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breach of warranty, since it would do away with the necessity of having to show privity of contract. It may be possible that the statute would not apply to those cases that have been cited where a foreign object did the damage, such as a piece of glass or a nail in the food, and yet even these may be covered by the words, "other added deleterious ingredient," if the courts saw fit to establish such a policy. The cases which involve corrupt food are beyond doubt within the scope of this type of statute, and it seems that an advantage is missed when the violation of the statute is not pleaded either as evidence of negligence, or where it pleases the Courts, as proof of negligence *per se.*

Edward Boyle.

RECENT DECISIONS

ASSAULT AND BATTERY—SHOOTING—CRIMINAL RESPONSIBILITY FOR USE OF SPRING GUNS IN PROTECTION OF PROPERTY.—In a prosecution for unlawfully shooting with intent to wound, it appeared that the defendant was the owner of a farm located some distance from the house in which he resided. On the farm was a field of watermelons to which considerable damage had been done, apparently by some boys in the neighborhood. After the damage was done to the melons, the defendant set six spring guns, loaded with the ordinary type of shells, one concealed at each end of the melon patch. Attached to the triggers were small wires which were so arranged that if anyone came in contact with them, the guns would be discharged. A mere trespasser, a boy of 14, entered upon defendant's property to commit at the most a petit larceny. One of the guns was discharged wounding the boy seriously. Counsel for the defendant contended that since there was no specific statute in Ohio making it unlawful to set spring guns on one's own property, no crime was committed. In considering the facts just as if the defendant himself had been in the melon patch and fired the shot, the court held that a specific statute was unnecessary since the act of the defendant was in violation of the following section of the Ohio General Code: "Whoever maliciously shoots, stabs, cuts or shoots at another person with intent to kill, wound or maim such person, shall be imprisoned in the penitentiary not less than one year nor more than twenty years." *State v. Childers,* 133 Oh. St. 508, 14 N. E. (2d) 767 (1938).

Although there is no dearth of such cases in other jurisdictions, in the principal case the Supreme Court of Ohio, being called upon for the first time to pass upon the legality of spring guns, reasserted the doctrine proclaimed to be the overwhelming weight of authority in the United States to the effect that "a person is not justified in taking human life or inflicting bodily harm upon the person of another by means of traps, spring guns or other means of destruction, unless, as a matter of law, he would have been justified had he been present personally and had taken the life or inflicted the bodily harm with his own hands." *Simpson v. State,* 59 Ala. 1, 31 Am. Rep. 1 (1877); *State v. Beckham,* 306 Mo. 566, 267 S. W. 817 (1924); *State v. Marfaudille,* 48 Wash. 117, 92 Pac. 939 (1907); *Schmidt v. State,* 159 Wis. 15, 149 N. W. 388 (1914). The latter case was decided under a statute declaring the setting of spring guns unlawful whether injury results or not. Such statutes have been found in at least two states. See section 340.66 Wisconsin Statutes and section 10505 Minnesota Statutes.

A few early American decisions seem to have been decided upon the theory that life may be taken by spring guns set to defend property. In *Gray v. Combs,* 7 J. J. Marsh (Ky.) 478, 23 Am. Dec. 431 (1832), it was held that one may lawfully erect a spring gun in a warehouse containing valuable property. In passing upon the legality of spring guns, the court, in *Aldrich v. Wright,* 53 N. H. 398, 16 Am. Rep. 339 (1873), said that it was not unlawful to set a gun which killed four fur-bearing mink which were damaging the owner's property. Both of these cases seem to stretch the doctrine of one's right to protect his property but upon closer examination we find that the questions arose in civil actions and involved property rights solely. Thus the apparent conflict is eliminated by distinguishing the cases on their facts.

In the earliest American case, *United States v. Gilliam,* 1 Hayw. & H. 109, Fed. Case No. 15,205a (1815), it was held that the setting of a spring gun in the dwelling house or curtilage surrounding it was not in itself unlawful, and if a person was killed by its discharge while attempting to perpetrate a felony upon the premises, a charge of homicide could not be sustained. But the important point to note is that the court also said that the principle allowing the use of spring guns to protect personal property does not apply to the protection of property in open fields or in buildings not within the privilege of the domicil. The cases following in point of time establish the principle that the use of spring guns can never be justified on the ground that they were set to protect property alone. The inherent nature of society as it exists today dictates that the value of human life and limb outweighs the interests of a possession of property and that life may be taken only in the protection and preservation of life and not where mere property rights are at stake. Thus where accused put a spring gun in a trunk which contained personal property of small value and a woman, actuated solely by curiosity, was killed by the gun as she opened the trunk, it was held that no one may take human life directly or indirectly as by setting a spring gun, to prevent a mere trespass or theft of property. *State v. Marfaudille,* 48 Wash. 117, 92 Pac. 939 (1907). The court, in *State v. Green,* 118 S. C. 279, 110 S. E. 145 (1921), proceeding upon the theory that life may be taken only in the preservation of life, held that one who set a spring gun to protect furniture in his unoccupied dwelling from marauders could be found guilty of manslaughter, if a person were killed when entering the dwelling merely to satisfy curiosity. In another case a merchant, whose store had once been burglarized, set a spring gun to guard against future burglaries, but failed to notify the police department of such action, and a policeman was killed in attempting to test the fastenings of the door, the court in sustaining a conviction, said that one cannot, except in extreme cases, endanger human life or do great bodily harm in defense of property. *Pierce v. Commonwealth,* 135 Va. 635, 115 S. E. 686 (1923).

