# RECENT CASES

ATTEMPT TO COMMIT CRIME—HOW NEAR CONSUMMATION ACT MUST BE, TO BE INDICTABLE.—THE KING V. HARRY ROBINSON, 2 K. B. 342, 84 L. J. K. B. 1149.—Appellant insured his stock of jewelry against burglary, then rifled his own safe and had himself bound to a chair, to present the appearance of having been robbed. He then set up an outcry, and told the police sergeant, who came in response, that he had been knocked on the head by some intruder. On investigation the jewelry was found and appellant confessed to having devised the fraud in order to obtain the insurance money. Appellant was indicted and convicted of attempting to obtain money under false pretenses. The conviction was quashed in the Court of Criminal Appeal. *Held,* that since there must be some act beyond mere preparation to constitute attempt, it is not sufficient to show that the accused made the false pretense to a third person with the expectation that the latter would report it to the person intended to be defrauded.

Bishop defines criminal attempt as "the intent to do a particular criminal thing, combined with an act which falls short of the thing intended." 1 Bish. Crim. Law, sec. 728. Many English and American courts, finding intent in the act, hold that no effort is an indictable attempt, unless it has gone so far that, if not frustrated by extraneous circumstances, it would have resulted in full consummation of the actual crime. *Reg. v. Collins,* L. and C. 471, *Reg. v. Eagleton,* 24 L. J. M. C. 158; *State v. Hewett,* 158 N. C. 627; *State v. Davidson,* 172 Mo. App. 356; *People v. Grubb,* 141 Pac. (Cal. App.) 1051. Under this doctrine the principal case is correctly decided. The difficulty that presents itself is that in many cases, especially where the last physical act of the offender is simultaneous with the completion of the crime, no indictment for the attempt could with certainty be made save where indictment for the crime would also be possible. In recognition of this fact, though perhaps not avowedly, some courts prefer the more general interpretation: "an act done in *part* execution of a design to commit a crime." *State v. Harwick,* 133 La. 545; *State v. Donovan,* 90 Atl. (Del. Gen. Sess.) 220; *State v. Lampe,* 154 N. W. (Minn.) 737; *State v. Huber,* 148 Pac. (Nev.) 562.

C. B.

CONSTITUTIONAL LAW—CARRIERS—REGULATION OF JITNEYS.—CITY OF MEMPHIS V. STATE EX REL. RYALS, 179 S. W. (TENN.) 631.—*Held,* Acts 1915, c. 60, regulating jitneys as common carriers, and prohibiting their operation except upon prescribed conditions does not make an arbitrary classification, but is a valid exercise of the police power.

An interesting example of the application of well established legal doctrines to a new situation is evidenced by a line of recent decisions passing upon the validity of legislative regulations of the jitney. The state has undoubted power to protect the health and welfare of its people, and to impose restrictions having reasonable relation to that end. The

nature and extent of these restrictions are matters for legislative judgment, and unless the regulation is palpably unreasonable and arbitrary, the court is not at liberty to say that it passes beyond the limits of the state's protective power. *McClean v. Arkansas,* 211 U. S. 539; *Price v. Illinois,* 238 U. S. 446. The specific regulation of one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other businesses of a different kind. *Soon Hing v. Crowley,* 113 U. S. 703; *Booth v. Indiana,* 237 U. S. 391. The use of automobiles in the city streets may be regulated by statute, and under certain circumstances by ordinance. II Dillon, Municipal Corporations (5th ed.), p. 1086. A regulation requiring operators of automobiles to pay a registration fee is constitutional. *Commonwealth v. Boyd,* 188 Mass. 79. Regulations limiting the speed of automobiles are not invalid because of unreasonable discrimination. *Christy v. Elliott,* 216 Ill. 31; *Schaar v. Comforth,* 151 N. W. (Minn.) 275. The statute under consideration in the principal case was passed upon and upheld in *Nolen v. Reichman,* 225 Fed. 812. The District Court said, "Here is a new class of common carriers clearly pointed out and defined in the law, differing in material respects from other common carriers." Ordinances and statutes regulating the operation of jitneys have been held valid by other courts. *Ex parte Cardinal,* 150 Pac. (Cal.) 348; *Ex parte Dickey,* 85 S. E. (W. Va.) 781; *Green v. City of San Antonio,* 178 S. W. (Tex.) 6; *Pub. Serv. Commission v. Booth,* 156 N. Y. S. 140. The principal case is clearly supported by authority, and seems correct in principle in view of the peculiar character and functions of the jitney, pointed out by Mr. Justice Williams at p. 633.

