## RECENT CASES.

BILLS AND NOTES—OMISSION OF DRAWEE—HOLDER IN DUE COURSE.—In a suit upon two bills of exchange, by an indorsee against the acceptor, the instruments, when put in evidence, revealed that the space for the drawee's name had been left blank. *Held:* The plaintiff was not a holder in due course, under the N. I. L., and the instruments were subject to the defense that the acceptance had been procured by fraud. *Clay and Funkhouser Banking Co. v. Dobyns*, 255 S. W. 946 (Mo. 1923).

At the common law there was some difference of opinion as to the effect of an instrument, in form a bill, which contained no drawee. Some courts held that, as the instrument was not addressed to any one, the drawer must be taken to have assumed the obligation himself, and was liable on the instrument as a note. Almy v. Winslow, 126 Mass. 342 (1879); Funk v. Babbitt, 156 Ill. 408 (1895). The same result has been reached in one case under the N. I. L. Didato v. Coniglio, 100 N. Y. Supp. 466 (1906).

The better view, however, was that the drawer could not be held liable on the instrument as a note, because there was no promise by him to pay. Forward v. Thompson, 12 U. C. Q. B. 103 (1854); Watrous v. Halbrook, 39 Tex. 573 (1873). Under the N. I. L. it has been held the instrument is not a note. Lehner v. Roth, 227 S. W. 833 (Mo. 1921).

After an instrument incomplete for lack of a drawee is accepted, it has been held that this is an admission by the acceptor that he was the person intended, and supplied the omission so that the instrument became a good bill. Gray v. Milner, 8 Taunt. 739 (1819); Wheeler v. Webster, 1 E. D. Smith 1 (N. Y. 1850). The preferable view, however, was that the acceptance would not make the instrument a bill, but that the acceptor became the obligor of a promissory note. Peto v. Reynolds, 9 Ex. 410 (1854); Watrous v. Halbrook, *supra;* Bliss v. Burnes, McCahon 91 (Kan. 1860).

Under the N. I. L. (sec. 52, paragraph 1) a holder in due course is one who has taken the instrument "complete and regular upon its face." Where the instrument is incomplete in any essential particular, the person taking it cannot acquire the character of a holder in due course. Hunter v. Allen, 127 N. Y. App. Div. 572 (1908); *In re* Estate of Phibpott, 169 Iowa 555 (1915). It would seem, therefore, that the plaintiff in the principal case was not a holder in due course of a bill of exchange, and that the court was correct in its decision.

It is submitted, however, that had the plaintiff declared upon the instruments as promissory notes, he would have been entitled to recover. By accepting the instrument, the defendant promised to pay the amount indicated unconditionally. The instrument, thereupon, became a "regular and complete" promissory note, as defined in section 184 of the N. I. L., and the plaintiff in the instant case was a holder in due course of such note.

CHARITABLE INSTITUTIONS—HOSPITALS' LIABILITY TO PAYING PATIENTS.—Plaintiff, a paying patient, was burned by a hot-water bottle negligently put in her bed by a hospital orderly. In an action against the hospital, the latter's defense was based on its immunity as a charitable organization. *Held:*

No recovery. *Phillips v. Buffalo General Hospital*, 202 N. Y. Sup. 572 (1924).

In New York surgeons and nurses have been held independent contracting parties and not servants of the hospital at all, the language there being broad enough to include an orderly doing something of this kind for the nurse. Schloendorg v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92 (1914). The instant case, however, seems to assume the relationship between the parties and discusses the liability of the hospital as principal.

The immunity of charitable institutions from liability for the negligence of their servants is recognized in almost all jurisdictions. Some jurisdictions allow no plaintiffs to recover, regardless of the degree or form of the negligence of the defendant. Fire Insurance Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553 (1888); Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453 (1907); Roosen v. Brigham Hospital, 235 Mass. 66, 126 N. E. 392 (1920). See Glavin v. Hospital, 12 R. I. 411 (1897), *contra*. But the more general rule is that a hospital is liable in all cases except those based on the negligence of an apparently competent servant. This exemption applies only to actions brought by patients. Horden v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910); St. Paul's Sanitarium v. Williamson, 164 S. W. 36 (Tex. Civ. App., 1914). Taylor v. Flower Home, 104 Oh. St. 61, 135 N. E. 287 (1922).

Although this immunity is generally admitted, the reasons given vary exceedingly and are not entirely satisfactory. For a discussion of them, see 19 MICH. L. R. 395 (1921); Tucker v. Mobile Infirmary, 191 Ala. 572, 68 So. 4 (1915); Weston v. Hospital of St. Vincent de Paul, 131 Va. 587, 107 S. E. 785 (1921). The more usual explanation given in recent cases is that it does not lie in the mouth of the beneficiary of the hospital's charity to attack it for the negligence of its servants. Adams v. University Hospital, *supra;* Schloendorff v. New York Hospital, *supra;* Weston v. Hospital, *supra*. A leading case likens the hospital to the good Samaritan, Powers v. Massachusetts Homœopathic Hospital, 109 Fed. 294, 47 C. C. A. 122 (1901). Yet the hospital is held liable to a patient for negligence in the selection of its nurses and surgeons. Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807 (1914); Taylor v. Flower Home, *supra*.

Under this theory the question arises as to the hospital's liability to a paying patient. A hospital run for a profit will be responsible for injuries to a patient resulting from the negligence of its servants. University of Louisville v. Hammock, 127 Ky. 564, 106 S. W. 219 (1907); Stewart v. California Medical Ass'n, 178 Cal. 418, 176 Pac. 46 (1918); Malcom v. Lutheran Hospital, 107 Neb. 101, 185 N. W. 350 (1921). So also will a hospital not run for profit, where the patient pays the full price, according to a few cases. Tucker v. Mobile Infirmary, *supra;* Morton v. Savannah Hospital, 148 Ga. 438, 96 S. E. 887 (1918). Mullinger v. Evangelischer Diakoniessenverein, 144 Minn. 392, 175 N. W. 699 (1920). See 18 MICH. L. REV. 539 (1920). The great majority, however, have held as the instant case holds, and treat him as the recipient of charity, and do not permit him to recover. Burdell v. St. Luke's Hospital, 37 Cal. App. 310, 173 Pac. 1008

(1918); Mikota v. Sisters of Mercy, 183 Iowa 1278, 168 N. W. 219 (1918); Weston v. Hospital, *supra*. In these cases the feeling is that the plaintiff, though paying the highest price asked, is still receiving more than he pays for, and therefore should not be allowed to hold the hospital, even as to funds received from other patients. See Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087 (1910). In the language of Cardozo, J., "Such a payment is regarded as a contribution to the income of the hospital, to be devoted, like its other funds to the maintenance of the charity."

