RECENT CASES

BRIDGES—FAILURE TO GUARD SUFFICIENTLY—INFANTS.—Plaintiff's intestate, a child of twenty-eight months, strayed on to a bridge in the vicinity of which children were accustomed to play. The child climbed through the guard rail of the bridge, attracted by the water below, brilliantly colored from the dye works up stream. He fell from the bridge and was killed. *Held:* The defendant city was liable, being negligent in not maintaining a rail sufficient to keep the child from such an attractive danger. Comer v. City of Winston-Salem, 100 S. E. 619 (N. C. 1919).

Municipalities are not insurers of the safety of their bridges. Their sole duty is to use reasonable care in their construction and maintenance to prevent accidents, which from the character of use of the bridge, are likely to happen. Their liability does not, therefore, extend to accidents from extraordinary uses not the common incidents of travel. McCormick v. Township of Washington, 112 Pa. 185, 4 Atl. 164 (1886); Nicholls v. City of New York, 112 N. Y. S. 795 (1908).

It must be borne in mind, however, that what is an extraordinary use by an adult may be a normal one by a child. Accordingly, though it has been held that a bridge owner is not liable for injury resulting to a child as a consequence of his venturing in juvenile recklessness where no one, child or adult, should go; Nicholls v. City of New York, *supra;* Gavin v. City of Chicago, 97 Ill. 66 (1880); Oil City etc. Bridge Co. v. Jackson, 114 Pa. 321, 6 Atl. 128 (1886), on the other hand there is liability where the act of the child resulting in injury is a natural and ordinary incident of travel, a momentary digression for example. Tannian v. Amesbury, 219 Mass. 310, 106 N. E. 996 (1914).

To fasten liability upon the defendant under these rules it was necessary in the principal case to import an alien doctrine, that is the implied invitation of the attractive nuisance theory, as set forth in the "Turntable Cases." The invitation figuratively held out to the child was the gurgling brilliant water. This doctrine was originally invoked to raise an active duty of care to a trespasser. In the principal case, the intestate not being a trespasser, a duty of care was owed him, so that the theory is not applicable as ordinarily used. The unusual phase of the case is that the theory is employed to impose a greater quantum of care upon the city than has heretofore been required toward a class which the city already owes a duty to protect from expectable accidents. Such a decision is in conflict with the class of case which holds a bridge owner not bound to protect against accidents from childish recklessness.

CARRIERS—CATTLE GUARD—TRESPASS—NEGLIGENCE.—In going to a railroad station to take a train, instead of entering through the passenger gate known to her, the plaintiff started from a street grade crossing and took a short cut across the double line of tracks. She fell between the tracks and was injured by "cattle-guards" which surrounded the tracks but which were hidden by a thick covering of snow. For these injuries she sues. *Held:* She can recover, since the railroad owed a duty to warn against such a danger. Jenks and Blackman J. J. dissented.—Kovarik v. Long Island R. R. Co., 178 N. Y. S. 705 (1919).

A railroad is bound to maintain in a reasonably safe condition those parts of its premises to which passengers are expressly or impliedly invited. Heffron vs. N. Y. C. & H. R. R. Co., 223 N. Y. 473, 119 N. E. 1024 (1918). A person who enters the premises of another for the purpose of transacting business, as does a railroad passenger, has, in the absence of evidence to the contrary, no implied invitation to deviate from the passageways which the premises themselves reveal as prepared for such use. Hempton vs. Green Bay & W. Ry. Co., 162 Wis. 62, 155 N. W. 927 (1916). The facts of the main case would preclude an implied invitation to use cattle guards as a safe way of approach, and, on the grounds of the difficulty of crossing, they would preclude any accustomed permissive use. The plaintiff was a trespasser to whom the railroad owed no duty other than to safeguard him when found in peril, and to refrain from doing him wanton injury. Cattle guards are not a trap. Brown v. Linville River Ry. Co., 174 N. C. 694, 94 S. E. 431 (1917). The majority opinion raises the novel defense of a duty being created in the proprietor by the lack of criminal intent in the trespasser; and if an appeal is taken, it is probable that the case will be reversed.

CONTRACT—AGREEMENT TO INDEMNIFY AGAINST CRIMINAL LIABILITY—PUBLIC POLICY.—The plaintiff, a retail store-keeper, bought a quantity of a supposed "soft-drink" called "Nutromal" from the defendants, who represented that it was not intoxicating, and agreed to indemnify the plaintiff from any damage that might result from prosecution under the local option law. The drink in fact was intoxicating; the plaintiff was convicted for selling it, and sued on the agreement of indemnity. *Held:* The contract was valid, and was not against public policy. Owens v. Henderson Brewing Co., 215 S. W. 90 (Ky. 1919).