S. H. S.

CRIMINAL LAW—TRIAL—CUSTODY OF JURY.—LEE V. STATE, 179 S. W. (TENN.) 145.—*Held,* in a capital case it is reversible error to permit the jury to go at large pending the trial, even though the accused consent, thus depriving him of his constitutional guaranties of a fair trial by jury.

In *non-capital* cases the court may at its discretion allow the jury to separate. *People v. Stowers,* 254 Ill. 588; *Commonwealth v. Simon,* 44 Pa. Super. Ct. 538, 545. And when so separated, prejudice to accused will not be presumed. *State v. Baudoin,* 115 La. 773; *contra, State v. Bennett,* 71 Wash. 673. But separation of jurors in a *capital* case is ground for reversal. *State v. Gray,* 100 Mo. 523. Unless the veniremen are not yet sworn as jurors. *Bell v. State,* 140 Ala. 57; *State v. Todd,* 146 Mo. 295. But if separated after being sworn in, prejudice will be presumed. *People v. Adams,* 143 Cal. 208. However, if the state shows by affidavits of jurors that they were not subjected to improper influences while separated, *State v. Schaeffer,* 172 Mo. 335; or that the separation was necessary and permitted and the jurors accompanied by a sworn court officer, *Bilton v. Territory,* 99 Pac. (Okla.) 163, no error will be found. And a further exception is made when counsel for the accused consents to the separation of the jury. *Carter v. State,* 10 Ga. App. 851. The rule in the principal case seems to be the best one from the standpoint of protection to the accused. Consent to a separation of the jury if refused by accused would undoubtedly

materially prejudice the jury against him, so that any consent he might give would be given under coercion. It is therefore best to make it impossible for him to consent.

L. S.

ELECTRICITY—STREETS—INJURIES CAUSED BY OBSTRUCTIONS.—PORTER V. MUNICIPAL GAS CO. OF CITY OF ALBANY, 155 N. Y. SUPP. 633.—The defendant's electric light wire, strung diagonally across the street, 28½ to 40 feet above the ground, prevented firemen from raising an aerial ladder to the burning building, from which the plaintiff was, accordingly, forced to jump. In the suit for the resulting injuries to the plaintiff, *held,* that it was a question for the jury, whether the maintenance of electric light wires in the above manner by the defendant constituted negligence.

Those engaged in business requiring the use of electric currents are uniformly bound to take nothing less than the greatest possible care to safeguard customers and the public from accidents peculiar to the nature of electricity. *Smith's Admrs. v. Middlesboro Electric Co.,* 174 S. W. (Ky.) 773; *Cochran v. Young-Hartsell Mills Co.,* 85 S. E. (N. C.) 149; *Wade v. Empire Distributing Electric Co.,* 147 Pac. (Kan.) 63. There is usually a question for the jury at least, even in ordinary accidents not involving the source of this heavy responsibility, such as, for instance, the physical impact from falling wires. *Fitsimmons v. Phila. Rapid Transit Co.,* 56 Pa. Superior Ct. 365; *Walter v. Baltimore Electric Co.,* 109 Md. 327. Or from falling light globes. *Sweeney v. Edison Electric Illuminating Co. of Brooklyn,* 143 N. Y. S. 636; *Louisville Lighting Co. v. Owens,* 32 Ky. Law Rep. 283. But the question of an electric company's responsibility with regard to the use of the highway for modern fire-fighting is new. *Lambert v. Westchester Elevated R. R. Co.,* 191 N. Y. 248—cited in the principal case—involved injury to a fireman caused by striking against one of the defendant's poles, set close to the fire station alley, as the fireman was mounting the moving wagon. Here the defendant's negligence was held to be a question for the jury. The effect of the principal case is to extend the obligation of corporations stringing wires along the highway, so as to include not only taking very great precautions as to insulation and non-interference with traffic by the location of its poles and wires but also seeing to it that no obstruction is presented in such emergencies as fire. In the average narrow American business street this seems wellnigh impossible, without forbidding altogether the use of overhead wiring systems.