Tested by these principles, it appears that one who sets a spring gun does so at his peril. As stated in the principal case, "If it is set in a dwelling house and prevents the entrance of a felon, the justification may be sufficient to acquit the owner. If on the other hand it inflicts death or great bodily harm on an innocent person or one who is a mere trespasser, the one who set the trap must suffer the consequences." Such is the only logical position the law can assume. The fact of a man's presence raises the possibility that he would realize the situation and determine the extent and character of the intrusion. Is a spring gun capable of such action? At most it is a menace — a lurking instrument of death. Is not the intruder entitled to the chance of safety arising from the presence of a human being capable of judgment? The malicious nature of a spring gun is most aptly described in *Simpson v. State,* 59 Ala. 1, 31 Am. Rep. 1 (1877), the court saying: "The secrecy and frequency of the trespass would not justify the owner in concealing himself, and with a deadly weapon, taking the life, or grievously wounding the trespasser, as he crept stealthily to do the wrong intended. What difference

is there in concealing his person, and weapon, and inflicting unlawful violence, and contriving and setting a mute, concealed agency or instrumentality which will inflict the same, or it may be greater violence? In each case, the intention is the same, and it is to exceed the degree of force the law allows to be exerted. In the one case, if the trespasser came not with an unlawful intent, if his trespass was merely technical, if it was a child, a madman, or an idiot, carelessly, thoughtlessly, entering and wandering on the premises, the owner would withhold all violence. Or, he could exercise a discretion, and graduate his violence to the character of the trespass. The mechanical agency is sensitive only to touch, it is without mercy, or discretion, its violence falls upon whatever comes in contact with it. Whatever may not be done directly cannot be done by circuity and indirection. If an owner, by means of spring guns or other mischievous engines planted on his premises, capable of causing death or of inflicting great bodily harm on ordinary trespassers, does cause death, he is guilty of criminal homicide."

Criticising the doctrine that the setting of spring guns can be justified so as to avoid criminal liability, the learned Chief Justice of the Supreme Court of Alabama, in *Simpson v. State, supra,* said: "The proposition itself subordinates human life, and the preservation of the body in its organized state, to the protection of property. It subjects man to loss of limb or member, or to the deprivation of life, for a mere trespass, capable of compensation in money. How else can the owner protect himself? it is asked. The answer may well be, He is not entitled to protection at the expense of the life, or limb, or member of the trespasser. All that the latter forfeits by the wrong is the penalty the law pronounces. It may well be asked in return, if the owner has the right to visit on the trespasser a higher penalty than the law would visit? Has he the right to punish a mere trespass as the law will punish the most aggravated felonies, which not only shock the moral sense, evince an abandoned, malignant, depraved spirit, but offend the whole social organization? There are but few offenses the law suffers to be punished with death. Whether this extreme penalty shall be visited, the law submits to the mercy and to the discretion of the jury. Shall the owner, for the prevention of a trespass, inflict absolutely the penalty of death which a jury could not inflict nor a court sanction? Inflict it without the opportunity the jury has, when they may lawfully inflict it, of lessening it, in their mercy and discretion, to imprisonment? Shall he, in protection of his property, lacerate the body, a punishment so revolting that it has long been excluded from our criminal code? If the owner is vexed by secret trespasses and their repetition, his own vigilance must, within the limits of the law, find means of protection. Stronger inclosures and a more constant watch must be resorted to, and a stricter enforcement of the remedies the law provides will furnish adequate protection. If these fail, it is within legislative competency to adapt remedies to the exigencies and necessities of the owner."

The great weight of authority in this country seems to be that while a person has a right to protect his property from a trespass, and, after warning or notice to the trespasser, use such force as is reasonably necessary, he cannot unlawfully use firearms to expel the intruder where he has no reasonable ground to fear the trespasser will do him great bodily harm. *Carpenter v. State,* 62 Ark. 286, 36 S. W. 900 (1896); *Bloom v. State,* 155 Ind. 292, 58 N. E. 81 (1900); *People v. Capello,* 282 Ill. 542, 118 N. E. 927 (1918); *Stacey v. Commonwealth,* 189 Ky. 402, 225 S. W. 37, 25 A. L. R. 490 (1920). From the foregoing principles and analyses of cases it is seen that one may set a spring gun to protect his premises from thieves and burglars but he must see to it that no injury is inflicted upon those who go upon the premises for lawful purposes or as mere trespassers. No one has the right, nor should have the right, to take human life to prevent secret trespasses on his personal goods. In the recent case of *State v. Plumlee,* 177 La. 687, 149 So. 425 (1933), the court followed the prevailing rule that the killing of, or the inflicting of bodily harm on a person by means of a spring gun is not justified or

excused unless the killer would have been justified in killing or injuring with his own hands had he been personally present. The evidence showed that the defendant set the spring gun merely to prevent the theft of his chickens, which were of small value, from his barn. The court went on to say that since the thief was guilty of only a petit larceny, a crime not attended with force and violence, the defendant was guilty of manslaughter as no one is justified in killing another by means of a death trap to prevent the commission of a minor crime. Thus if a burglar is killed by the discharge of a spring gun in the commission of a felony, such killing is justified as the owner of the property would have been permitted to shoot had he been personally present; but taking the same circumstances, with the exception of making the deceased a mere trespasser, then such a killing would not be justifiable or excusable but unlawful homicide. The reason for the rule arose at the common law where the life of any person attempting to commit a felony could be taken. Means calculated to cause death may be used only in preventing crimes of violence, and if such means are used, and the crime committed falls short of one attended with violence, the user of such means is guilty of criminal homicide. But see *State v. Barr,* 11 Wash. 481, 39 Pac. 1080, 29 L. R. A. 154 (1895), on the proposition that one should only properly make use of means which might be expected to cause death to prevent the commission of a capital offense. In conclusion, the general rule in regard to the use of spring guns to protect property is most aptly stated in the view adopted by the American Law Institute; "The use of mechanical devices which involve a hazard to life or limb is privileged when, and only when, the possessor would be privileged to intentionally use similar force to repel an invasion of his property were he actually present at the time." See RESTATEMENT OF LAW OF TORTS, section 106.

