marriage. In the principal case the right to letters of administration arises solely out of the first marriage, from the proving of which the invalidity of the second follows as a consequence. It cannot be said that the right here sought arises out of the invalidity of the second marriage. Furthermore, principles of decency and morals are not in themselves grounds for an estoppel. They constitute an important element in the presumption discussed above, but had this presumption been rebutted by conclusive proof of the first marriage, as in Sloan's Case, *supra*, the court would probably have held there was no estoppel.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—RECOVERY FOR ACCIDENT—DISEASE.—A workman employed in bagging bone manure contracted blood poisoning and died. The point of infection was an abrasion on his leg. It was not shown when or where the scratch was received, nor when the infection occurred; but it was found as a fact that the infection was caused by the entry of germs contained in the bone manure. *Held:* Death was caused by "personal injury by accident arising out of and in the course of employment," within the meaning of Sect. 1 (1) Workmen's Compensation Act, 1906. Innes v. Kynoch, 121 L. T. 39 (1919).

The decision in this class of case depends on the interpretation of the words of the Statute "injury by accident." Decisions construing this phrase show a progressive liberality. In 1905 a radical departure from strict interpretation allowed compensation for injury which took the form of disease, on the ground that the entry of the germ was accidental. Brinton's Limited v. Turvey, 92 L. T. 578 (1905). Unwilling to go so far, courts subsequently declared this case anomalous, as decided on a special finding of accident by the trial judge. Eke v. Hart-Dyke, 2 K. B. 677 (1910); Liondale Bleach Works v. Riker, 85 N. J. L. 426 (1914).

Attempts to bring occupational and industrial diseases within the "injury by accident" clause have as yet been rejected. Steel v. Cammel, 2 K. B. 232 (1905). Adams v. Acme, 182 Mich. 157 (1914). It has, however, been generally held that a disease, the result of an injury by accident, is compensable. Larke v. Life Ins. Co. 90 Conn. 303 (1915). Plass v. Central New England Ry., 155 N. Y. S. 854 (1915). It has also been held that an accident which brings the workman into contact with the source of infection is within the meaning of the phrase. Alloa Coal Co. v. Drylie, 6 B. W. C. C. 398 (1913). Monson v. Battelle, 102 Kan. 208 (1918).

Many courts have held that the element of accident must be furnished by an event answering to the popular use of the word, and that the invasion of the bacillus is not such an event; with the additional objection that only an

approximate date can be assigned the "accident." Broderick v. London County Council, 2 K. B. 807 (1908); Eke v. Hart-Dyke, 2 K. B. 677 (1910); Liondale Bleach Works v. Riker, 85 N. J. L. 426 (1914).

The most liberal construction gives compensation for injury resulting from the entrance of the bacillus, when the point of infection is an abrasion incurred in the course of employment, likening the invasion of the germ to a blow or assault. Great Western Power Co. v. Pillsbury, 171 Cal. 69 (1915). Hiers v. Hull, 164 N. Y. S. 767 (1917).

The principal case takes the extreme position that there is no necessity for a definite date, and that the injury is compensable though the abrasion is not incurred in the course of employment.

MASTER AND SERVANT—EFFECT OF ORDERS—ASSUMPTION OF RISK.—Plaintiff was employed by defendant to take care of his cows. He was injured by one of the cows while removing a halter from her, under direction of the defendant. *Held:* Recovery is possible, even though the plaintiff knew at the time that the cow was vicious, if he acted with that degree of prudence which an ordinarily prudent man would exercise under the circumstances. Walters v. Sievers, 181 Pac. 853 (Wash. 1919).

The court has here given the maximum significance to the effect of a master's command in relieving the servant from voluntary assumption of risk.

