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Contributors to the May Issue/Notes

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NOTES

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—NATURE AND GROUNDS OF MASTER'S LIABILITY—INJURIES ARISING OUT OF COURSE OF EMPLOYMENT—ACCIDENTAL INJURIES—HERNIA.—The practitioner acquainted with procedure and practice under the Workmen's Compensation Acts is well aware that not all injuries suffered by an employee are compensable. It frequently occurs that the sole inquiry resolves itself to one issue, Was the complainant's condition caused by a compensable injury? Necessarily, if the state act covers only "accidental injuries" or "personal injury by accident," and does not broadly scope all injuries incurred in industry, the affirmative determination of the above inquiry is a condition precedent to further consideration by the commission or industrial board.

In both the Indiana ¹ and Michigan ² Acts, as in fact the majority of statutes, there is specified an "accidental injury." It is the purpose of the writer to discuss, within the limited confines of this note, the status of hernia, hemorrhages, and strains as compensable injuries within the terms of such acts. Where, concededly, the hernia is caused by blows, sudden or unusual strains producing injury, or other ac-

¹ IND. STAT. ANN. (Burns, 1933) § 1701.

² MICH. COMP. LAWS (1929) § 8407 *et seq.*

cidents, it is clearly compensable. The writer narrows his attention to those situations in which the hernia is occasioned by the employee's work done in the ordinary, usual manner. In such cases, as hereinafter developed, there is a conflict of authority as to whether there can be a recovery. The Michigan Supreme Court has consistently refused to allow compensation in such cases. Its attitude in that respect is given a harsh test by a very recent case which on the face of the facts would appear to strongly warrant recovery.³ Therein, the Court held that a salesman who had suffered an inguinal hernia, as a result of lifting a cash register from a car seat and carrying it to a store to exhibit to a prospective customer in his common way of doing his work, had not suffered an accidental injury and therefore compensable injury within the Michigan Act. The Court says: "The fact that the plaintiff reached down slightly to lift the register did not render the hernia the result of an untoward or fortuitous happening." The Michigan Court expressly follows the case of *Kutschmar v. Briggs Mfg. Co.*,⁴ which held that a workman who ruptured himself by lifting a heavy iron bar in his usual and ordinary employment in the usual and ordinary way without the intervention of any untoward or accidental happening, had not suffered an accidental injury within the Michigan Act. This case has been much criticized and is declared to be against the great weight of authority both in this country and England.⁵ Other Michigan cases definitely and consistently place that State then in a decidedly minority position.⁶ Says the Court in the *Kutschmar* case: "To justify compensation for accidental injuries, there must have been some unusual, fortuitous or unexpected happening which caused the injury and which was in essence, accidental in character." Thus does Michigan align herself with the English cases of the turn of the century which construed the English Act in a similar way.⁷ An

³ *Williams v. National Cash Register Co.*, 262 N. W. 306 (Mich. 1935).

⁴ 163 N. W. 933 (Mich. 1917). Accord: *Alpert v. Powers*, 119 N. E. 229 (N. Y. 1918) (The court said that "hernia is a disease arising out of natural causes, as well as an accident, and that it was therefore incumbent upon claimant to show that his employment caused the injury, and that the injury was assignable to a determinate or single act identifiable in space and time . . . to something catastrophic or extraordinary."); *Lerner v. Bump*, 149 N. E. 334 (N. Y. 1925); *Sanders v. Fuller*, 205 N. Y. S. 295 (1924); *Westbrook v. Highview*, 157 S. E. 362 (Ga. 1931).

⁵ See: Annotation, L. R. A. 1918B, 1133; WORKMEN'S COMPENSATION ACTS, 71 C. J. 621; Annotation, L. R. A. 1916A, 32, 228, 304; Annotation, L. R. A. 1917D, 108, 111; HERZOG, MEDICAL JURISPRUDENCE (1931) 401.

⁶ *Tackles v. Bryant & Detwiler Co.*, 167 N. W. 36 (Mich. 1918); *Sinkiewicz v. Lee & Cady*, 263 N. W. 784 (Mich. 1931).

⁷ *Roper v. Greenwood*, 83 L. T. R. (N. S.) 471 (1901); *Perry v. Baker*, 3 W. C. C. (Eng. 1901) 29. Professor Bohlen says that under this early state of Compensation Law no injury was regarded as sustained by an accident where the workman was harmed while doing the very work he was employed to do

actual accident is required to render the hernia compensable. These English cases were overruled by *Fenton v. Thorley & Co.*,⁸ which settled the question under the English Act.