John H. Wilson.

AUTOMOBILES—LIABILITY OF AN UNLICENSED OPERATOR.—The plaintiff, while driving her car one night along a country road, collided with the rear of the defendant's unlighted truck, which was parked on the highway while the defendant was making repairs. The tail light of the truck was out, and the defendant had failed to place any flares to show his presence, in violation of the statute. GENERAL LAWS OF MASSACHUSETTS (1932) c. 85 § 15, and c. 90 § 7. In the action brought by the plaintiff to recover damages resulting from the defendant's negligence, the defendant pleaded as a bar to the plaintiff's recovery that she did not have an operator's license as required by Massachusetts law, and that this operated as negligence sufficient to bar her recovery. The Massachusetts court in *Price v. Pearson,* 16 N. E. (2d) 855 (1938), however gave judgment for the plaintiff, saying, "Negligence consisting in whole or in part of violation of law, like other negligence, is without legal consequence unless it is a contributing cause of the injury. We think that the jury was not required to find that the failure to have an operator's license at the time of the collision constituted negligence which was a contributing cause of the accident."

This case represents the law in Massachusetts. An earlier decision from the same jurisdiction, *McMahon v. Pearlman,* 242 Mass. 367, 136 N. E. 154 (1922), held that the absence of a license is admissible as evidence of negligence but does not establish liability as a legal result. This is clearly the law in Massachusetts, there being several other cases from that state holding that this failure to comply with the statutory requirements as to licensing of operators, although evidence of negligence, is of no value whatever in determining liability in the absence of some causal connection between the violation of the regulation and the accident. *Bourne v. Whitman,* 209 Mass. 155, 95 N. E. 404 (1911); *Simon v. Berkshire Street Ry.,* 11 N. E. (2d) 485 (Mass. 1937).

These cases represent the great weight of authority in the United States as to the liability of an unlicensed operator of an automobile. "The absence of the license may be proper evidence (of negligence), but before it can afford a basis of liability, it must be shown to have been a contributing cause to the injury." HUDDY'S CYCLOPEDIA OF AUTOMOBILE LAW, Vol. 1-2, pp. 484-485. AMERICAN JURISPRUDENCE has this to say on the subject. "The fact that the operator of an automobile has no operator's license, as required by statute, does not, according to the majority view, bar recovery for an injury to him through the negligence of another where the lack of such license has no causal connection with the injury." 5 AM. JUR. 141.

There is now only one state, Maine, that is not in accord with the decision reached in the principal case. The REVISED STATUTES OF MAINE, 1930, c. 29, § 33 requires an examination as precedent for a license to operate an automobile, and says that no one shall drive a car without such license, but does not expressly provide for liability for failure to live up to this law. However, the Supreme Judicial Court of Maine in a case in 1921, which has not as yet been reversed, held that an unlicensed driver of a motor vehicle was not a lawful traveler on the highway and could not recover for personal injuries, or damages to the vehicle from defects in the highway, irrespective of any questions of causal connection between the violation of the statute and the happening of the accident. *Blanchard v. City of Portland,* 120 Me. 142, 113 Atl. 18 (1921). This is certainly a drastic result and can hardly be condoned, even with the court's reasoning that this strict rule must be enforced to insure competent drivers on the highway of the state. But perhaps, this case can be distinguished from the principal case upon the facts involved. In the Maine case, the action was brought against the city for defects in the highway, and perhaps the court's decision was based on the idea that since the operator had no right to use the highways without the driver's license, that therefore the municipality owed him no duty to keep the roads safe for his travel. It would be interesting to see whether the Maine court would rule differently in a case not involving the municipality.

Connecticut reached a similar result prior to a few years ago, by means of a statute, Connecticut Public Acts 1911, c. 8519, which barred recovery by an owner and by the operator of an unlicensed car, or one operated by an unlicensed driver regardless of causal connection between the accident and the absence of the license. Connecticut cases of necessity followed this harsh rule, *Shea v. Corbett,* 97 Conn. 141, 115 Atl. 694 (1921); but with the repeal of this stringent statute with the passage of Public Acts 1929, c. 256, the Connecticut courts swung towards the majority view on the subject, and a later case from that jurisdiction, *De Vite v. Connecticut Company,* 112 Conn. 670, 151 Atl. 320 (1930), did not preclude recovery, even though the plaintiff was an unlicensed driver, because there was no showing that the plaintiff's failure to provide himself with a license was a proximate cause of the accident.

This switch of the Connecticut court and legislature represents the more reasonable view. It would seem that denial of recovery because of failure to be licensed would be a most inequitable result without causal connection, especially when the statutory regulation anent the matter is purely a financial measure, concerned only with revenue and not with the safety of the motorists. Such a statute is Indiana's, BALDWIN'S INDIANA STATUTES § § 11293 and 11295, which provides for a fee, and does not demand an examination to test the qualifications of the applicant except in the case of minors under 18. Under such a statute, a man who has failed to live up to the law is no less a capable driver because of that omission than one who has paid his fee. There might be slightly more excuse for holding as the Maine court in the case of statutes such as those in New York, Massachusetts, and Maine, which require a rather rigid examination by state traffic examiners to test the eyesight, hearing and general driving ability of an

applicant. CAHILL'S CONSOLIDATED LAWS OF NEW YORK c. 64a, § 20; GENERAL LAWS OF MASSACHUSETTS 1932, c. 90, § 8; REVISED STATUTES OF MAINE, 1930, c. 29, § 33. But, even in New York, which has perhaps the strictest test for applicants, the New York court recently ruled in *Plunkett v. Heath,* 1 N. Y. S. (2d) 778 (1938), that the violation of a statute prohibiting operation of automobiles by persons under 18 must be a causal factor of the injury to be a basis of recovery for the injured party, or to constitute contributory negligence upon the violator's part.