According to a great line of cases the direct command of a master negatives the idea of voluntary assumption of risk, Dallemand v. Saalfeldt, 175 Ill. 310 (1898); Atkins v. Madry, 93 S. E. 744 (N. C. 1917); and if injury result therefrom knowledge by the servant that there was some danger in the act is not a bar to recovery unless the danger was so obvious and imminent that an ordinarily prudent man would have refused obedience under the circumstances. Vandalia R. Co. v. Kendall, 119 N. E. 816 (Ind. 1918); Roy v. Louisville Gas & Elec. Co., 203 S. W. 855 (Ky. 1918). However this distinction has been made,—a command to negative the idea of assumption of risk must be specific as to time and manner, and cannot be in the nature of a general command leaving details of performance to the judgment of the servant. The Standard Cement Co. v. Minor, 54 Ind. App. 301 (1913).

The legal grounds for recognizing the coercive effect of the master's command, even in the face of obvious danger, are the servant's primary duty of obedience, and his right to rely on the master's superior knowledge of the danger and fulfillment of the duty of due care towards him. Dickinson v. Mooneyham, 203 S. W. 840 (Ark. 1918); Porter v. Wilson, 62 Pa. Super. Ct. 339 (1916). Necessity for quick action may also be a determining factor. Cherry v. Atlantic Coast Line R. Co., 93 S. E. 783 (N. C. 1917).

In cases where the risk in obeying is equally obvious to master and servant it would often be illogical to find that the master was negligent in commanding the act and that the servant was free from negligence in performing. In many such cases the court has refused recovery on the ground of contributory negligence, City of Greeley v. Foster, 32 Col. 292 (1904); or because the defendant was not negligent, Skidmore v. West Virginia & P. R. R. Co., 41 W. Va. 293 (1895); or assumption of risk, used by the court to mean contributory negligence. Lexington & E. Ry. v. Stacy, 189 S. W. 25 (Ky. 1916). Most of the apparent contradictions to the direct command rule are due to confusion of terms.

But in cases where the facts are similar to those of the principal case there is a decided tendency to submit the question to the jury as to the negligence of plaintiff and defendant. Vandalia R. Co. v. Kendall, *supra.*; Roy v. Louisville Gas & Elec. Co., *supra.* The sanction thus put by law on the master's command is not in keeping with the modern conception of the relation of master and servant. The ideas of respect for authority, dependence on the master, and fear of discharge are not living forces in our industrial world. Therefore the decision in the principal case indicates a willingness to fall in line with the trend of modern thought, away from the individualistic notions of the law of master and servant, and toward the "absolute liability" idea as expressed in Employers' Liability and Workmen's Compensation Acts.

TRUSTS—CAPITAL AND INCOME—PROCEEDS OF STOCK DIVIDEND.—Where a stock dividend was declared by a company, whose stock was held in trust, against surplus assets earned before the creation of the trust, the company sold the stock and distributed the greater portion of the cash received. *Held:* Such extraordinary cash dividends belonged to the corpus of the trust estate as capital, and not to the life tenants as income. Hospital Trust Co. v. Peckham, 107 Atl. 209 (R. I. 1919).

This question has never been decided in Rhode Island, although many similar cases have arisen in other jurisdictions. It has been held that cash dividends, however large, are income, and stock dividends, however made, are capital. Minot v. Paine, 99 Mass. 101 (1868). This is known as the Massachusetts rule, and is founded on convenience and simplicity, often resulting in great hardship and injustice.

In Earp's Appeal, 28 Penna. 368 (1857) it was held that extraordinary dividends should be apportioned between the life estate man and the remainderman in accordance with the amount thereof accumulated before and after the creation of the trust. This rule prevails in nearly every state in the Union and may well be called the American rule. It proceeds upon the theory that the court in disposing of the dividends may properly inquire as to the time they were earned or accumulated. If found to have accrued before the life estate arose they are held to be principal, and, irrespective of the time declared, to belong to the corpus of the estate. But if the fund out of which the dividend is paid accrued after the life estate arose, then it is held that the dividend is income and belongs to the tenant for life. The ruling in this case has been steadily maintained without modification or change. *Accord: In re* Kernochan, 104 N. Y. 618 (1887); *In re* Smith's Estate, 140 Pa. 344 (1891); Spooner v. Phillips et al., 24 Atl. 524 (Conn. 1892).