The general rule is that a contract to indemnify from the consequence of an unlawful act is against public policy, and is therefore void. Thompson v. Whitman, 49 N. C. 47 (1856); Babcock v. Terry, 97 Mass. 482 (1867); Bowman v. Phillips, 41 Kan. 364 (1889). But in all these cases the plaintiff was indemnified against the consequences of a deliberate violation of the law which he contemplated at the time the contract was made. The reason why such contracts are against public policy, as explained in Bowman v. Phillips, *supra*, is that they encourage crime by removing the fear of effective punishment. In the principal case, the plaintiff did not commit the offense because of the indemnity agreement, but because he believed the "Nutromal" was a "soft-drink," the offense under the statute not requiring criminal intent. The Court distinguished the case on this ground, refusing to apply the rule where the reason for the rule did not exist, though unable to cite any precedent for the distinction.

In a case where the facts were very similar, the plaintiff having been convicted for selling a drink called "Hiawatha" without a license, relying on the defendant's representation that it was "soft," the Court did not allow the plaintiff to recover for the loss incurred through his criminal prosecution. Houston Ice & Brewing Co. v. Sneed, 63 Tex. Civ. App. 17, 132 S. W. 386 (1910). Authorities are scarce because there are comparatively few crimes that do not require criminal intent. The "Hiawatha" case follows the general rule strictly, while the "Nutromal" case takes the more liberal view that where the reason no longer holds good the rule should end.

For similar recent case, where, however, there was no express contract but an implied duty, see note on Weld-Blundell v. Stephens, 1 K. B. 520 (1919), in 68 U. of P. Law Review 194.

COVENANTS—BUILDING RESTRICTION—GARAGE.—An owner in a residential district, whose premises were under a restriction not to erect thereon any establishment for an offensive business, attempted to build a garage to accommodate twenty-four cars, as a public garage and also for the owner's private use. *Held:* Injunction granted to plaintiffs, who were neighbors, to stop the building of such public garage, since it was a breach of the restriction. Hohl v. Modell, 107 Atl. 885 (Pa. 1919).

That a public garage comes within such a restriction as appears in the principal case would seem to allow of no argument; and the few decisions to be found on this point are in accord. Evans v. Foss, 194 Mass. 513, 80 N. E. 587 (1907); Hibberd v. Edwards, 235 Pa. 454, 84 Atl. 437 (1912). In both these cases the garage in question was large enough to accommodate some hundred automobiles.

It has been held that a restriction in a deed against erection of any building offensive to a good neighborhood does not apply to a garage for twenty-nine cars, where the owner also stores his own car, since the structure differs from an ordinary public garage, and is not offensive to a good neighborhood. Hammond v. Constant, 168 N. Y. S. 384 (1917).

Therefore, the only doubtful question in such cases seems to be how large the garage must be in order to be held to have the offensive characteristics of a public garage.

DAMAGES—NON-DELIVERY BY CARRIER—NOTICE OF SPECIAL FACTS.—Agent of State Agricultural Board delivered package containing hog cholera serum to carrier with notice of its contents and with instructions to ship it at once. Consignee was allowed to recover full value of 52 hogs which died of cholera following the non-delivery of serum within a reasonable time. *Held:* The amount of damages allowed was proper. Adams Express Co. v. Allen, 100 S. E. 473 (Va. 1919).

Under the first half of the rule of Hadley v. Baxendale, 9 Ex. 341, 23 L. J. Exch. 179 (Eng. 1854), which is generally accepted as a correct summary of the law of damages, the amount recoverable for a breach of contract is the loss which normally results from such a breach, "which arise in the usual course of things." The death of hogs is obviously not such a normal result of the delay of an express package.

The test of the Virginia case just decided is in the second part of the rule as laid down in Hadley v. Baxendale, *supra:* that where one party to a contract makes known to the other at the time of the contract certain special facts which would give him notice that a breach of the contract would result in an otherwise unexpected loss, the former might recover that special loss in case of a breach. This requirement of notice to recover special loss is generally followed in cases of non-delivery or late delivery by carriers of packages entrusted to them. Lewark v. Railroad Co., 137 N. C. 383, 49 S. E. 882 (1905); Ill. Central Ry. Co. v. Nelson, 30 Ky. L. Rep. 114, 97 S. W. 757 (1907).