In any discussion of the American compensation acts, the important effect of the English Act and the constructions thereon, cannot be minimized, for the term "personal injury by accident," and indeed almost every other important provision, was copied into the various American acts, from the English Act of 1876 (amended in 1906). The constructions, then, of the English courts of the term under examination, are of importance in emphasizing and explaining the trend of the American courts.⁹ In the famous case of *Fenton v. Thorley & Co.*¹⁰ the employee was ruptured while moving a wheel in his usual manner, and the court held that "despite the absence of any slip, wrench, sudden jerk or external force, the injury, having been unexpectedly and undesignedly incurred in the course of employment was caused by an 'accident' within the Compensation Act."¹¹

It is not to be supposed that Michigan, any less than other American jurisdictions in construing their new statutory mediums for settling master-servant disputes, was not affected by this and subsequent English decisions. The case of *La Veck v. Parke, Davis & Co.*¹² bears witness to the contrary. Therein was involved a ruptured blood ves-

under the conditions usual thereto. Bohlen, *The Drafting of Workman's Compensation Acts* (1912) 25 HARV. L. REV. 328, 338. This appears to be the precise attitude of the Michigan Court at the present time.

⁸ [1903] A. C. 443.

⁹ An interesting and scholarly discussion of the effect of the English Act and the court constructions thereon, especially of the term "personal injury by accident," by the American courts, is contained in *Big Jack Overall Co. v. Bray*, 171 S. E. 686 (Va. 1933). See, also, Walton, *Workmen's Compensation and the Theory of Professional Risk* (1911) 11 COL. L. REV. 36.

¹⁰ *Op. cit. supra* note 8.

¹¹ See, also: *Timmins v. Leeds Forge Co.*, 16 L. T. R. 521 (1900); *Neville v. Kelley & Mitchell*, 1 B. W. C. C. 432 (1907); *Lancaster v. Blackwell Colliery Co.*, 122 L. T. R. (N. S.) 152 (1920). Professor Bohlen, in his article commented on in note 7, *supra*, criticizes the aforesaid English cases for giving such a broad meaning to accidents and failing to differentiate between diseases and accidents. In effect, Professor Bohlen lays down the rationale of the present Michigan Court. In *Fenton v. Thorley & Co.*, *supra* note 8, the term "accident" is used in the lay or ordinary and popular sense. It might be submitted that the lay meaning is too uncertain to be of much value. However, since the case of *Fenton v. Thorley & Co.*, the great weight of authority both in this country and in England supports the view that nothing more is required than that the plaintiff's injury be unexpected, and that unusual or external causes are unnecessary.

¹² 190 Mich. 604, 157 N. W. 72 (1916). It is interesting to note that this case has never been cited, to the writer's knowledge, in any subsequent Michigan case involving hernia, strain or similar injury, unaccompanied by a fortuitous circumstance. It is submitted that the award of the Industrial Accident Board is more in accord with the majority holding in this country than with the later

sel resulting from heat and excessive exertion by the employee in a boiling room of the employer's, and it was conceded that there had been no visible accident and no event causing external violence to the employee's body. There was nothing to indicate that the workman was not doing his work other than in his usual manner. Citing the English cases, and, particularly, *Fenton v. Thorley & Co.*, the Michigan Court affirmed the award to the employee, observing that the result could be traced to the unusual hours of work and conditions and was an unexpected consequence from the continued work in the excessively warm room. This decision has, however, had but little effect on subsequent cases involving hernias and kindred injuries of the nature under examination, and it cannot be said that the Michigan Court today adopts as liberal an attitude. It instead insists on some, even though slight, untoward occasion, actually accidental, to render the injury compensable. How slight is evidenced by the case of *Crosby v. Thorpe, Hawley & Co.*,¹³ in which it was held that a traveling salesman, hurrying with heavy grips to a station, became excited when he heard the train pulling in and broke a blood vessel in his brain, had suffered an accidental injury.

An accident is distinguished in that it arises from a definite, fixed, traceable event, thus differing from an occupational disease which develops gradually over a long period of time.¹⁴ Before Wisconsin

Michigan cases. It should be noted that while the court therein speaks of "unusual hours of work" and the "excessively warm room," these were but the conditions under which the employee worked, and therefore not untoward.