The English rule was first established in 1799 and holds that an extraordinary cash, stock, or property dividend belongs to the corpus of the estate. Brander v. Brander, 4 Vesey 800 (1799). It has been held in recent cases that extraordinary cash dividends may be decreed to belong to the life tenant. Bouch v. Sproule, 57 L. T. R. 345 (1887); Sugden v. Alsbury, 63 L. T. R. 576 (1890); Ellis v. Barfield, 64 L. T. R. 625 (1891).

It is evident that the courts differ widely in laying down rules on the subject. The rule in Minot's Case is the minority rule and prevails in Massachusetts and Georgia. The English decisions are in a state of confusion. The Rhode

Island Court in following the Pennsylvania rule in the principal case has accepted a rule founded not on convenience and simplicity, but on satisfactory legal reasoning.

WILLS—CONDITIONS IN RESTRAINT OF MARRIAGE.—Testatrix left money in trust for her daughter, provided that (1) she should not marry X, and (2) that she should marry one of her own social class. At the time the will was drawn the daughter was engaged to X. She subsequently married him. *Held:* The daughter lost the legacy. The first condition was valid, and had not been fulfilled. The second condition was void for uncertainty, and the conditions were not so interdependent that the invalidity of the second destroyed the first. Turner v. Evans, 106 Atl. 617 (Md. 1919).

Only conditions which totally or unreasonably restrain marriage are now considered invalid: see note, 49 L. R. A. (N. S.) 605. Conditions in wills restraining marriage with particular individuals or classes have been uniformly held to be valid. Jervois v. Duke, 1 Vern. 19 (1697); Jenner v. Turner, L. R. 16 Ch. Div. 188 (1880); *in re* Seamon, 218 N. Y. 77 (1916). But the validity of a condition requiring the legatee to break a binding promise has never before been decided in any jurisdiction. In Graydon v. Graydon, 23 N. J. Eq. 229 (1872) the point was raised, but there the legatee was a minor son, and his promise was voidable. It was held in the principal case that the binding promise by the legatee made no difference in the validity of the condition. This was logical from the point of view of the testatrix, whose reasons against X would be as urgent after the engagement as before; and the court was trying to carry out the will of the testatrix.

The question of the validity of the second condition has rarely been decided, and is one of first impression in Maryland. In Greene v. Kirkwood, 1 I. R. 130 (1895) a condition not to marry a "man of a lower social plane" was held to be valid. There the court undertook to set up a standard whereby the jury could find a verdict. But in Keilly v. Monck, 3 Ridg. P. C. 205 (1795) a condition not to marry a man "not seised in fee, or perpetual freehold of an estate of an annual value of £500 above incumbrances" was held to be too general and vague. And in Watts v. Griffin, 137 N. C. 572 (1905) a condition not to marry "common women" was held invalid for vagueness. So the principal case seems to come under the majority rule.

GIFTS—PAROL GIFTS—GOOD CONSIDERATION.—*Held:* A parol gift of land by a man to the wife of his living son and the mother of an infant child is supported by good or meritorious consideration. Berry v. Berry, 99 S. E. 79 (W. Va. 1919).

It is well settled that relationship by consanguinity will constitute meritorious consideration to support a gift to a son, Hardman v. Roberts, 1 Vern. 132 (Eng. 1682); Hadden v. Thompson, 118 Ga. 207 (1903); or to a daughter, Jefferys v. Jefferys, Craig & Phillips 139 (Eng. 1841); but not to an illegitimate child, Fursaker v. Robinson, Finch Pre. in Cha. 475 (Eng. 1717); nor a nephew, Buford v. McKee, 31 Ky. 107 (1833); nor a niece, Mark v. Clark, 11 B. Mon. 44 (Ky. 1850); *Contra* Porter v. Allen, 54 Ga. 623 (1875) in which case the court fails to state any authority for its decision.