All the states, but Maine, reach the same result, but through slightly different reasonings. Some of the courts treat the failure of the driver to comply with the operator's licensing laws as negligence *per se. Lindsay v. Cecchi,* 26 Del. 133, 80 Atl. 523 (1911); *Brown v. Green,* 29 Del. 449, 100 Atl. 475 (1917); *Zageir v. Southern Express Co.,* 171 N. C. 692, 89 S. E. 43 (1916); *Walker v. Klopp,* 157 N. W. 962 (Neb., 1916); *Speight v. Simonsen,* 115 Or. 618, 239 Pac. 542 (1925); *Cirosky v. Smathers,* 122 S. E. 864 (S. C., 1924); *White v. Kline,* 119 Wash. 45, 204 Pac. 796 (1922). Other jurisdictions hold it to be merely evidence of negligence. *McMahon v. Pearlman,* 242 Mass. 367, 136 N. E. 154 (1922); *Simon v. Berkshire Street Ry.,* 11 N. E. (2d) 485 (Mass., 1937); *Plunkett v. Heath,* 1 N. Y. S. (2d) 778 (1938); *Austin v. Rochester Folding Box Co.,* 185 N. Y. S. 108 (1920). The greatest number of states make no comment on whether the violation of the statute is negligence *per se,* or merely evidence of negligence; but do not consider the subject at all in the absence of a causal connection. *Luffy v. Lockhart,* 37 Ariz. 488, 295 Pac. 975 (1931); *Page v. Mayors* 191 Cal. 263, 216 Pac. 31 (1923); *Opple v. Ray,* 208 Ind. 450, 195 N. E. 81 (1935); *Schuster v. Gillespie,* 217 Iowa 386, 251 N. W. 735 (1933); *McCarry v. Center Tp.,* 138 Kan. 624, 27 Pac. (2d) 918 (1933); *Moore v. Hart,* 171 Ky. 725, 188 S. W. 861 (1924); *Moreau v. Garritson,* 166 So. 660 (La., 1936); *Renner v. Martin,* 116 N. J. L. 240, 183 Atl. 185 (1936); *Hart v. Altoona & Logan Electric Ry.,* 79 Pa. Super. Ct. 180 (1922); *American Auto Insurance Co. v. Struwe,* 218 S. W. 534 (Texas, 1920); *Dervin v. Frenier,* 91 Vt. 308, 100 Atl. 760 (1917).

About the best statement of the majority, and sounder, rule can be found in the opinion of an Indiana case, ". . . if the person, adult or minor, unlicensed, operates it (the automobile) with that degree of skill and care that is required of a licensed operator, negligence cannot be predicated upon mere fact of minority or lack of operator's license." *Opple v. Ray,* 208 Ind. 450, 195 N. E. 81 (1935). Perhaps in the very near future, the Maine legislature or courts will take cognizance of the change of the Connecticut law and the almost universal weight of authority, and reverse themselves; so that all the jurisdictions in the United States will hold that driving without an operator's license, although illegal, will not bar recovery unless it is a proximate cause of the accident.

Leon L. Lancaster, Jr.

EXECUTORS AND ADMINISTRATORS — COMPENSATION — RENUNCIATION FIXED IN WILL — DELAY — EFFECT.—Six weeks after John Suverkrup had entered into his duties as executor of the will of Arthur Newby, the testator, he filed a written renunciation of the compensation fixed in the will by the testator, and asked the court to make such an allowance as was fair and reasonable. One of the beneficiaries under the will intervened to contest the authority of the court to authorize payment, to the executor, of the compensation in excess of the amount stipulated in the will. The beneficiary based his objection on the theory that the appellant by entering upon the discharge of his duties as executor is deemed to have accepted the proposal and stipulation contained in the will as to his fee and thereby became

bound, as such acceptance amounts to a contract — thus contending that his renunciation, after qualification, had no legal effect. The Statute, Section 6-1417, BURNS INDIANA STATUTE (1933), provided: "When provision is made by a will for compensation to the executor thereof, the same shall be deemed a full satisfaction for his services . . . unless he shall, by a written renunciation, filed in the court issuing his letters, renounce all claims to such compensation given by the will." The court interpreted this statute so as to give the executor a reasonable period of time within which to renounce the provision of the will fixing his compensation, and held that renunciation after six weeks time was not unreasonable. Whereupon the court allowed the executor's renunciation and fixed a reasonable fee. *Suverkrup v. Suverkrup,* 18 N. E. (2d) 488 (Ind. 1939).

This question of renunciation of the compensation fixed by the testator brings us into a field marked by three lines of decisions. Such a variety of holdings is principally due to the fact that a few of the states have enacted statutes on the subject, thus upsetting a rule existing quite uniformly throughout the United States. Only a few states, namely New Jersey, California, New York, Washington, and Indiana, have enacted statutes, whose interpretations have led to a contrariety in the decisions; while the rest of the states are content to do without statutes and adhere to the rule laid down by the courts.

Before dealing specifically with the different rules on renunciation, it is well to consider the history of this compensation to the executor and his rights thereto. At common law executors and administrators were entitled to no compensation for their work in the discharge of their duties, either at law or in equity. *Gordon v. Greening,* 121 Ark. 617, 182 S. W. 272 (1916); *In re Corning's Will,* 289 N. Y. S. 1101, 160 Misc. 434 (1936). But in all states, compensation is now provided by statute. *Adamson v. Parker,* 74 Ark. 168, 85 S. W. 239 (1905); *In re Furniss,* 83 N. Y. S. 530, 86 App. Div. 96 (1903); *Collins v. Clements,* 199 Ala. 618, 75 So. 165 (1917); *St. Mary's Female Orphan Asylum of Baltimore v. Hankey,* 137 Md. 569, 113 A. 100 (1921); *Bailey v. Crosby,* 226 Mass. 492, 116 N. E. 238 (1917); *Jones v. Virginia Trust Co.,* 142 Va. 229, 128 S. E. 533 (1925); *In re Hagerty's Estate,* 97 Wash. 491, 166 P. 1139 (1917); *In re Fehlmann's Estate,* 134 Ore. 46, 292 P. 1027 (1930); *Parsons v. Leak,* 204 N. C. 86, 167 S. E. 563 (1933); *Leach v. Cowan,* 125 Tenn. 182, 140 S. W. 1070.