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS.—The Supreme Court of Iowa held that certain contracts were avoided by a statute, whereas, the court had previously decided that such contracts were valid under the same statute. It was assigned as error that on the faith of the latter ruling, certain contracts had been entered into, and the new construction of the statute was an impairment of the contracts in violation of the provisions of the Federal Constitution. *Held:* Writ of error dismissed. *Fleming v. Fleming*, United States Supreme Court, No. 175, October Term, 1923.

It has been settled by a long line of decisions that the provision of Section 10, Article 1, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgment of courts. A literal construction of the provision—"No state shall . . . pass any . . . law impairing the obligation of contracts,"—plainly warrants such a conclusion. R. R. Co. v. McClure, 10 Wall. 511 (1870); Kryger v. Wilson, 242 U. S. 171 (1916); Columbia Ry. v. South Carolina, 261 U. S. 236 (1923). As is pointed out by the court in the principal case, the effect of the subsequent decision by the state court is not to make a new law but only to hold that the law always meant what the court now says it means.

Aside from the above question as to the impairment of the obligation of contracts, another problem arises. A distinction is drawn by the Supreme Court between those cases coming to it by writ of error to the supreme court of a state, and those in which the cause comes before the Federal courts because of diversity of citizenship, and thence by appeal to the Supreme Court. In the latter class of cases the Federal courts, under the powers granted by the third Article of the Constitution, hold themselves free to decide which, if any, of the decisions of the state courts dealing with the state laws they will follow. Gelpcke v. Dubuque, 1 Wall. 175 (1863); Burgess v. Seligman, 107 U. S. 20 (1882); Great Southern Hotel Company v. Jones, 193 U. S. 532 (1903). It is generally stated that it is the duty of the Federal court in exercising its independent judgment to lean to an agreement with the state court; but where a state court has reversed its ruling as to a state law, the Federal court, to avoid injustice, will not usually follow the later decision, when to do so will make it necessary to impair the contracts (though the clause as to impairment is not involved) entered into prior to the second decision. German Savings Bank v. Franklin Co., 128 U. S. 526 (1888); Los Angeles v. Los Angeles Water Co., 177 U. S. 558 (1899).

In cases where a writ of error is directed to a state court, the only ground of Federal jurisdiction is the alleged violation of a right guaranteed by the Federal Constitution. In such cases the Supreme Court follows the last decision of the state supreme court as to what the law of that state is; but, as set forth in the principal case, the mere decision of a court has never been held to have the effect of a legislative act. Muhlker v. N. Y. R. R. Co., 197 U. S. 544 (1904); Tidal Oil Co. v. Flanagan, U. S. Supreme Court, No. 179, October Term, 1923; but see McCullough v. Va., 172 U. S. 102 (1898).

ASSIGNMENT—CONTRACTS—PRIORITY OF SUCCESSIVE ASSIGNEES.—The A Co. assigned to X an indebtedness due it from the B Co. Later the A Co. assigned the same debt to Y, who made no inquiries of the B Co. Y first gave notice to the B Co. *Held:* X has priority. *Salem Trust Co. v. Manufacturers' Finance Co.*, U. S. Sup. Ct., No. 74, October Term, 1923. Decided Feb. 18, 1924.

There is a direct conflict of authority on the question whether, as between successive assignees of the same debt who took in good faith, prior notice to the debtor of the later assignment subordinates the rights of the earlier to those of the later assignee. The English rule is well settled that whichever of several assignees first gives notice has priority on the ground that the assignee must do all he can to take possession (through analogy to sales by vendor remaining in possession) and if he does not give notice, the assignor is thereby enabled to defraud a subsequent purchaser. Foster v. Cockerell, 3 Cl. and F. 456 (1835); Ward v. Duncombe, L. R. 3 A. C. 369 (1893).

The English rule is followed in many jurisdictions in the United States. Phillips' Estate, 205 Pa. 515, 55 Atl. 213 (1903); Jenkinson v. N. Y. Finance Co., 79 N. J. Eq. 247, 82 Atl. 36 (1911); and prior to the principal case was often stated to be the Federal rule; 1 Williston, Contracts, sec. 435; Metheven v. S. I. Light Co., 66 Fed. 113, 13 C. C. A. 362 (1895). Just as many American jurisdictions, however, follow a contrary rule on grounds that the assignor has no title left to pass to any subsequent purchaser. Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 62 N. E. 287 (1901); Herman v. Conn. Mut. Life Ins. Co., 218 Mass. 181, 105 N. E. 450. Even under this latter theory the subsequent assignee will be protected if in good faith he obtains payment; Bridge v. Conn. Co., 152 Mass. 343, 25 N. E. 612 (1890); reduces his claim to judgment; Judson v. Corcoran, 17 How 612 (U. S. 1854); effects a novation with the debtor; N. Y. Co. v. Schuyler, 34 N. Y. 30 (1865); obtains the document containing the obligation in the case of a specialty; Fisher v. Knox, 13 Pa. 622 (1850); first complies with statutes requiring recording; Whitcomb v. Waterville, 99 Me. 75. 58 A 68 (1904); holds by an assignment which alone conforms to stipulations in the contract; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572 (1895); or if any circumstances create an equitable estoppel against the prior assignee. Rabinowitz v. Peoples' Nat. Bank, 235 Mass. 102, 105 N. E. 450 (1920).

The court in the principal case seems to prefer the reasoning of the Massachusetts and New York rule, but points out that, even assuming the reason-

ing of the English rule, the purchaser here was not injured through the fact that the prior assignee gave no notice, since no inquiries were made of the debtor.