It is also well settled that relationship by marriage constitutes such meritorious consideration as will support a gift. Ashburne's Principles of Equity,

527; but there is a conflict as to the extent to which this doctrine will be carried. Thus a son-in-law, whose wife and child were dead, has been held to come within the rule. Bell v. Scammon, 15 N. H. 381 (1844). *Accord* Gale v. Coburn, 18 Pick 397 (Mass. 1836) in which case the wife was dead but there were living children; *contra* Corwin v. Corwin, 6 N. Y. 342 (1852) wherein the wife and children of the grantee were living at the time grant was made. The court in the last case did not cite any authority for its decision. A daughter-in-law has also been held to come within the rule. Berry v. Berry *supra*. *Contra* Jackson v. Caldwell, 1 Cowen 622 (N. Y. 1824) in which case the husband was dead but there was a living child. The court based its decision on the fact that there was no relation by blood between the grantor and grantee, entirely disregarding the question of relationship by marriage.

The cases which are in accord with the principal case base their decisions that gifts to sons-in-law and daughters-in-law who have living children are supported by meritorious consideration, on the ground that this is merely an indirect method of providing for the grandchildren who are related to the grantor by consanguinity.

WORKMEN'S COMPENSATION—PRESUMPTION OF SUICIDE—BURDEN OF PROOF.—A man employed to remove wood-ashes died of alkali poisoning. A large quantity of ashes, part of which had combined with water and formed lye, was found in his stomach. *Held:* The burden of proving a claim for compensation is on those seeking the award. The inference that the ashes were swallowed with suicidal intent is as reasonable as the inference that they were in the system as a result of the employment. The inferences being equal, the claim must fail. Chaudier v. Sterns & Culver Lumber Company, 173 N. W. 198 (Mich. 1919).

The general rule in compensation cases is that the burden of proof in the first instance is on the person seeking the award. Where a death occurs and there is no positive evidence as to whether it was accidental or suicidal, there is a presumption against suicide. Fisher v. Life Association, 188 Pa. 1 (1898); Clemens v. Royal Neighbors, etc., 103 N. W. 402 (N. D. 1905). Therefore the defendant must put the fact of suicide in issue, if he intends to rely on it in his defense and when he does so, the burden of proving that fact is on him. According to the Michigan cases, the actual burden of proof shifts under such circumstances. Grant v. Railway, 1 B. W. C. C. 17 (England 1907); Papinaw v. Grand Trunk, 189 Mich. 441 (1915); Wishcaless v. Hammond, etc., 201 Mich. 192 (1918). Unless the defendant proves that the death was due to suicide, the presumption against suicide will prevail and the inferences would not be equal as stated in the principal case, with the result that the claimant will recover if he makes out a prima facie case.

The Michigan Workmen's Compensation Act is silent as to the burden of proof in suicide cases. Michigan Laws of 1912, page 23, part II, section 2. The Pennsylvania Act specifically provides that when the employer alleges that the death was due to suicide, "the burden of proof of such fact shall be upon the employer." Laws of Pennsylvania, 1915, page 738, article III, section 301.

For cases under the Pennsylvania Act see Flucker v. Steel Co., W. C. Supplement to Department Reports of Pa., volume 3, page 2989 (1917); Keyes v.

N. Y., Ont., & W. Ry., W. C. Supplement to Dept. Reports of Pa., volume 3, page 2698 (1917). The Keyes case was appealed to the Common Pleas Court of Lackawanna County which reversed the Board on the ground that the defense of suicide did not release the claimant from the burden of proving that the death was due to the employment, even though the defendant failed to establish the fact of suicide. Keyes v. Ry., I Mackey, Court Decisions under the W. C. L. of Pa., page 195 (1917). This opinion has been appealed to the Supreme Court of Pennsylvania, but no decision on it has been handed down.