The first of the three rules on renunciation of the testamentary provision was the aftermath of the above statutes abrogating the common law rule which denied the absolute right to compensation. Immediately after the enactment of these statutes, confusion arose as to whether an executor could apply to the court for compensation when the testator had provided such in his will. So, to protect the estates, the courts had to lay down the rule that, in cases where the compensation was fixed in the will, "the executor, having accepted the trust, is entitled to receive only the compensation named in the will, whether that sum be more or less than a reasonable sum;" — *i. e.,* the executor, by accepting the appointment, has entered into a contract, thereby making himself bound to accept the fee fixed by the testator. See *Bailey v. Crosby, supra; Rote v. Warner,* 9 Ohio Cir. Dec. 539; *Harper's Appeal,* 111 Pa. 243, 2 A. 861 (1886); *Gordon v. Greening,* 121 Ark. 617, 182 S. W. 272 (1916); *Vicksburg Public Library v. First Nat. Bank,* 168 Miss. 88, 150 So. 755 (1933); *Birmingham Trust & Savings Co. v. Hightower,* 233 Ala. 39, 169 So. 878 (1936); *Washington Loan & Trust Co. v. Convention of Protestant Episcopal Church,* 293 F. 833, 54 App. D. C. 14 (1923); *In re Lennig's Estate,* 53 Pa. Sup. Ct. 596 (1913). This rule applies in virtually every state which has no statute authorizing such renunciation of the testamentary compensation. It is, by far, the most popularly followed of the three rules.

The second rule, although termed by the court in the principal case to be the majority rule, should correctly be called the minority view. This statement in the

principal case can be justified, however, since the court obviously was confining the rule to those states having statutes covering the question of renunciation. This rule, embraced by the principal case, is to the effect that where no time is fixed by the statute in which an act is to be done, a reasonable time is contemplated. *Heath v. Maddock,* 83 N. J. Eq. 681, 94 A. 218 (1914), is a leading case supporting this rule. The New Jersey statute provided: "The executor is bound by the compensation fixed in the will, unless he renounces such compensation and claims a fee that the court deems just and reasonable." Here the defendant had served as executor for over five years and then renounced the compensation provided by the testatrix. The plaintiff argued that the renunciation came too late, not being filed with the surrogate until after the defendant had served as executor for several years. The court, in holding that the renunciation was filed in time, said, "It is possible that limitation of time for filing such a renunciation might be properly imposed by the Legislature, but it is not within the power of court to so impose it and limit the executor's right." This theory of interpretation of that statute is also supported by *In re Arkenburgh,* 56 N. Y. S. 522, 38 App. Div. 473 (1899); *In re Runyon's Estate,* 125 Cal. 195, 57 P. 783 (1899); in addition to the principal case.

In re Williams' Estate, 147 Wash. 381, 266 P. 137 (1928), expresses the third rule on renunciation. It is the only case found, up to the date of this writing, representing the second, or so-called minority view among those states having statutes on the subject. Therein it was decided that "the renunciation of the compensation, fixed by the will, must come at the earliest possible time, and before the duties as executor are entered upon, and before the offer contained in the will is accepted by acting thereunder." Section 1528, REM. COMP. STATUTES, provides: "Where no compensation shall have been provided by will, or the executor shall renounce his claim thereto, he shall be allowed such compensation as to the court shall seem just and reasonable." The wording of this statute is almost identical with the Indiana, California, New Jersey, and New York (since repealed) statutes. Yet the court, in construing it, applied an entirely different meaning. Assuming that the executor of the *Heath v. Maddock* case, *supra,* had filed a renunciation in the Washington court, there would have been no doubt that the renunciation would be refused, because he had entered into his duties as executor five years before.

Although the Washington decision, *In re Williams, supra,* is identified as a minority rule by the courts, it is essentially the same rule laid down by over three-fourths of the states; *i. e.,* all those states not having statutes on renunciation. It is a mere exemplification of the majority rule, the only difference being that it is reasoned from a statute. It must therefore be concluded that the principal case, although said by the court to be adhering to the majority rule, is actually a holding embracing the minority view.

The rule of the *In re Williams'* case and the majority rule is based upon stronger principles of law and justice. The decision of the principal case may not appear to be unjust or too severe, since the executor only waited six weeks before renouncing; but the rule, laid down, allowing "reasonable" time to renounce is so flexible that its application sometimes goes to dangerous extremes. An excellent example of this danger is *Heath v. Maddock, supra,* where five years was considered a "reasonable" time.

New York was apparently dissatisfied with the results of the statute, for after such decisions as *In re Arkenburgh, supra,* and *In re Nester,* 151 N. Y. S. 194, 166 App. Div. 224 (1915), both allowing renunciation after services had been performed two and one-half years, the Legislature repealed the NEW YORK CODE CIVIL PROCEDURE, Section 2730 (amended Section 2753) (which provided no time, and was construed to mean a reasonable time), by the Surrogate Court Act, Section 285, which provided that a renunciation must be filed within four months from the

date of his letter. The legislature apparently was not satisfied with the right accorded to the executor, by reason of the interpretation of the former statute, by which he could wait for any length of time, while deciding whether to accept the compensation the testator has offered, or to apply to the court for its fee. *In re O'Donahue's Estate,* 181 N. Y. S. 911, 115 Misc. Rep. 697 (1920); and *In re Cohen's Will,* 220 N. Y. S. 509, 128 Misc. Rep. 906 (1927), are excellent cases demonstrating how the confusion and uncertainty on the question of "time" has been eradicated.