CONTRACTS—CONSTRUCTION CONTRACTS—COST OF COMPLETION.—Defendant city contracted with plaintiff to build a bridge. The contract provided that on abandonment the city might "secure a completion of the work . . . and charge the cost to the contractor . . . which expense shall be deducted from any moneys due the contractor under this contract." The contractor ceased work in January, 1918, when the bridge structure and false work had been completed, but the concrete had not been poured. There was an ice gorge above the bridge, and grave danger that unless the concrete was poured promptly the gorge would break and so much of the structure as was then in place would be carried away. The contractor owed back wages to workmen, who refused to continue work on the bridge unless the arrears were paid. Owing to the labor scarcity of wartime, other competent labor could not be obtained. The city paid the back wages, the bridge was completed, and soon afterwards the ice gorge did break and carry away the false work, but the completed bridge was not injured. In a suit by the contractor for money due him, the city claimed the amount of back wages paid as a cost of completion. The contractor contended that this was a mere voluntary payment. *Held:* This payment was a necessary expense, chargeable to the contractor under the contract. *Hackendorn Contracting Co. v. Johnstown City*, 278 Pa. 442 (1924).

In building contracts authorizing the owner to complete the work on the contractor's default "at the contractor's expense," or to complete the work and "charge the cost to the contractor," when the contractor sues for any money due him the owner can, of course, offset the cost of completion. School Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81 (1898); Coppola v. Grande, 88 N. J. L. 324, 96 Atl. 67 (1915); Halferty v. Marsch, 252 Pa. 137, 97 Atl. 196 (1916).

The expression "cost of completion" in such contracts means "the actual amount necessarily expended . . . provided that the same is fair and reasonable." Clark v. Fleishmann, 187 N. Y. S. 807 (1921); and Cf. McArthur v. Whitney, 104 Ill. App. 570 (1902); Arndt v. Keller, 96 Wis. 274, 71 N. W. 651 (1897).

To determine what expense is reasonably necessary in completing the building is a simple question when the account includes only the amounts spent on labor and material in the actual construction, whether this be completion from where the contractor left off; Hay v. Bush, 110 La. 575, 34 So. 692 (1903); Beach v. Wakefield, 107 Iowa 567, 108 N. W. 757 (1899); Wills v. Board of Education, 78 Mich. 260, 44 N. W. 267 (1889); or a rebuilding of work already done, to conform to the contractual requirements, followed by completion. Powers v. Yonkers, 114 N. Y. 145, 21 N. E. 132 (1889).

The problem is more intricate when the money is expended on some object not so closely connected with the work of building. The following

expenses have been allowed as costs: settlement of claims for injuries done to neighboring property in blasting. Newton v. Devlin, 134 Mass. 490 (1883); premiums for employers' liability insurance; Museum v. Amer. Bonding Co., 211 Mass. 124, 97 N. E. 633 (1912); additional expense when some change in the plans becomes necessary. Rowe v. Peabody, 207 Mass. 226, 93 N. E. 604 (1911). Sums paid for surgical assistance to workmen injured during the progress of the work were not allowed as costs in Newton v. Devlin, *supra*. It has also been held that payment of the back wages of the contractor's workmen, when no necessity for this was shown, was purely voluntary as against the contractor's surety; Newton v. Devlin, *supra*. But the instant case is distinguished from this by the circumstances which made the payment necessary to complete the contract, and the decision seems not only sound in theory but also eminently just and fair.

CONTRACTS—FRUSTRATION—SUPERVENING ILLEGALITY—RECOVERY OF MONEY PAID.—An Austrian shipbuilding company sued the defendant, a Scottish company, to recover a part payment made in 1914 on a contract by the terms of which the defendant was to build marine engines for the plaintiff. The defendant's engineers prepared plans, but the engines were never built, due to the intervention of the war, the plaintiff becoming an enemy alien. *Held:* For the plaintiff. *Cantiere San Rocco Shipbuilding Co. v. Clyde Shipbuilding Co.*, (1923) Scots Law Times 624.

At early common law, impossibility of performance did not dissolve an express unconditional contract. Paradine v. Jane, Aleyn 26 (Eng. 1647). Today, courts imply a condition that subsequent performance is to be excused where a contingency intervenes which the parties themselves, when they made the contract, would have obviously regarded as terminating the obligation. See 66 U. OF PA. L. REV. 28. War is such an intervening contingency. Horlock v. Beal, L. R. 1 App. Cas. 486 (Eng., 1916); Zinc Corporation v. Hirsch, L. R. 1 K. B. 541 (Eng., 1916); Kronprinzessin Cecilie, 244 U. S. 12 (1917).

Where one party to the contract has advanced money to the other, and the latter has been prevented from performing by the intervention of the contingency, the civil law of Scotland allows a recovery of the money advanced on the ground of failure of consideration. Watson & Co. v. Shankland, 10 M. 143 (Scotland, 1871); Davis & Primrose, Ltd. v. Clyde Shipbuilding Co., 1 Scots L. T. 297 (Scotland, 1917). In England the law is *contra;* a payment previously made cannot be recovered. The contract is not rescinded *ab initio* and the *status quo* restored as nearly as is possible, but the contract remains valid and subsisting up to the moment at which impossibility supervenes. Accrued rights remain, but the parties are free from subsequent liability. Chandler v. Webster, L. R. 1 K. B. 493 (Eng., 1904); Civil Service Co-operative Society v. General Steam Navigation Co., L. R. 2 K. B. 756 (Eng., 1903).

The English decisions are based largely upon two lines of decisions which hold, first, that a payment previously made on account of freight cannot be recovered back in the event of the ships being lost which carried

the goods, and that no freight thereafter becomes payable; Allison v. Bristol Insurance Co., L. R. 1 App. Cas. 209 (Eng., 1876); and second, that there can be no recovery for uncompleted work upon property of another which has been accidentally destroyed; Appleby v. Myers, L. R. 2 C. P. 651 (Eng., 1867); neither of which is generally law in the United States. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667 (1891); the Pehr Ugland, 271 Fed. 340 (1921). *Contra:* Brumby v. v. Smith, 3 Ala. 123 (1841); Taulbee v. McCarty, 144 Ky. 199, 137 S. W. 1045 (1911). The English rule is therefore not followed in most American decisions, which are usually in accord with the principal case. See Joyce v. Adams, 8 N. Y. 291 (1853); Manhattan Life Insurance Co. v. Buck, 93 U. S. 24 (1876); Jones-Gray Construction Co. v. Stephens, 167 Ky. 765, 181 S. W. 659 (1916). Numerous American decisions, however, have in effect adopted the English rule. Bruce v. Indianapolis Gas Co., 46 Ind. App. 193, 92 N. E. 189 (1910); Cowley v. Northern Pacific Railroad, 68 Wash. 558, 123 Pac. 998 (1912); but see Louisville Railroad v. Crowe, 156 Ky. 27, 160 S. W. 759 (1913).