C. B.

MASTER AND SERVANT—INJURIES TO SERVANT—WORKMAN'S COMPENSATION ACT—CONSTRUCTION OF ACT—DISEASE AN ACCIDENT.—VENNEN V. NEWS DELLS LUMBER CO., 154 N. W. (WIS.) 640.—An employee's death was caused by typhoid fever contracted by reason of impure drinking water furnished by the master. *Held,* there is a right to compensation, for such a happening is an accident within the intent of the Workman's Compensation Act as 'being a personal injury accidentally sustained by the employee.'

An accident is any event which takes place without the foresight or expectation of the person acted upon or affected by the event. *Crandal v. Accident Ins. Co.*, 27 Fed. 40. The laws of accident insurance are applied to injuries under the Act. *Wicks v. Dowell & Co., Ltd.*, 1905 2 K. B. 225. A liberal construction should be given to any set of facts. *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443. To consider a disease accidental there must be an accidental cause, as distinct from the disease itself. *Columbia Paper Stock Co. v. Fidelity Co.*, 104 Mo. App. 157; *Travelers Ins. Co. v. Melick*, 65 Fed. 178; *Delaney v. Modern Acc. Club*, 121 Iowa 528. So a disease which results from a cause known and foreseen at the time as likely to produce the result cannot be included under the term accidental. *Sinclair v. Maritime Pass. Co.*, 3 E. & E. 478; *Dozier v. Fidelity Co.*, 46 Fed. 446. That the cases are at variance may be seen from a comparison of *Britons, Ltd. v. Turvey*, 1905 A. C. 230, and *Bacon v. U. S. Mut. Acc. Assoc.*, 123 N. Y. 304. Recovery was allowed in the former and denied in the latter, in both cases the disease being anthrax. The distinction seems to hinge on whether or not the cause of the contraction of the disease was accidental. In the principal case this requisite seems to be fulfilled and although the courts are not settled, yet the holding seems to accord with the intent of the legislature which enacted the act in question.

J. McD.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—DEFINITION OF "ACCIDENT."—WESTERN INDEMNITY CO. V. PILLSBURY, 151 PAC. (CAL.) 398.—A foreman, in disputing with one of the laborers under his direction, as to the manner of performing certain work, was severely injured and lacerated by the angered workman, in the quarrel which ensued. *Held*, such injury may be termed an "accident," within the terms of the Workmen's Compensation Act. Henshaw, J., *dissenting*.

An accident has been defined as an event happening without the concurrence or the will of the person by whose agency it was caused. *Ætna Life Insurance Co. v. Vandecar*, 86 Fed. 282. The first formulation of such a definition of the word as applied to workmen's compensation laws is to be found in the case of *United States Mutual Accident Association v. Barry*, 131 U. S. 100. That case defines an accident as an unusual and unexpected result attending the performance of a usual and necessary act. Also *Williams v. U. S. Mut. Acc. Ass'n*, 14 N. Y. Supp. 728, 730. The English cases, in deciding actions under their Workmen's Compensation Act, seem to have been influenced by this view. Where a school teacher had incurred the hostility of some of the pupils because of his strict discipline, and was assaulted by them so grievously that he died, the event was held an accident, arising in the course of his employment. *Kelly v. District School*, 136 L. T. R. (H. L.) 605 (1914). Where an employee was shot by a third person in the course of carrying wages to a colliery, he was held entitled to compensation. *Nesbit v. Rayne*, 3 B. W. C. C. 507 (1910). A gamekeeper, attacked and injured by poachers, was held to have been disabled by an accident. *Anderson v. Balfour*, 2 I. R. 497 (1910) (Cherry, J. *dissenting*). The dissenting opinion seeks to define

accident from the point of view of the intent of the third party to work the injury: holding that only without such intent could the deed be denominated an accident. But it is from the point of view of the employee that the question must be considered, and so these cases hold that from such point of view, a deliberate and intentional deed by another can be termed an accident, always provided the employee has not engaged in a private altercation on his own account. See *Matter of Employers' Liability Assurance Corporation,* 102 N. E. (Mass.) 697.