Where there has been notice to the carrier of special facts, the consignee of a package delayed by the carrier is allowed to recover his special loss. Jameson v. Midland Ry. Co., 50 L. T. N. S. 426 (Eng. 1884); Ill. Central Ry. Co. v. Mossbarger, 28 Ky. L. Rep. 1217, 91 S. W. 1121 (1906); Weston v. B. & M. R. R., 190 Mass. 298, 76 N. E. 1050 (1906). But only the loss resulting as the probable consequence of the facts made known to the carrier can be recovered. Chapman v. Fargo, 223 N. Y. 32 (1918); Sedgwick on Damages, §157.

To warrant the damages awarded in the principal case, the court must hold that the death of the consignee's hogs was the probable consequence of non-delivery under the facts made known to the carrier, which were that the package contained hog cholera serum and that it should be sent at once. There was no evidence that the carrier knew that the serum was to be used for hogs already exposed to cholera, rather than as a general preventative measure. This conclusion seems extreme and hardly justifiable. The case is interesting also as showing the firmness of the belief of the court in the efficacy of the serum to protect hogs from cholera.

EVIDENCE—ADMISSIBILITY—LACK OF PREVIOUS ACCIDENTS.—A pedestrian sued the city for injuries received by slipping on a sidewalk, alleged to be defective. The city introduced evidence that many persons had used the walk at the particular place without injury previous to the plaintiff's accident. *Held:* Such evidence was admissible to show that the sidewalk was not dangerous. Kansier v. City of Billings, 184 Pac. 630 (Mont. 1919).

Evidence of prior accidents is by the great weight of authority admissible, because such evidence raises a strong presumption that the place in question is not reasonably safe. It must be shown, however, that such accidents occurred within a reasonable time prior to the accident complained of, and under the same conditions. It is then admissible as tending to show the existence of a defect or a dangerous condition, and the possibility or probability that the injury complained of resulted therefrom. The following cases illustrate this doctrine: a slippery and defective sidewalk, Madison Township v. Scott, 9 Kan. App. 871, 61 Pac. 967 (1900); a coal hole in the middle of the sidewalk, City of Chicago v. Jarvis, 226 Ill. 614, 80 N. E. 1079 (1907); a water box which projected two inches above the surface of the sidewalk, City of Covington v. Visse, 158 Ken. 134, 164 S. W. 332 (1914); but a similar accident ten years previously is clearly incompetent to show the dangerous condition of a footpath, because of the lapse of time and the different circumstances, Van Buren v. The Town of Bethlehem, 178 App. Div. N. Y. 254, 164 N. Y. S. 964 (1917). Unless the facts regarding the falls of other persons at the same spot are shown to approximately correspond with the fall in question as to time and other important conditions, they are inadmissible, Perrine v. Southern Co., 66 So. 705 (Ala. 1914).

On the other hand, in regard to evidence that no previous accidents had ever happened, there is a conflict of authority, with the majority opinion against the decision in the principal case. People may use an unsafe place for a long time without an accident; and therefore the fact that accidents have not happened is of very little probative value in determining whether the place actually was dangerous. In some of the cases which rejected this negative form of evidence, the conditions were not shown to be similar and therefore the evidence was excluded. Temperance Hall v. Giles, 33 N. J. L. 264 (1869); Canney v.

Rochester Assn., 76 N. H. 60, 79 Atl. 517 (1911); Smith v. Milford, 89 Conn. 24, 92 Atl. 675 (1914). And of course those courts which do not allow the plaintiff to prove prior accidents, apply the converse of the rule, Kidder v. The Inhabitants of Dunstable, 77 Mass. 342 (1858). Other courts, although they allow the plaintiff to show previous accidents, if properly connected as to time and place, absolutely refuse to allow the defendant to introduce negative evidence. Their reason is that such testimony would introduce numerous collateral issues into the case, bearing only remotely on the main issue, which would tend greatly to protract the trial. Anderson v. Taft, 20 R. I. 362, 39 Atl. 191 (1898); Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22 (1905). In Bauer v. City of Indianapolis, 99 Ind. 56 (1884) the court clearly brought out one of the underlying reasons for the majority point of view when it said, "If the place was actually dangerous, then the fact that others had used it and escaped unhurt would not relieve the city from liability." The fact that people have used the place in question without injury is of little probative value in determining its dangerous character, but is merely persuasive evidence for the jury that the place is a safe one.

The minority view supporting the principal case is sustained by the following authorities: Fulton Engine Works v. Kimball Township, 52 Mich. 146, 17 N. W. 733 (1883); East Tennessee Co. v. Thompson, 94 Ala. 636, 10 So. 280 (1891); Butler v. Village of Oxford, 186 N. Y. 444, 79 N. E. 712 (1906).