It is submitted that the principal case represents the better view, since it ascertains more clearly the respective rights of the parties. The English doctrine, while a rough and ready solution of a difficult problem, is obviously, in many instances, unjust. See 3 Williston, Contracts, sec. 1974.

DIVORCE—DENIED WHERE MARRIAGE WAS IN VIOLATION OF STATUTE.—A and B were husband and wife living in the District of Columbia. A obtained a divorce from B on the ground of adultery. Ch. 966 of D. of C. Laws provides that "in such case only the innocent party may remarry." Six years later, while still living in the same jurisdiction, B married C in Maryland. She then returned and continued her previous residence. B asks divorce and alimony from C on grounds of cruelty. *Held:* Bill dismissed. *Olverson v. Olverson,* 293 Fed. 1015 (1923).

The act of marrying was stated to be illegal and the court refused to recognize the marriage so as to aid B, nor would the court relieve her from the obligations thus assumed.

A litigant who bases his action on an illegal act cannot succeed, Hunter v. Wheate, 289 Fed. 604 (1923), and in equity one must have clean hands, Wilde v. Wilde, 37 Neb. 891, 56 N. W. 724 (1893). In divorce these maxims have been applied where libellant induced respondent not to defend; Lanktree v. Lanktree, 42 Cal. App. 648, 183 Pac. 954 (1919), and will probably be extended to cover the so-called "insincerity cases," where the libellant has a good action but seeks a divorce to attain some collateral end. Kirschbaum v. Kirschbaum, 92 N. J. Eq. 7, 111 Atl. 697 (1920). But Cf. Wille v. Wille, 88 N. J. Eq. 581, 103 Atl. 74 (1918). As regards the petition for alimony, the maxims were correctly applied in the principal case, provided the act actually was illegal in the District of Columbia.

Where a statute has in general terms (as above) prohibited a guilty party from remarrying, the weight of authority construes it to have no extra-territorial effect, so that the act of marrying outside the state would not be illegal. Medway v. Needham, 16 Mass. 157 (1819); State v. Shattuck, 69 Vt. 403, 38 Atl. 81 (1897); *In re* Chace, 26 R. I. 351, 58 Atl. 978

(1904). And the intent to evade the law should properly be immaterial. Van Voorhis v. Brintnall, 86 N. Y. 18 (1881). Some courts, however, regard such a statute to express a "public policy so distinctive" that they will construe it to have extra-territorial force. Pennegar v. State, 87 Tenn. 244, 10 S. W. 305 (1889). Stull's Estate, 183 Pa. 625, 39 Atl. 16 (1898). The court does not discuss this point but must follow the second view.

As regards the divorce action by itself, if the court has decided the marriage itself illegal, there would seem to be no need for a divorce in the District of Columbia. It is probable, however, that the Court regards the marriage itself a binding contract although the libellant was breaking a court order to enter it, and leaves the parties where they stand as a punishment.

INFANCY—FRAUDULENT CONCEALMENT OF AGE—ESTOPPEL—Plaintiffs, whose personal appearance and business activities were those of adults, and whom the defendant, to the knowledge of plaintiffs, believed to be such, purchased from the defendant a lease of a coal mine, paying for the same $2000. They bring this action at law to recover judgment for the amount paid on the ground that they were in fact infants at the time, and now repudiate the contract. *Held:* They are estopped to avoid the contract. *Young, et al. v. Daniel,* 255 S. W. 854 (Ky. 1923).

Although there is great diversity of opinion on the subject, the weight of authority probably is that, when the action is at law, the infant is not estopped by his false representations as to age from using his defense of infancy as a shield when his contract is sought to be enforced against him; or in disaffirming the contract and recovering the consideration paid by him. International Text Book Co. v. Connelly, 206 N. Y. 188 (1912); Leslie v. Sheill, 3 K. B. 607 (1914); Knudson v. General Motorcycle Sales Co., 230 Mass. 54, 119 N. E. 359 (1917). The reasoning on which these cases proceed is that to estop the infant would be in fact to contradict the principle of law that his contracts of this kind are voidable. Williams v. Baker, 71 Pa. 476 (1872).

There are, however, well considered cases the other way. In addition to the principal case, see Smith v. Cole, 148 Ky. 138, 146 S. W. 30 (1912), and Rosa v. Nichols, 92 N. J. L. 375, 105 Atl. 201 (1918), in which it is held the infant will not be permitted to use the advantages given him in defrauding others.

When the infant comes into equity to obtain cancellation of a deed or other equitable relief, it is generally held his misrepresentations as to age will prevent recovery for the reason that he has not come into equity with clean hands. Ostrander v. Quin, 84 Miss. 230, 36 So. 257 (1904); Levine v. Brougham, 24 T. L. R. 801 (1908); Looney v. Elkhorn Land Co., 195 Ky. 198, 242 S. W. 27 (1922). For cases holding an infant is not affected by the doctrine of equitable estoppel, see Sims v. Everhardt, 102 U. S. 313 (1890); Tobin v. Spann, 85 Ark. 556, 109 S. W. 534 (1908).

Different views are taken by the courts as to the circumstances under which the infant will be estopped. Mere silence, it is held, will not have

this effect; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411 (1897); although the infant knows the other party believes him to be of age. Baker v. Stone, 136 Mass. 405 (1884); Buchanan v. Hubbard, 96 Ind. 1 (1884). Some courts hold that nothing short of active misrepresentation as to age will estop the infant. Pemberton Bldg. Asso. v. Adams, 53 N. J. Eq. 258, 31 Atl. 280 (1895); Confederation Life Asso. v. Kinnear, 23 Ont. App. 497 (1896).