A. N. H.

TRADE-MARKS AND TRADE-NAMES—DESCRIPTIVE WORDS.—N. Y. AND N. J. LUBRICANT CO. *v.* YOUNG, 94 ATL. (N. J.) 570.—Plaintiff put on the market an article which it called "non-fluid oil." It had the consistency of a grease but was composed of oil to an extent varying from 75 to 95 per cent. *Held,* the words "non-fluid oil" are descriptive, and plaintiff is not entitled to an exclusive property right therein. Kalisch, Black, and Williams, JJ., *dissenting.*

Names which are mere descriptive terms of a business and generic in their nature are not capable of being appropriated and there can be no unfair competition arising from the use of such names. *Furniture Hospital v. Dorfman,* 179 Mo. App. 302. For example, "always closed," as applied to a revolving door. *Van Kannel Revolving Door Co. v. American Revolving Door Co.,* 215 Fed. 582, 131 C. C. A. 650. "Inter-phone," as applied to telephone switching apparatus. *In re Western Electric Co.,* 39 App. D. C. 420. "Brilliant," as applied to designate one kind of flour. *Sauers Milling Co. v. Kehlor Mills Co.,* 39 App. D. C. 535. "Union," as applied to tobacco packages. *American Tobacco Co. v. Globe Tobacco Co.,* 193 Fed. 1015. "No-sag," as applied to handbags. *In re Freund Bros. and Co.,* 37 App. D. C. 109. But non-exclusive trade-marks or names which all may use because descriptive, may yet by long use in connection with the goods or business of a particular trader, come to have a secondary meaning and though the primary meaning of the word is *publici juris* its secondary meaning is not. *Furniture Hospital v. Dorfman* (*supra.*). Thus the name "Furniture Hopital," though descriptive, was yet so unusual as to be capable of being appropriated as a trade-name; and in the case of the *National Cloak Co. v. Londy & Friend,* 211 Fed. 760, the word "National" as applied to the cloak business, while not distinctive, was held to have acquired a meaning which was plaintiff's property. Also in the case of *N. Y. Mackintosh Co. v. Ham,* 198 Fed. 571, the word "Bestyette" was held to be sufficiently distinctive to be a valid trade-mark for cloaks. The same was held as to the word "cream" as a trade-name for a baking-powder. *International Food Co. v. Price Baking Powder Co.,* 37 App. D. C. 137.

S. B.

WILLS—PROBATE AND ESTABLISHMENT—PLEADING—UNDUE INFLUENCE.—CUNNINGHAME V. HERRING, 70 So. (ALA.) 148.—*Held,* In a proceeding contesting a will, a bare allegation of undue influence without averment of the quo modo of its exercise is sufficient, and is not subject to demurrer for failure to set out the facts.

In a suit to contest a will, an allegation that the will was not duly executed is sufficient to include duress, fraud and whatever else goes to impeach the execution thereof. *Willett v. Porter,* 42 Ind. 250; *Reed v. Watson,* 27 Ind. 443. Thus an allegation of undue influence whereby the testator discriminated against his daughter need not show in what the undue influence consisted, or the facts relied on as a basis for recovery. *Scott v. Townsend,* 159 S. W. (Tex.) 342. A bill to set aside probate of a will on grounds of fraud need not set out the precise manner in which the fraud was accomplished. *Smith v. Boyd,* 127 Mich. 417. In *Coghill v. Kennedy,* 119 Ala. 641, it is said, "To require contestant to state the means by which undue influence was acquired and the manner in which it was exercised, would be to require that which in most cases is impossible." See also *McLeod v. McLeod,* 137 Ala. 267, and *Phillips v. Bradford,* 147 Ala. 352. But there are authorities contrary to this and to the doctrine of the principal case. For example, in a suit attacking the validity of a will, an allegation that "the defendant and another conspired with others and exercised undue influence over the testatrix to fraudulently procure the execution of such will," was held bad on demurrer as not stating sufficient facts. *Brown v. Mitchell,* 75 Tex. 9. And in Alabama it has been held that an allegation that a will was procured by fraud and undue influence must state the particular facts relied on and a general allegation is *not* sufficient. *Barksdale v. Davis,* 114 Ala. 623. Allegations in a will contest must sufficiently show the particular acts involving undue influence. *In re Olson's Estate,* 19 Cal. App. 379. To the same effect *Ross v. Kell,* 159 S. W. (Tex.) 119. The same thing is true as to fraud. *Story v. Story,* 118 Mo. 110; *Gray v. Parks,* 125 S. W. (Ark.) 1023. But allegations of acts of undue influence need not go into much detail. *Alexander v. Gibson,* 57 So. (Ala.) 760; *Murphy v. Nett,* 130 Pac. (Mont.) 451.

S. B.