FORGERY—FILLING IN UNAUTHORIZED AMOUNT IN BLANK CHECK—ACT OF AGENT.—The prosecuting witness gave the defendant a signed blank check with authority to fill it in for any amount not exceeding $40. The defendant procured an innocent agent, a bank clerk who believed the defendant was properly authorized, to fill in the check for $1262. *Held:* The defendant was guilty of forgery. Duncan v. State, 215 S. W. 853 (Tex. 1919).

Forgery is defined in the common law as "the fraudulent making or alteration of a writing, to the prejudice of another's rights." 4 Bl. Comm. 247. It has been held in many cases that filling in blanks in documents which are otherwise authentic, with the intent to defraud the maker or others by making the instrument different from what was intended, is included within the terms "making or alteration." Regina v. Wilson, 2 Car. & K. 527 (1847); State v. Kroeger, 47 Mo. 552 (1871); Commonwealth v. Pioso, 17 Pa. Super. Ct. 45 (1901); though it seems doubtful whether in the strict interpretation of language it is either making or altering the check to fill in the amount, when the space was left blank for that purpose, even though an unauthorized amount was filled in.

In an action on a promissory note, Abbott v. Rose, 62 Me. 194 (1873), it was held not to be forgery to fill in blanks in a paper which the defendant had signed without reading, and that therefore the note was good; but the decision turned largely on the rights of an innocent holder against a grossly careless maker, and the criminal guilt of the person who perpetrated the fraud was not directly involved. *Accord:* Putnam v. Sullivan, 4 Mass. 45 (1808).

In the more common class of case, where there has been an actual changing of the instrument, with no authority to add anything to it, as by increasing the amount of a bill or note, State v. Schwartz, 64 Wis. 432, 25 N. W. 417 (1885); Lawless v. State, 114 Wis. 189, 89 N. W. 891 (1902); changing the date of a paper, State v. Kattlemann, 35 Mo. 105 (1864); State v. Maxwell, 47 Iowa 454

(1877); or changing a receipt from an acknowledgment of part payment to an acknowledgment of payment in full, State v. Floyd, 5 Strobh. 58 (S. C. 1850), the defendant has been uniformly held guilty, under the strict wording of the common law definition. The tendency of the courts is to make the scope of forgery as wide as possible, to cover every possible form of fraudulent tampering with written instruments; and there is no practical reason for any distinction between these cases where the writing was physically changed, and the principal case where the wrong amount was fraudulently written in the first place.

As to the fact that the amount was filled in by the bank clerk and not by the defendant himself, it has been held, in accordance with the general principles of criminal law, that one who procures an innocent agent to do the actual writing of the forged instrument is guilty of forgery as a principal. Reg. v. Clifford, 2 Car. & K. 202 (1845); Gregory v. State, 26 Ohio 510 (1875).

INSURANCE—DEATH OF INSURED THROUGH CRIME OF BENEFICIARY—MURDER BY HEIR.—A woman killed her husband, was convicted of murder and sentenced to the penitentiary for life. She was both the statutory heir of her victim and the beneficiary of his life insurance policy. The administrator sought to recover on the policy. *Held:* He can not recover, since his recovery would allow the guilty beneficiary to have the insurance money. Johnston v. Metropolitan Life Insurance Co., 100 S. E. W. 865 (W. Va. 1919).

In order to prevent the criminal from profiting by his crime, the courts will read into a contract of life insurance an excepted risk acting against the beneficiary who murders the insured. Neither he nor his assignees can recover. Schmidt, Adm. v. The Northern Life Assoc., 112 Ia. 41, 83 N. W. 800 (1900); New York Montreal Life Ins. Co. v. Armstrong, 117 U. S. 591, (1886). With the felon deprived of the benefit of his crime, public policy pauses —the insurers are still liable and must pay the fund to the estate of the deceased. Cleaver v. Mutual Reserve Fund Life Assoc., L. R. 1 Q. B. 1892; Supreme Lodge etc. v. Menkhausen, 209 Ill. 277, 70 N. E. 567 (1904).

In the absence of a statutory exclusion, an heir or legatee inherits property from the intestate or testator whom he has murdered. This practice, apparently so opposed to the moral sense, is based on the refusal of courts to go beyond the imperative terms of a statute or to add to the punishments provided for crime. Owens v. Owens, 100 N. C. 240, 6 S. E. 794 (1888); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894). It has, however, been held that it was not the intention of the legislature in passing laws as to the general devolution of property to benefit such a wrong-doer. Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889). In Pennsylvania recent statutes have excluded him. Sec. 23, Intestate Act, 1917, P. L. 429; Sec. 22 Wills Act, 1917, P. L. 403.