The opinion in the *In re Williams'* case presents very strong reasons why such a decision is followed by the majority of the states, statute or no statute. The following constitutes a part of the well reasoned opinion: "The language of the statute is more inferential than direct, but it seems to us that it does not evidence a legislative intent that an executor may repudiate his contract when half performed, simply because it has proved more burdensome than anticipated, and both in good law and good morals it must mean that the renunciation of the compensation fixed by the will must come at the earliest possible time, before the duties are entered, and before the offer contained in the will is accepted thereunder; otherwise, an executor may speculate, procrastinate, and delay until he feels that he has put himself in a position to obtain more from the court than the will allows. Such a course would be abhorrent to the law and good morals. . . . If a living person says to another, 'Do certain work and I will pay you $1,000;' and the person to whom that is said replies not at all, but proceeds immediately to do the work, can either say there was no contract? Or can he who has done the work, or half of it, finding it more arduous than he anticipated, then say: 'True, you made the offer, but I did not in words accept it. I now find the work is reasonably worth $2,000, and that sum I now demand.' Must not the answer be, 'You are bound by your contract'? If this be the rule as to living persons, how much more important and salutary to apply it when the mouth of one party has been closed by death."

John C. O'Connor.

GAMING—PIN BALL MACHINES DISCHARGING TOKENS CONSTITUTE A GAMBLING DEVICE.—Plaintiff, a resident of the city of Cleveland, Ohio, sought to enjoin the licensing of mechanical amusement devices paying off in tokens, and to declare invalid a Cleveland ordinance permitting such licensing. The ordinance authorized the licensing of "any machines or device which, as a result of a deposit of a coin, by and through an automatic or mechanical operation, affords amusement, whether accompanied by the automatic vending of any mints, candies, confections, or other commodities, and which shall by means of such operation register a score or indicate the results of such operation, whether accompanied by the return of tokens, slugs or any other evidence of the result of such operation or not." From a judgment for the defendant, the plaintiff appealed. Held, that the ordinance was invalid in view of the fact that such machines were gambling devices *per se* and therefore in conflict with Sections 13056 and 13066, General Code, which sections read as follows: Section 13056. "Whoever permits a game to be played for gain upon or by means of a device or machines in his house or in an out-house, booth, arbor, or erection of which he has the care or possession, shall be fined not less than fifty dollars nor more than two hundred dollars." Section 13066. "Whoever keeps or exhibits for gain or to win or gain money or other property, a gambling table, or faro or keno bank, or gambling device or machine, or keeps or exhibits a billiard table for the purpose of gambling or allows it to be so used, shall be fined not less than fifty dollars and imprisoned not less than ten days nor more than ninety

days, and shall give security in the sum of five hundred dollars for his good behavior for one year." *Kraus v. City of Cleveland,* 19 N. E. (2d) 159, (Ohio 1939).

The court based its decision on the ground that amusement is a thing of value, and the less amusement one receives, the less value he receives, and the more amusement, the more value he receives. Whoever plays the device and obtains tokens therefrom receives more value for his nickel, with respect to the amount of amusement obtained, than the player who receives none at all. The player who receives ten tokens which he can replay in the machines and thus gain more amusement, receives more for his nickel, than the player who receives only two. However, the number of tokens a player may receive is wholly dependent upon chance. He may receive none; he may receive a few; or he may receive many. Consequently, the amount of amusement a player receives for his nickel, by virtue of the return of the tokens, is dependent wholly upon chance. Whatever amusement is offered through the return of tokens is added amusement, which a player has an uncertain chance of receiving.

To further substantiate its conclusion, the court cited numerous cases in which under different factual situations, various types of machines were held to be gambling devices. The case of *Myers v. City of Cincinnati,* 128 Ohio St. 235, 190 N. E. 569 (1934), held that "mechanical devices, whether paying off in confection, tokens, or money, encouraged and stimulated the gambling instinct of receiving for nothing, or more for less, and are in such contravention of sound public policy as to come within laws relating to gambling and the exhibition of gambling devices."

The Supreme Court of Maine came to almost this same conclusion when they held that, "a machine, the theory upon which it is conceived and worked, is to induce customers to play with the expectation of getting something for nothing—it matters not what customer is successful, as it is perfectly obvious one part of the public pays in money for what another part of the public gets in prizes, and such machines are gambling devices." *State v. Googin,* 117 Me. 102, 102 Atl. 970 (1918).

The principal case justifies and extends a holding of the Ohio Appellate Court in an early case, in which that judicial body held that, "a vending machine from which the operator on depositing a nickel receives mints and from which he might receive tokens with which to play the amusement feature thereof, constituted a gambling device." *Snyder v. City of Alliance,* 41 Ohio App. 48, 179 N. E. 426 (1931).

In *Manchester v. Marvin,* 211 Iowa 462, 233 N. W. 486 (1930) the court held that a slot machine where the player may receive trade checks ranging in value from five cents to one dollar by dropping a nickel in the machine, is a gambling device. Similar results were reached in two Kentucky cases where the court held that trade or premium checks which might be forthcoming from mechanical devices, made such machines gambling devices. *Allen v. Commonwealth,* 178 Ky. 250, 198 S. W. 896 (1917), and *Commonwealth v. Gritten,* 180 Ky. 446, 202 S. W. 884, 38 A. L. R. 73 (1918).

The Maryland Court in disposing of a problem similar to the one found in the principal case, took another point of view, holding a state statute making lawful the licensed operation of pin ball machines or games played with balls and plungers or any other machine depending upon player's skill, void because the standard by which administrative officers enforcing the statute were to determine whether the outcome was dependent upon player's skill was too indefinite. *Hoke v. Lawson,* 1 Atl. (2d) 77, (Maryland 1938).