The better view, however, seems to be that positive misrepresentation is not necessary to bar the infant from relief, but that any active concealment of age, when the infant has arrived at the age of discretion, coupled with the fact that his personal appearance indicates he has reached his majority, is sufficient. Commander v. Brazile, 88 Miss. 668, 41 So. 497 (1906); Stallard v. Sutherland, 131 Va. 316, 108 S. E. 568 (1921); Lewis v. Van Cleeve, 302 Ill. 413, 134 N. E. 804 (1922).

Statutes have been passed in Kansas, Washington and Iowa preventing an infant from disaffirming a contract induced by misrepresentation as to age. 31 C. J. 1007.

It is submitted that, although the decision in the instant case goes quite far in estopping the infant in an action at law, it has, none the less, much to commend it. There seems to be no satisfactory reason why the infant should be permitted to defraud others whom he has misled, either in law or equity. In this connection the remarks of Lord Mansfield in Touch v. Parons, 3 Burr. 1794 (1765), are pertinent: "The privilege of infancy—shall protect him from fraud and oppression, but shall not be turned into an offensive weapon to assist fraud and oppression."

INJUNCTION—PROTECTION OF PERSONAL RIGHTS—HUSBAND AND WIFE.—The plaintiff, a man of highly nervous and excitable nature, had been objecting for some time to the fact that his wife's employer consorted with her. He requested the court to grant an injunction restraining the defendant from associating with his wife after office hours. *Held:* The injunction should be granted. *Witte v. Banderer,* 255 S. W. 1016 (Texas, 1923).

It is a general rule that a court of equity will only interfere by injunction when a property right is involved. Corless v. Walker Co., 57 Fed. 434 (1893); Chappel v. Stewart, 82 Md. 323, 33 Atl. 542 (1896). That there can be no injunctive relief against injury to one's feelings or for the protection of the right of privacy has been commonly declared by the courts and by the text writers on equity jurisprudence. Chappel v. Stewart, *supra;* High, Injunctions (4th ed., 1905) 34. In a considerable number of cases, however, the courts have based their jurisdiction nominally on an alleged property right, when in reality the only right involved was one of reputation or privacy. Woolsey v. Judd, 4 Duer 379 (N. Y. 1855); *ex parte* Warfield, 40 Tex. Crim. 413, 50 S. W. 933 (1899). But in Louisiana, where the civil law obtains, it has been directly asserted that an injunction may be granted to protect a purely personal right. Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).

In the instant case the Texas Court stands as an upholder of the doubtful doctrine fostered by the dissenting justices in the case of Robeson

v. Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442 (1902), where it was suggested that "where there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection."

At least it can be said that no other common law courts have successfully applied the injunctive remedy merely to preserve the peace of mind of a husband.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF EMPLOYEES.—The plaintiff while standing at the side of the street was injured by an automobile truck, the property of the city, loaded with ashes and operated by an employee of the city, the vehicle being engaged at the time in conveying the ashes from a centralization plant to one of its dumps. In an action against the city for damages, *held:* no recovery. *Scibilia v. Philadelphia,* Pa. Supreme Ct., January Term, 1924, No. 315.

The courts everywhere repeat the formula that "a city when acting in its public capacity cannot be held liable for negligence of its servants, although it is liable when it is acting in its private or proprietary capacity." Hill v. Boston, 122 Mass. 344 (1877); Kansas City v. Lemen, 57 Fed. 905 (1893); Long Beach v. Chafor, 174 Cal. 478, 163 Pac. 670 (1918). The reasons assigned for non-liability in public functions are principally that the city is a body politic established as an administrative agent of the sovereign. Dillon, Municipal Corporations, (5th ed., 1911) 59; or, as intimated in the instant case, that money appropriated for public purposes should not be paid to private individuals. Boyd v. Fire Insurance Patrol, 120 Pa. 624 (1888); O'Connell v. Merchants' and Police Telegraph, 167 Ky. 468, 180 S. W. 845 (1915). For a discussion of other reasons, and criticisms of them, see 34 HARV. L. REV. 68.

To the part of the above rule as to non-liability there are exceptions. Thus a city, though acting in its public capacity, is liable for creating a nuisance. Noonan v. City of Albany, 79 N. Y. 470 (1879); Field v. West Orange, 36 N. J. Eq. 183 (1883); Briegel v. Phila., 135 Pa. 451, 19 Atl. 1038 (1890). This exception is based on historical precedent rather than on reason. Scibilia v. Phila., *supra.* So also the city is liable where, though it acts in a public capacity, the state has required of it absolute and imperative duties. Rochester White Lead Co. v. Rochester, 3 N. Y. 463 (1850); Parmenter v. Marion, 113 Iowa 297, 85 N. W. 900 (1892); Ludlow v. Fargo, 3 N. D. 485, 57 N. W. 506 (1893).

The courts are not clear as to when the act is public or private within the meaning of the rule. It seems that where the city undertakes to act with a view to profit it acts in its private capacity. People v. Detroit, 28 Mich. 228 (1873); Hill v. Boston, *supra;* Winona v. Bolzet, 169 Fed. 321 (1909). The inference would seem to be that all other acts are public.

But where the city is fulfilling a duty which is discretionary even though public, it is not liable for the negligence of its servants in perform-

ing that duty. Jones v. New Haven, 34 Conn. 1 (1867); McDade v. Chester, 117 Pa. 414 (1887); Foard v. Maryland, 219 Fed. 827, 135 C. C. A. 497 (1914). Thus, having determined the act to have been in a public capacity, it is further necessary to determine whether it was in the performance of an absolute or of a discretionary duty.