In the main case, therefore, the court has authority for these propositions: (1) The murderer forfeits his right as beneficiary of the murdered man's policy; (2) the fund goes to the estate; (3) the estate goes to the heir even though the heir has murdered the intestate. If the court had determined to cling to the second and third propositions it would have had to shut its eyes to the first, as the murderous beneficiary would receive the estate and with it the insurance money. The decision rests on the first proposition and under the attendant circumstances denies the validity of the second and third. The court's main reliance is on McDonald v. Montreal Life Ins. Co., 178 Ia. 863, 160 N. W. 289

(1916). There is little justification for this reliance as in Iowa by statute a murderer is not entitled to inherit from his victim, whereas in West Virginia there is no such statutory exclusion. Professor James Barr Ames suggests that, in a case such as this, the murderer should be considered a constructive trustee not only of the estate but of the insurance money for the benefit of the murdered man's heirs, excluding the murderer. 45 American Law Register 225. This would be based on the equitable principle that one who acquires title by unconscionable means cannot keep it but holds it as constructive trustee for the injured party or his representatives.

INTOXICATING LIQUORS—SALE OF ALCOHOLIC FLAVORING EXTRACTS.—A grocer sold flavoring extracts, containing from thirty to ninety per cent. alcohol, which were manufactured for culinary uses. He knew that they were to be used for beverage purposes. The State brought proceedings to enjoin his business as unlawful. *Held:* The injunction should be granted, because the use for which the extracts were manufactured was immaterial, if, as a matter of fact, they were potable and contained alcohol in measurable proportions; and they were intoxicating liquors because they contained alcohol, even though they were not proven capable of producing intoxication. State ex rel. Zipse v. Klein et al. 174 N. W. 481 (Iowa 1919).

The illegal sale of intoxicating liquor is a public nuisance which a court of equity may enjoin at the instance of the State. Dispensary Commission of Lee County v. Hooper, 128 Ga. 99, 56 S. E. 997 (1907); Hammond v. King, 137 Iowa 548, 114 N. W. 1062 (1908).

The sale of medicines, toilet or culinary articles, which are popularly known as such, and whose formulae are on record at the United States dispensatory, was originally held not to be within the purview of liquor laws. Intoxicating Liquor Cases; 25 Kan. 751, 766 (1881); Mason v. State, 1 Ga. App. 534, 58 S. E. 139 (1907). Later cases disregard the dispensatory formula test, if the articles are in fact potable and are often used as a beverage. Arbuthnot v. State, 56 Tex. Crim. 517, 120 S. W. 478 (1909); State v. Miller, 92 Kan. 994, 142 Pac. 979 (1914). If these articles are intentionally sold for uses as a beverage, or the seller has reason to believe they will be so used, they acquire the status of a beverage under the liquor laws by the *mala fides* of the sale. King v. State, 58 Miss. 737 (1881); Carl v. State, 87 Ala. 17 (1888); State v. Costa, 78 Vt. 198, 62 Atl. 38 (1905); Marks v. State, 159 Ala. 71, 86, 48 So. 864 (1909); State v. Agalos, 107 Atl. 314 (N. H. 1919). They are, "by the acts of the parties given a status with intoxicating liquors." State v. Kezer, 74 Vt. 50, 52 Atl. 116 (1901).

The court in the principal case could have decided it upon the above mentioned rule, for the seller knew that the extracts were to be used as a beverage. However, they declare the test not to be the bad faith of the seller, but the mere fact that the article is potable and that it contains alcohol. Such a test has been applied in the same jurisdiction in the case of a medicine. McNeil v. Horan, 153 Iowa 630, 133 N. W. 1070 (1912). If carried to its logical conclusion it would render the bona fide sale of many useful articles of this class illegal, no matter what the intent of the seller nor how innocent the use. For this reason such a test is too broad. However, it has never been applied to a case in which the article has not in fact been sold for use as a beverage.

As to the necessity of proving the intoxicating qualities of a beverage there is a distinct split arising from fundamental difference in opinion as to the purpose of liquor laws. Some authorities conceive that purpose to be the immediate prevention of intemperance and require proof of the fact of the beverage's capability to intoxicate. Kincaid v. State, 49 Tex. Crim. 303, 92 S. W. 415 (1906); Roberts v. State, 4 Ga. App. 207, 60 S. E. 1082 (1908); Moss v. State, 4 Okl. Crim. 247, 111 Pac. 950 (1910); State v. Miller, *supra;* U. S. v. Ranier Brewing Co., 259 Fed. 359 (1919).