It was not indicated in the Maryland case (supra) that such machines would be considered gambling devices as would be contrary to the general laws of the state, or that licensing of the same would be in conflict with constitutional pro-

visions relating to gaming. The Ohio Court on the other hand, in *Kraus v. City of Cleveland,* definitely decided that machines paying off in tokens or anything of a like character, other than machines which merely gave a score for the result of skill, were gambling devices; and licensing of the same would be legislation contrary to the laws of the state.

After an investigation and study of numerous cases dealing with the subject of gaming, it is quite apparent that the principal case decidedly broadens the doctrine as to the types of machines which constitute gambling devices. The Ohio Court through its logical reasoning pertaining to amusement as being an item of value, and that anyone who may receive more than a definite amusement, depends on chance, makes clear the doctrine that all machines which give more for the amount of money paid into them than a definite amount of amusement, or specified merchandise equal to the amount placed in the machines, is a gambling device.

Armed with this decision in the principal case, other courts, may if they wish, free their jurisdictions from the bondage of any type of machine which offers an uncertain chance to receive more in return for a coin deposited therein than actual value or definite amusement.

Richard F. Sullivan.

WORKMEN'S COMPENSATION—CONTINUING JURISDICTION OF INDUSTRIAL BOARD ON ACCOUNT OF CHANGE IN CONDITION.—Plaintiff, while in the employ of defendant packing house, sustained an injury to his right eye, impairing its vision 80%. At the time defendant tendered plaintiff surgical services for removal of a cataract in his right eye, which offer was refused. The industrial board found that if plaintiff should submit to an operation in all probability the total impairment to the right eye would be reduced to 50%. Accordingly, the board awarded plaintiff compensation on basis of 50% impairment of the eye, declaring that this order would not be conclusive upon plaintiff except for the number of weeks and the percentage of impairment stated, if plaintiff shall accept medical services proffered by defendant for removal of cataract. After the last payment of the award plaintiff filed application for review of the award on account of change in condition, alleging that partial impairment had increased and that defendant refused to supply services which now the plaintiff is willing to accept. Although finding that the partial impairment had not increased, the industrial board sustained plaintiff's application, ordering defendant to supply medical service to plaintiff should the latter accept within thirty days. From this order, defendant appealed. The Indiana Appellate Court with two judges dissenting, sustained the ruling of the board on the ground that conditions under which original award was entered no longer obtained. *Swift & Company v. Neal,* 18 N. E. (2d) 491 (Ind. App. 1939).

Plaintiff in above instance invoked § 45 of the INDIANA WORKMEN'S COMPENSATION ACT, BURNS' INDIANA STATUTES (1933 Rev.), § 40-1410 which reads as follows:

"Power and jurisdiction of industrial board over each case shall be continuing, and from time to time, it may, upon its own motion or upon application of either party, on account of a change in conditions, make such modification or change in award, ending, lessening, continuing or extending payments previously awarded, either by agreement or upon hearing, as it may deem just, subject to maximum and minimum provided by this act."

The whole case hinges on the definition and interpretation of the all-important phrase "on account of change in conditions." The majority opinion emphatically declared that as for a "change in conditions" this does not necessarily mean that there must be a change in the physical condition of the injured employee; just

as emphatically, if not more so, the dissenting jurists assert that "change in conditions" has reference to physical condition of the injured employee and that alone. Consequently, the object of this review is to determine whether the Indiana court is striking forward in a new advance, whether there are other courts which substantiate this decision, and whether such decision is valid or not.

As a general rule it may safely be said that an order awarding or denying compensation may be changed only when there has been a change in the claimant's physical condition; and this rule is enunciated more strongly in such jurisdictions as Illinois, Oklahoma, Michigan, Arizona, Missouri, Ohio, Tennessee, Texas, and West Virginia because in those jurisdictions it is a necessary and only ground for alteration. *Western Foundry Co. v. Industrial Comm.*, 298 Ill. 593, 132 N. E. 218 (1921); *Bloomington, D. & C. Ry. Co. v. Industrial Board*, 276 Ill. 120, 114 N. E. 511 (1916); *Barnsdall Oil Co. v. State Ind. Comm.*, 178 Okla. 289, 62 Pac. (2d) 1031 (1936); *Texas Co. v. Atkinson*, 178 Okla. 418, 62 Pac. (2d) 883 (1936); *Runnels v. Allied Engineers*, 270 Mich. 153, 258 N. W. 230 (1935); *Jesulich v. Wis. Land & Lumber Co.*, 267 Mich. 313, 255 N. W. 920 (1934); *Doby v. Miami Trust Co.*, 40 Ariz. 490, 14 Pac. (2d) 476 (1932); *State v. Industrial Comm.*, 125 Ohio St. 27, 180 N. E. 376 (1931); *Home Accident Ins. Co. v. McNair*, 173 Ga. 566, 161 S. E. 131 (1931).

In the past it is evident that the Indiana court was prone to follow the general rule and the books are replete with cases on that score. As the dissenting jurists pointed out, in *Jackson Hill Coal Co. v. Gregson*, 84 Ind. App. 170, 150 N. E. 398 (1926) the Indiana court stated that "changed conditions" has reference to the physical condition of an injured employee, and, perhaps as an afterthought, the court said, "the meaning of the statute is not in doubt." Indiana cases sustaining this point are *Morgan v. Wooley*, 103 Ind. App. 242, 6 N. E. (2d) 717 (1937); *Indianapolis Tube Co. v. Surface*, 86 Ind. App. 55, 155 N. E. 835 (1927); *Lukich v. W. Clinton Coal Co.*, 104 Ind. App. 73, 10 N. E. (2d) 302 (1937).