In trying to pigeon-hole each act under this last test the courts are in hopeless confusion. Thus a city has been held exempt from liability, where it was building a drawbridge; Daly v. New Haven, 69 Conn. 644, 38 Atl. 397 (1897); maintaining a health department; Howard v. Phila., *supra;* Leavell v. Western Kentucky Asylum, 122 Ky. 213, 91 S. W. 671 (1906).; sweeping and cleaning streets (analogous to the present case); Haley v. Boston, 191 Mass. 291, 77 N. E. 888 (1906). Harris v. District of Columbia, 256 U. S. 650 (1921); *contra,* street cleaning, Missano v. New York, 160 N. Y. 123, 54 N. E. 744 (1899); Ferdanez v. Pass Christian, 100 Miss. 76, 56 So. 329 (1911); failure to maintain a sewer, Johnson v. District of Columbia, 118 U. S. 19 (1886); *contra,* Murphy v. Lowell, 124 Mass. 516 (1877); using a defective steam roller to repair highway, Albert v. Muskegon, 146 Mich. 210, 109 N. W. 262 (1906); fire department, Grant v. Erie, 69 Pa. 420 (1871); but compare Ries v. Erie, 169 Pa. 598, 32 Atl. 621 (1895); educational facilities, Hill v. Boston, *supra; contra,* Johnston v. Chicago, 258 Ill. 494, 101 N. E. 960 (1913). For an exhaustive list see White, Negligence of Municipal Corporation (1920), sec. 50 *et seq.;* Dillon, *supra,* 1640 *et seq.* The instant case follows the majority of jurisdictions in holding that the removal of rubbish is a governmental and discretionary function.

It is submitted that, unless some definite test be found to distinguish public from private acts, and discretionary from absolute duties, the rules of non-liability are meaningless. The non-liability might be put on the ground that a city even though exercising a mandatory duty should not be liable for collateral negligence of its employees. Albert v. Muskegon, *supra;* City of Eldorado v. Scruggs, 113 Ark. 239, 168 S. W. 846 (1914).

PARDONS—WHEN GOVERNOR IS ABSENT.—The Governor of the state was out of the jurisdiction for six hours. He did not ask the lieutenant governor to act for him. The constitution provided that "When the Governor shall be absent . . . from the State, the Lieutenant Governor shall discharge the duties of said office." . . . During the six hours the lieutenant governor granted a pardon. *Held:* The pardon was valid. *Montgomery v. Cleveland,* 98 So. 111 (Miss. 1923).

The lieutenant governor could only properly act if the governor was absent. The sole point to be considered then is whether the governor was "absent" within the meaning of the constitution. It is a fundamental rule of interpretation that a statute "is to be expounded according to the intent of them that made it." Maxwell, Interpretation of Statutes (6 ed., 1920) 1. This rule applies to constitutions. Watkins v. Mooney, 114 Ky. 646, 71 S. W. 622 (1903). The word "absent" has a technical meaning according to the legal subject matter to which the word is applied. 1 C. J. 342. In arriving at their conclusions in cases like the principal one the courts have

been confronted with two problems: first, that there should always be some one capable of administering the laws at the head of the government; second, that the mere stepping outside the borders of the state should not give an opportunity to the successor to disrupt the administration and policy of the government. The better view would seem to be that the legislature meant "effective absence" as distinguished from "physical absence," State v. Graham, 28 La. 568 (1874). State v. Lahiff, 146 Wis. 490, 131 N. W. 824 (1911); and that effective absence is such as renders him incapable for the time being of performing the act which requires immediate execution. Detroit v. Moran, 46 Mich. 213, 9 N. W. 252; Watkins v. Mooney, 114 Ky. 646, 71 S. W. 622 (1903). Pardon is a matter of grace and discretion; United States v. Wilson, 7 Pet. 160 (U. S. 1833); and in the instant case it did not fall into the class of acts which "require immediate execution." In addition to the principal case; *in re* Crump, 135 Pac. 428 (Okla., 1913), on facts very similar, held that the pardon granted by the lieutenant governor was valid. For the reasons set out above, it is submitted that these two cases are wrongly decided.

TAXATION—FEDERAL ESTATE TAX—"NET ESTATE."—The Federal Estate Tax Act of February 24, 1919 (ch. 18, 40 St. 1057, 1096) section 401, imposes upon "the transfer of the net estate of every decedent dying after the passage of this act" taxes equal to certain specified percentages of the value of the net estate. The government in computing the value of the net estate upon which the tax was to be levied added to the otherwise taxable estate the unknown Federal Estate tax. *Held:* The tax should not have been included in the taxable net estate. *Edwards v. Slocum et al.*, U. S. S. C., Advance Sheets, No. 276, October Term, 1923.

The Federal estate tax is a tax on the transfer of the net estate by the decedent rather than a tax on the receipt of the property by the legatees or a tax on the residuary estate. See the recent case of Young Men's Christian Association *et al.* v. Davis *et al., infra.* The Federal Act specifies the criteria by which the net estate shall be ascertained, and expressly exempts all gifts to charity. Since the residue here was given to charity, it was not part of net estate; and the amount of the tax, though payable out of such residue, is held not to be a part of the net estate. The act does not provide that the unknown estate tax shall be included in the taxable estate, but infers that the net estate shall be ascertained before the tax is computed. To hold otherwise would be to have an unknown on each side of the equation, which would necessitate algebraic formulæ in computing the tax. As Hough, J., said in Edwards v. Slocum *et al.*, 287 Fed. 651 (C. C. A. 1923), "Algebraic formulæ are not lightly to be imputed to legislators." It is also contrary to long established usage to include the incidence of the tax in the taxable estate.

TAXATION—FEDERAL ESTATE TAX—PAYABLE OUT OF RESIDUARY ESTATE.—Testator after giving certain legacies bequeathed the residue of his property to charity. The executor paid an estate tax under the Revenue Act of 1918, enacted February 24, 1919 (ch. 18, 40 St. 1057, 1096). The question

involved was whether the tax should be deducted from the amounts about to be distributed to the specific legatees and devisees or from the residuary estate. *Held:* From the residuary estate. *Young Men's Christian Association et al. v. Davis et al.*, U. S. S. C., Advance Sheets, No. 249, October Term, 1923.