Others, holding the more radical view, conceive the purpose to be the ultimate prevention of intemperance by the entire prohibition of beverages containing any intoxicants, so that no one may unconsciously acquire a taste for them. They require merely that the beverage contain intoxicants, notwithstanding that drinking it could not produce intoxication. State v. Intoxicating Liquors, 76 Iowa 243 (1888); Bradshaw v. State, 76 Ark. 562, 89 S. W. 1051 (1905); State v. York, 74 N. H. 125, 65 Atl. 685 (1907); State v. Burke, 234 Mo. 574, 137 S. W. 969 (1911); McLean v. People, 180 Pac. 676 (Col. 1919). The court in the principal case, following this view, declares that the mere fact that the extracts contained alcohol, which Sec. 2382 of the Iowa Code (1913) defines as an intoxicating liquor, makes the sale of them illegal, although they be not sold in sufficient quantities to intoxicate.

LANDLORD AND TENANT—COVENANT TO REPAIR—LIABILITY TO EMPLOYEE OF TENANT.—A lessor covenanted with his lessee to heat the leased premises. An employee of the lessee sued the lessor in tort for illness incurred through the lessor's breach of covenant. *Held:* Employee could recover. Hinsman v. Western Union Telegraph Co., 174 N. W. 434 (Minn. 1919).

Generally the rights of an employee of a lesee against the lessor are no greater than those of the lessee. Dalton v. Gibson, 192 Mass. 1, 77 N. E. 1035 (1906). It is well settled that in the absence of a covenant to repair there can be no recovery against the lessor. Mills v. Swanton, 222 Mass. 557, 111 N. E. 384 (1916); 34 L. R. A. 825, note; except where the lessor has been guilty of concealing the defects which caused the injury. Willcox v. Hines, 100 Tenn. 524, 45 S. W. 781 (1898). But where there is no concealment on the part of the lessor the doctrine of *caveat emptor* applies, and though the premises are let in a ruinous condition, the lessee cannot recover, for by leasing the premises there is an assumption of risk; and any one coming on the premises at his invitation has no greater rights against the lessor than has the lessee. Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767 (1875). However, a stranger has been allowed to recover where the injury was the result of the defective condition of the premises, on the ground that it would avoid circuity of action. Payne v. Rogers, 2 H. Bl. 351 (Eng. 1794); Boyce v. Tallerman, 183 Ill. 115, 55 N. E. 703 (1899). But this theory has been questioned by many authorities. Tiffany: Landlord and Tenant, 701, 92 Am. St. R. 506, note.

Where the injury is the result of a defect in the premises arising after they have been leased, the great weight of authority holds that the lessee cannot recover in a tort action; Dustin v. Curtis, 74 N. H. 266, 67 Atl. 220 (1907); Dancy v. Walz, 112 App. Div. 355, 98 N. Y. S. 407 (1906); L. R. A. 1916 F, note; since a breach of contract is not the basis for a tort action. 11 L. R. A. (N. S.) 506, note. However some cases hold that such an action may be main-

tained on the theory that a negligent failure to repair is the basis for a tort action, Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289 (1905); Lowe v. O'Brien, 77 Wash. 677, 138 Pac. 295 (1914), and on the theory that when the necessity for repairs has been reported to the landlord the assumption of risk is suspended. Graff v. Lemp Brew. Co., 130 Mo. App. 618, 109 S. W. 1044 (1908).

The doctrine of the principal case cannot be sustained on logical grounds. It appears rather to be an anomalous growth resulting from the dictum in Payne v. Rogers, *supra*, and the failure of many of the courts to distinguish between actions *ex contractu* and actions *ex delicto*.

PRINCIPAL AND AGENT—SHERIFF AS AGENT OF PLAINTIFF IN COMMITTING ASSAULT.—A instituted replevin proceedings to obtain possession of property covered by a chattel mortgage, which was being foreclosed. He gave a duly issued writ to the sheriff of Beltami County, who went into Itasco County to serve process on B, the possessor of the mortgaged property; and in so doing, assaulted B. *Held:* A is liable as principal for the acts of the sheriff, for the latter outside his territorial jurisdiction acts not as an officer, but as a private citizen. Daigle v. Summit Mercantile Co. et al., 174 N. W. 830 (Minn. 1919).