The statements of previous Indiana decisions appear irrevocable and clear-cut. In *Sumpter v. Colvin*, 98 Ind. App. 453, 190 N. E. 66 (1934) the court said in part, ". . . subject only to the right of either party . . . to have a modification thereof on account of a change in the injured man's condition, . ." Again, in *Birdsell Mfg. Co. v. Tripp*, 80 Ind. App. 450, 141 N. E. 252 (1923) it was asserted that "An employer who believes that its liability to an injured employee has ceased because of a change of condition of the injured employee has a remedy under this section." Too, it was said in *Indianapolis Tube Co. v. Surface, supra*, that "where there has been no change in the injured employee's condition since the award, the board has no authority to review the award because of changed condition." In *Sewall v. Terre Haute Brew. Co.*, 102 Ind. App. 373, 200 N. E. 734 (1936) is stated in part ". . . . Sec. 45, providing for additional compensation on ground of change in condition of injured employee. . . " Other cases on the point are *Zeller v. Mesker*, 85 Ind. App. 659, 155 N. E. 520 (1927); *Pettiford v. U. Dept. Stores*, 100 Ind. App. 471, 196 N. E. 342 (1935).

From time to time various courts have negatively defined "change in conditions" by laying down what is not such a change. It has been held that a change in economic condition is not a change in condition, *McCormick S. S. Co. v. U. S. Employees Compensation Comm.*, Circuit Court of Appeals, 9th District, 64 F. (2d) 84 (1933); neither is a general increase in wages, *Lerner v. Jakenwall Embroidery Co.*, 196 N. Y. S. 736, (1922); *Travelers Ins. Co. v. Hurt*, 176 Ga. 153, 167 S. E. 175 (1932); nor the marriage of a dependent sister, *Jackson Hill Coal Co. v. Gregson, supra*; too, an increase or decrease in injured employee's earning power is no basis for modification on ground of change in condition, *Sumpter v. Colvin, supra;* neither is mistake, *Fair v. Hartford Rubber Works*, 95 Conn. 350, 111 A. 193 (1920); nor is a change in the condition of the labor market, *Hudson's Case*, 244 Mass. 346, 138 N. E. 235 (1923).

Other courts, not given to negative assertions, positively state that there can be no modification without a change of physical condition, and so define the term. "But the Act contemplates changes in award thereafter corresponding to changes in condition of claimant's disability. *Shay v. Aetna Life Ins. Co.,* 200 A. 302 (Pa. 1938). Too, "there can be no change in award . . . where there has been no change in employee's physical condition." *Smith v. Pontiac Motor Car Co.,* 277 Mich. 652, 270 N. W. 172 (1936). More cogently, "Words 'change in condition' means change in physical condition of employee." *Atlantic Coast Shipping Co. v. Golubiewski,* District Court, D. of Maryland, 9 Fed. Supp. 315 (1934). And finally, "additional award is authorized. . . only when there has been a physical change in employee." *Brown Bros. v. Parks* 174 Okla. 736, 56 Pac. (2d) 883 (1935).

Numerically, the weight of opinion appears to be overwhelming against the principal case, yet there is strong authority, much common sense, and more justice supporting its stand. Strangely enough, it is an Oklahoma court, where the *contra* view is staunchly entrenched, that points the way. In *U. S. Fidelity & Guaranty Co. v. State Industrial Comm.,* 115 Okla. 273, 244 Pac. 432 (1925) it was remarked that the term might refer to changes other than physical which might have a direct bearing on the right of the injured workman. While there is little sustaining American authority, there is some important English authority. Accordingly in *Woodilee Coal & Coke Co. v. McNeil,* [1918] A. C. 43, it was held that a general rise in scale of wages amounts to a change in condition; so, too, has been held a general fall in wages and the fact that no work is available. *Pollard Collieries Co. v. Murray,* [1923] A. C. 506. Increased earnings of employee constituted a change in condition in *Anley v. Neale,* 9 W. C. C. C. 341 (1916); while in *Silicock v. Golightly,* 8 B. W. C. C. 48 (1915) it was so held on the failure of the workman to obtain employment.

There is some American authority supporting the principal case. In *Ray v. Frenchman's Bay Packing Co.,* 122 Me. 108, 119 A. 19 (1922) it was held that "Lessened income because of inability to procure work on account of disinclination of employers to employ crippled men is within provision allowing increased compensation when there is an increased incapacity for work, although physical condition of claimant is not changed." *Sullivan's Case,* 218 Mass. 141, 105 N. E. 463 (1914); *Duprey's Case,* 219 Mass. 189, 106 N. E. 686 (1914). As far back as 1923, an Indiana court in *Cullen v. Panhandle Coal Co.,* 81 Ind. App. 213, 141 N. E. 647 (1923) was of the opinion that remarriage was a change in condition. Obviously that ruling was submerged by the wealth of *contra* decisions and now, like the long lost river, rises again to the light.

Homan v. Belleville, 98 Ind. App. 466, 8 N. E. (2d) 127 (1937) marks the turning point in the history of the interpretation of the phrase "change of condition." In that instance, the discovery of the making of a compromise claim was held to be a change of condition under Sec. 45 sufficient to modify a previous award. In this case, cited by the majority opinion in the principal case and in which the same two judges who dissented in principal case dissented in this also, it was said: "Unfortunately this in the past has been interpreted to be a change in the physical condition of the injured one, but certainly this was not what the general assembly had in mind."

With these two cases it is evident that the Indiana Appellate court is sweeping into discard a multitude of cases by giving a new and more progressive interpretation to the clause "change of condition." By this decision the court not only gives vent to what it considers the legislative intent for the advancement of public welfare but adds its bit towards the great social progress of law, tending more to humane and just decisions rather than adhering strictly to the very letter of the law. In this the Indiana court makes an appreciable advance.

Louis Da Pra.