The Estate Tax Act imposes "a tax . . . equal to the following percentages of the value of the net estate . . . upon the transfer of the net estate." The Act of 1918 is an amended version of the Act of 1916 (39 Stat. L. 756), which was declared to be constitutional in New York Trust Co. *et al.*, as executors of Purdy v. Eisner, 256 U. S. 345 (1921). The law has long recognized the difference between an estate tax and a legacy or succession tax. An estate tax is a tax on the right or privilege of the owner to transmit property at his death. A legacy or succession tax is a tax on the right or privilege of the legatees to receive the property. Knowlton v. Moore, 178 U. S. 41, 49 (1899); Hanson, Death Duties (6th ed.), 40. An estate tax is a charge on the estate and like any other debt is paid out of the residue. Plunkett *et al.* v. Old Colony Trust Co. *et al.*, 233 Mass. 471, 124 N. E. 265 (1919). It is only on failure of residue that it is payable *pro rata* out of the shares that are to go to legatees. A legacy or succession tax is payable *pro rata* out of the shares which will go to the specific legatees. Knowlton v. Moore, *supra.* It has been decided by the Supreme Courts of two states that the Federal Estate Tax is an estate tax and is payable out of the residuary estate. *In re* Hamlin *et al.*, 226 N. Y. 407, 124 N. E. 4 (1919); Plunkett *et al.* v. Old Colony Trust Co. *et al.*, *supra.* Several courts have expressed similar opinions in dicta. Corbin v. Townshend, 92 Conn. 501, 103 Atl. 647 (1918); Estate of Ferdinand W. Roebling, deceased, 89 N. J. Eq. 163, 104 Atl. 295 (1918). Under the English statutes "estate duties" are payable out of the residue. 13 Halsbury's Laws of England 219 (1910); Parker v. Pullen, 1 Ch. 564 (Eng. 1910).

The Supreme Court seems clearly to be right in deciding that the above-mentioned tax is an estate tax payable out of the residue. (1) The title to the act provides for an "estate tax." (2) Section 408 provides that unless otherwise directed by the testator the tax shall be paid out of the estate before distribution. (3) The measure of the tax is the value of the net estate and no mention of legacies is made in this connection. (4) The terms of the act present a striking contrast to the terms of the act interpreted by Knowlton v. Moore, *supra,* to be a legacy tax. (5) The framers intended that this be an estate tax. Report of July 5, 1916, Report No. 922, 64th Congress, 1st Session, page 5. Since the tax is on the transmission of the property from the deceased and not on the residue, the fact that the residue was given to charity should not change the result.

TORTS—INFANTS—PRE-NATAL INJURY.—The plaintiff was injured one month and eleven days before birth through defendant's negligence. *Held:* The plaintiff may recover. *Kline v. Zuckerman*, C. P. No. 2 (Phila.) Feb., 1924.

A child *en ventre sa mere* has generally been accorded the same property and inheritance rights as if he were actually born. Biggs v. McCar-

they, 86 Md. 352 (1882); McArthur v. Scott, 113 U. S. 340 (1885); 1 Bl. Comm. 118 (Lewis' ed., 1902). But by the weight of authority a child cannot sustain an action for injuries sustained before birth. Dietrich v. Northampton, 138 Mass. 14 (1884); Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); 70 U. OF PA. L. REV. 355.

In the instant case, everything else necessary to the action having been proved, the sole question upon which the case turned was whether the plaintiff at the time of the injury had an individual existence by virtue of which he had a personal right to be free from injury, the violation of which would constitute a tort on the part of the defendant. The court rested its decision largely upon the ground that as a matter of *fact*, discoverable by science, a child does have a separate existence, a separate blood system, etc., at some time before birth, so that, if the mother die, the child would live when extracted. Cf. Boggs, J., in Allaire v. St. Luke's Hospital, 184 Ill. 359 (1900). It is submitted that the incident of acquiring a separate existence in *law* should be held to coincide with that of acquiring a separate existence in *fact*. Somewhere between conception and birth the law must select a dividing line—a point, at which the child ceases to be merely a part of the mother and becomes a distinct individual. Formerly, as shown by cases cited *supra*, it was considered that this transformation took place at birth. But there seems to be no reason for regarding birth as the point of transformation, if it is not true as a matter of fact that then, for the first time, the child has a separate existence. There is nothing legally miraculous about birth *per se*. A child is no more able to possess a legal intent nor to do a legal act immediately after its first breath than it is immediately before it; nor should the mere fact that it has taken the breath have any legal consequence. And if the child in *fact* has a separate existence before birth, the fact that it is concealed *en ventre sa mere* should not affect in any way the existence or non-existence of its personal rights.

In *The George and Richards*, 24 Law Times 717 (Eng. 1871), a widow brought an action on behalf of an unborn child under a statute giving the widow and children compensation in cases where the negligent injury would have given the father a right of action, had death not ensued. In deciding that the child could recover the court started with the proposition that "by a legal fiction a legal personality is imputed to an unborn child for beneficial purposes . . ." To say that the child had a separate existence by a "legal fiction" is to admit that he does not have an actual existence in *law*, and to assume that he does not have it in *fact*. This is nothing more nor less than judicial legislation in a somewhat veiled form. In an attempt to arrive at a conclusion which to the court seemed just, instead of merely stating the conclusion on the grounds that it was just, it effected the same result by going one step back of the conclusion to assume a premise from which the conclusion irresistibly followed.

On the other hand by ruling as a matter of law that a child can have no separate existence until birth, courts which follow the majority rule, *supra*, are arbitrarily denying a fact which may be shown to exist, and are closing legal doors to a source of accurate knowledge which should, it is submitted, be used, as should the knowledge of all facts, in the application of our legal principles.

TRUSTS—CHARITABLE TRUST—LAPSE OF TRUST ON DEATH OF TRUSTEE.—Property was left by will to executors in trust "to be handled and used by them as trustees, as they deem best, and to whom they may decide best" for the benefit of widows and orphans of the World War in certain parishes in England. The executor died after distribution to him as trustee, but before expending the entire amount. Testator's heir petitions for an accounting. *Held:* The trust lapsed. *In re Chellew's Est.*, 221 Pac. 3 (Wash. 1923).

This will would create a valid charitable trust in England and in almost all American jurisdictions, had the trustee carried out the trust. Perry, Trusts (6th ed., 1911), sec. 687; Russell v. Allen, 107 U. S. 163 (1882); Hesketh v. Murphy, 36 N. J. Eq. 304 (1882). Upon the death of the trustee to whose discretion the distribution is entrusted, the Chancellor, in England, would continue to enforce the trust on the theory that the testator was more interested in the fulfillment of the charity than in the exercise of discretion by the trustee.