In order to prevent the oppression and irregularities which would result from the service of process by interested parties, statutes provide for a sheriff, a neutral, unbiased third party, who is answerable to the courts and liable personally for his abuses. One of his duties is to serve valid process. When a person sues out process from a competent court, he is responsible only for the validity of the process and for his good faith in suing it out. He is entitled to presume that the officer serving it will not abuse his functions, and he is not liable for the latter's acts in excess of his official authority; Adams v. Freeman, 9 Johns 117 (N. Y. 1812); Sutherland v. Ingalls, 63 Mich. 620 (1886); unless he gives specific instruction to the officer, or is personally present; Murray v. Mace, 41 Neb. 60 (1894); Bradshaw v. Frazier, 113 Iowa 579, 85 N. W. 752 (1901); Gonsouland v. Rosomano, 176 Fed. 481 (1910); James v. Graham, 78 S. E. 82 (1913); or unless he subsequently ratifies and adopts the unlawful acts. People's Building & Loan Ass'n v. McElroy, 79 Ill. App. 266 (1898).

Though the plaintiff in a suit may not serve process himself, Snydacker v. Brosse, 51 Ill. 357 (1869); Rutherford v. Moody, 59 Ark. 328, 27 S. W. 230 (1894), statutes to that effect have been held not to preclude an agent serving process for him. First National Bank v. Estenson, 68 Minn. 28, 70 N. W. 775 (1885); Plano Mfg. Co. v. Murphy, 16 S. D. 380, 92 N. W. 1072 (1902). A sheriff serving process beyond his territorial jurisdiction has no more authority than a private citizen. Shirley v. State, 100 Miss. 799, 57 So. 221 (1911). It would seem, therefore, that there is nothing to prevent a sheriff serving process outside his territorial jurisdiction as agent for the plaintiff in the writ; but in such case he would act in the capacity of a private citizen.

The problem presented by the principal case is new to the law; and upon the evidence, it is difficult to justify the finding that there is an implied agency. If A had known that B and the mortgaged property were outside Beltami County, it could have been conclusively presumed that he knew as a matter of law that the sheriff of that county could only serve the process as a private citizen. Under those circumstances, an implied authority to serve the process as his agent might have been a fair inference from his act of giving the sheriff the writ. But

there was no evidence of A's knowledge of such a fact. To charge him with such knowledge as a matter of law would be contrary to the principle laid down in Sutherland v. Ingalls, *supra*, and would place an unreasonable burden upon him. To presume knowledge of this fact; then to presume he knew that its legal consequence was to give the sheriff the status of a mere private citizen; and, in addition, to infer the giving of an authority to serve process for him, is to place presumption upon presumption contrary to the policy of the law.

In the absence of evidence that A knew that B and the mortgaged property were not in Beltami County, it is difficult to justify the finding in the principal case that there was an implied agency. It is still a question whether A's knowledge would be sufficient, since the cases cited above require such positive acts as instructions, personal presence or ratification to establish the liability of the plaintiff in the writ.

WILLS—BEQUEST FOR MASSES—"SUPERSTITIOUS USES."—Testator left bequests to cathedral and to Jesuit fathers for masses. *Held:* The bequests were valid, and were not for superstitious uses. Bourne v. Keane, 121 Law Times 426 (Eng. 1919).

The House of Lords, in reversing the decision of the Court of Appeal and holding a bequest for masses valid in England, has upset a series of cases in which such bequests were held void as "superstitious uses." The basis of the earlier view was in the Chantries Act of 1547 (1 Edw. VI, c. 14), of which the preamble declared masses to be superstitious and the enacting clause forfeited chantries, chapels and such to the crown. The series of recent cases, here declared wrongly decided, are those beginning with West v. Shuttleworth, 2 My. & K. 684 (Eng. 1835), which held a bequest for masses to be a superstitious use even after the passage of the Roman Catholic Relief Act of 1829 and the Roman Catholic Charities Act of 1832.

The view taken by the House of Lords in this case is that "the substratum of the decisions which held such uses and trusts invalid perished as a consequence of the passing of the Catholic Relief Act of 1829," and that therefore the principle *cessante ratione legis cessat lex ipsa* applied.

England alone of those countries to which the common law applies, has until now considered gifts for masses as superstitious uses. Such bequests have long been held valid in Ireland; Commissioner v. Walsh, 7 Ir. Eq. Rep. 34 (1823); Reichenbach v. Quin, Ir. L. R. 21 Eq. 138 (1888). Similar decisions have been reached in Canada, Elmsley v. Madden, 18 Grant's Ch. Rep. 386, (1871); in Australia, Nelan v. Downes, 23 C. L. Rep. 546, (1917); and in New Zealand, Carrington v. Redwood, 30 N. Z. L. Rep. 244, (1911).

The doctrine of superstitious uses has been universally disapproved in the United States; Schouler, Petitioner, 134 Mass. 426 (1883); Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305 (1888); Harrison v. Brophy, 59 Kans. 1, 51 Pac. 883, 40 L. R. A. 721 (1898); Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730 (1898).

Bequests for masses have usually been upheld in the United States as being for such religious or pious uses that they will be classed as public charities. Schouler, Petitioner, *supra;* Hoeffer v. Clogan, *supra;* Seibert's Appeal, 18 W. N. C. (Pa.) 276, 6 Atl. 105 (1886). Some jurisdictions have refused to support their validity as charitable trusts, because not for the benefit of the public

as a whole or for a general religious purpose. Festorazzi v. St. Joseph Catholic Church, 104 Ala. 327, 18 So. 394 (1894); In re Lennon, 152 Calif. 327, 92 Pac. 870 (1907). In jurisdictions which do not recognize the doctrine of charitable uses, bequests for masses are held invalid through lack of a beneficiary who could enforce the performance of the trust. Holland v. Alcock, *supra;* McHugh v. McCole, 97 Wis. 166, 72 N. W. 631 (1897).

The decision of the House of Lords in the principal case must be commended. To declare the principal rite of a great church a "superstitious use" in an enlightened country like England is an anachronism which not even a series of weighty decisions should support.

WORKMAN'S COMPENSATION—DEATH BY UNEXPLAINED GUN SHOT—BURDEN OF PROOF.—An engine hostler was found dead from a bullet wound. It was not discovered who fired the shot nor why it was fired. His widow seeks to recover under the Workman's Compensation Act. *Held:* The burden was upon the employer to prove the shot was fired by a third party intending to injure the employee because of reasons personal to him. Keyes v. New York, Ontario & Western Ry. Co., 256 Pa. 105, 108 Atl. 406 (1919).

An accident arising out of the employment is one where there is "a casual connection between the conditions under which the work is required to be performed and the resulting injury." McNichol's Case, 215 Mass. 497, 102 N. E. 697 (1913). An injury resu ting from an assault upon an employee by a third person for reasons personal to him, and not directed against him as an employee or because of his employment, has been held not to arise out of the employment. Walther v. American Paper Co., 89 N. J. L. 732, 99 Atl. 263 (1916); State v. District Court of Itasco County, 140 Minn. 470, 168 N. W. 555 (1918). Likewise a wound from a shot accidentally fired by a fellow workman does not arise out of the employment. Ward v. Indus. Acc. Com., 175 Cal. 42, 164 Pac. 1123 (1917).

An accident which happens "while the workman is doing the duty he is employed to perform" is one in the course of the employment. McNichol's Case, *supra.* An accident by injury from an assault for personal reasons has been held to be in the course of the employment. In re Schwenlein, 1 Bulletin of Ohio Indus. Com., 136; dictum in Metropolitan Redwood Lumber Co. v. Indus. Acc. Com., 182 Pac. 315 (Cal. App. 1919).

Under Acts containing both the phrases "arising out of" and "in the course of" the employment, the employee, to bring his case within the Act, must prove that the accident arose out of the employment. He must, therefore, prove that the assault was directed against him as an employee, or because of his employment, in order to establish such a causal connection between his employment and the injury that the accident may be classified as "arising out of" the employment. Bateman v. Albion Combing Co., 7 Butterworth's W. C. C. 47 (Eng. 1914); Schmoll v. Weisbrod & Hess Brewing Co., 89 N. J. L. 150, 97 Atl. 723 (1916); Ohio Bldg. Vault Co. v. Indus. Board, 277 Ill. 96, 115 N. E. 149 (1917).

The decision in the principal case is contrary to all prior decisions on this point. The reason for this difference is the broader scope of the Pennsylvania Act, which omits the phrase "arising out of the employment." It gives compensation for an "injury by an accident in the course of his employment" and

subsequently provides that this term "shall not include an injury caused by an act of a third party intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment." Art. III, sec. 301, Act of June 2, 1915, P. L. 736. An injury from an assault for personal reasons being one in the course of the employment, the exclusion of such an accident from the operation of the Act is not an interpretation of the phrase "in the course of his employment," but rather an exception to it. Black on Interpretation of Laws, Sec. 127. Such an exception need not be negatived by the plaintiff in his pleadings, but must be pleaded and proved by the defendant as a matter of defense. Brinkley v. Jackson, 2 Houston 71 (Del. 1859); Grand Trunk Ry. Co. v. U. S., 229 Fed. 116 (1916). In the principal case, therefore, the burden of proving this exception was correctly placed upon the defendant.