One line of English cases holds that the Chancellor assumes jurisdiction by virtue of his prerogative power, acting for the King as *parens patriæ;* Att'y Gen'l v. Matthews, 2 Lev. 167 (Eng., 1677); Att'y Gen'l v. Berryman, Dick. 168 (Eng., 1755); Felan v. Russell, 4 Ir. Eq. Rep. 701 (Eng., 1842). In many American jurisdictions this view of the source of the Chancellor's power has been adopted, and they refuse to enforce the trust when the trustee fails to exercise his discretion as to the objects, on the ground that American courts do not have the prerogative power. Perry, Trusts (6th ed., 1911), sec. 721; Hall v. Harvey, 77 N. H. 82, 88 Atl. 97 (1913); Beekman v. Bonsor, 23 N. Y. 298 (1861).

Lord Eldon first suggested that a devise to charity is under the sign manual, but a devise to a trustee for charity is under the ordinary chancery powers; Boyle, Charities (1837) 238; Moggridge v. Thackwell, 7 Ves. Jr. 36 (1803); Paice v. Archbishop of Canterbury, 14 Ves. Jr. 364 (1807); and a later line of English cases follows this view; Hayter v. Trego, 5 Russ. 113 (Eng., 1830); Att'y Gen'l v. Gladstone, 13 Sim. 7 (Eng., 1842); Reeve v. Att'y Gen'l, 3 Hare 191 (Eng., 1843); *In re* Pyne, L. R. (1903) 1 Ch. 88; *semble, In re* Eades, L. R. (1920) 2 Ch. 353. It has been held in Massachusetts, upon the authority of Lord Eldon, that, on the failure of the trustee to appoint, the court has power to apply the rest to charity. Minot v. Baker, 147 Mass. 348, 17 N. E. 839 (1888). Sherman v. Shaw, 243 Mass. 257, 137 N. E. 374 (1922).

In Pennsylvania it is provided by statute that a charitable trust shall not fail for want of a trustee, though such trustee is vested with discretionary powers, and the objects of the trust are uncertain; Act of April 26, 1855 (P. L. 328), as amended by Act of May 23, 1895 (P. L. 114); De Silver's Est., 211 Pa. 459, 60 Atl. 1048 (1905); Hutchinson's Est., 17 Pa. Dist. R. 248 (1908); Cromwell's Est., 18 Pa. Dist. R. 157 (1908); and it has been said that these acts are only declaratory of the common law; Frazier v. St. Luke's Church, 147 Pa. 256, 23 Atl. 442 (1892); though the contrary view was once held; Zeissweiss v. James, 63 Pa. 465 (1870); Dunn's Est., 10 W. N. C. 313 (Pa. 1881). Such cases as these must be distinguished from

a naked power of appointment in favor of charity, not coupled with a trust. Att'y Gen'l v. Fletcher, 5 L. J. Ch. (N. S.) 75 (Eng., 1835); *In re* Willis, L. R. (1920) 2 Ch. 358; Fontain v. Ravenel, 58 U. S. 369 (1854). (So explained in Minot v. Baker *supra*.) It is submitted that the rule in Massachusetts and Pennsylvania is founded on better authority than the contrary American rule, and in the instant case would bring about a more satisfactory result, in that the continued distribution of the *res* to the widows and orphans seems closer to the testator's intention than does the lapse of the trust.

WORKMEN'S COMPENSATION—"ACCIDENT" AND "IN THE COURSE OF HIS EMPLOYMENT."—A miner who was working during a strike and who was forced to remain on the premises because of danger of attack from the strikers, was killed by a bomb thrown through the window of the bunk house in which he slept. *Held:* The widow of the deceased can recover. *Malky v. Kiskiminetas Valley Coal Co.*, 278 Pa. 552 (1924).

The English Workmen's Compensation Act provides that the injury must be "by accident arising out of and in the course of the employment." Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), sec. I. Practically all the American acts have borrowed this phrase, the corresponding words of the Pennsylvania act being "by accident, in the course of his employment," Acts of 1915, P. L. 736, Art. III, sec. 301.

In order to be "in the course of his employment," it is not necessary that the employee be actively engaged in doing the work which he was employed to do at the very moment the injury occurred. Henderson v. Glasgow, 2 Fraser 1127 (Scot. Ct. Sess., 1900); Dzikonska v. Sup. Steel Co., 259 Pa. 578, 103 Atl. 351 (1918). He may recover if he is injured upon the premises within a reasonable time before his work is to commence; Hills v. Blair, 182 Mich. 20, 148 N. W. 243 (1914); Milwaukee v. Althoff, 156 Wis. 68, 145 N. W. 238 (1914); Carlin v. Coxe Bro. & Co., 274 Pa. 38, 117 Atl. 405 (1922); or while riding home after work on a conveyance supplied by the employer; Knorr v. C. R. R. of N. J., 268 Pa. 172, 110 Atl. 797 (1920); or while rendering some service after hours. Grieb v. Hammerle, 222 N. Y. 382, 118 N. E. 805 (1918).

It has been said that "since domestic servants and sailors are required to eat, sleep, and rest upon their masters' premises or vessel, they are clearly within the course of their employment while doing so." Cf. Bohlen, 25 HARV. L. REV. 410, note 20. And also that "the leisure of sailors on board a vessel is as much in the course of their employment as their actual work." Marshall v. S. S. "Wild Rose," 2 K. B. 46, 49 (Eng., 1909). It has been specifically decided that a domestic servant injured while sleeping was injured in the course of her employment. Alderidge v. Merry, 2 I. R. 308 (1913).

The fact that the injury was the result of a criminal or wilful assault by another does not exclude the possibility that it was caused by accident. The murder of a cashier for the sake of robbery is an "accident" within the statute. Nisbet v. Rayne & Burn, 2 K. B. 689 (Eng., 1910). A game keeper who is beaten by poachers suffers an injury by accident within the

act. Anderson v. Balfour, 2 I. R. 497 (1910). So also does a section foreman who has been assaulted by a member of a gang, whom he had discharged. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 Pac. 398 (1915). It has even been held that an engine-driver, injured by a stone wilfully dropped from a bridge by a boy, was injured "by accident arising out of and in the course of his employment." Challis v. London & S. W. R. Co., L. R. 2 K. B. 154 (Eng., 1905).

In the light of the foregoing decisions, it is clear that the death of the deceased was due to an accident which occurred during the course of his employment, and that there can be a recovery under the Pennsylvania Act.