¹³ 172 N. W. 535 (Mich. 1919). In reference thereto, the commentor in 18 MICH. L. REV. 72 remarks that this case is in line with the English cases, especially *Fenton v. Thorley & Co.* The present writer believes that it is more in reason to regard this case as simply presenting that untoward, fortuitous, occasion, even though minimal, which the Michigan Court has consistently required since the *Kutschmar* case. See, also: *Schanning v. Standard Castings Co.*, 169 N. W. 879 (Mich. 1918); *Shaw v. Packard Motor Car Co.*, 183 N. W. 767 (Mich. 1921); *Helder v. Luce Furniture Co.*, 187 N. W. 263 (Mich. 1922); *Smallegan v. John Smallegan & Sons*, 256 N. W. 435 (Mich. 1934).

¹⁴ WORKMEN'S COMPENSATION ACTS, 71 C. J. 602. It was because of this essential distinction that Bohlen criticized the English cases, particularly *Fenton v. Thorley & Co.* See Note 11 *supra*. What is termed an "accident" must be something out of the ordinary, unexpected, and definitely located as to time and place. *Barron v. Texas Employers Ins. Ass'n*, 36 S. W. (2d) 464 (Tex. 1931); *Scheerens v. Edwards & Sons*, 232 N. Y. S. 557 (1929); ACCIDENT, 1. C. J. 390; 1 BOUVIER LAW DICR. (Rawle's Third Revision) 101; Checkver, *Treating Disease as a Personal Injury Accident under Workmen's Compensation Acts* (1928) 14 VA. L. REV. 358.

Idiopathic diseases are not treated by the courts as coming within the meaning of "accidental injuries," but rather as belonging to the category of occupational diseases. *Thomas v. Ford Motor Co.*, 242 Pac. 765 (Okla. 1925); *Renkel v. Industrial Commission*, 141 N. E. 834 (Ohio, 1923); *Moore v. Service Motor Truck Co.*, 142 N. E. 19 (Ind. App. 1924); WORKMEN'S COMPENSATION ACTS, 71 C. J. 574, 99. That a disease may be traumatic and constitute a personal in-

changed its act from "personal injury accidentally sustained" to any and all industrial injuries,¹⁵ the Supreme Court of that state adopted the same interpretation as that of the Michigan Court. The compensation reports of that period are illuminating. Says the Wisconsin Commission on one occasion:¹⁶ "Inguinal hernias rarely come from accident. The accident is the occasion, rather than the cause, of the hernia. Such hernias ordinarily come from inherited or acquired weakness and come through process of gradual development. The immediate propulsion usually comes from a slight strain resulting from ordinary work. The injured party is apt to think that the hernia is the result of severe strain, and when he notices it, tries to fix in his mind the time and place when he received such strain. There can be no doubt that hernias are sometimes the result of accident, but it . . . appears that they are seldom traumatic." The last statement is, of course, true, for the term "accident" is broad enough to include a hernia sustained by muscular strain.¹⁷

Because the writer is particularly interested in the Michigan set-up, he has perhaps devoted too much attention to what is really minority law in this country. The majority of the courts¹⁸ generally allow compensation in cases of strain or hernia from over-exertion, even though occasioned by the employee's work performed in the normal manner.¹⁹ These courts place a very liberal construction on their Compensation Acts, and the specification "by accident," holding that in cases of hernias and strains an unforeseen, fortuitous, outside, physical force which causes the injury is unnecessary; that if the injury itself is received unexpectedly and in the course of employment from an un-

jury by accident, see WORKMEN'S COMPENSATION ACTS, 71 C. J. 589. Occupational diseases are now expressly included in the statutes of several states, Wisconsin notably taking the lead, and New York, Illinois, Connecticut and other states having like amendments. See *Weinrich v. Industrial Commission*, 196 N. W. 824 (Wis. 1924).

¹⁵ WIS. STAT. (1929) § 102.35. The Wisconsin Act allows compensation for all injuries, including occupational diseases, growing out of and incidental to the employment, in addition to accidental injuries.

¹⁶ *Herman Seiffert v. City of Milwaukee*, 2 Wis. W. C. R. 66 (1913). In 6 Wis. W. C. R. 81 the Commission says that it is practically impossible for hernias to occur otherwise than from predisposition, and that when that viewed as accidental, the "progress of the hernia sac must come coincidental to some accident or some sudden and unexpected strain."

¹⁷ WORKMEN'S COMPENSATION ACTS, 71 C. J. 620 (§ 373).

¹⁸ See authorities cited in references in Note 5, *supra*.

¹⁹ *Terre Haute Malleable & Mfg. Co. v. Wehrle*, 132 N. E. 698 (Ind. App. 1921); *Poccardi v. Public Service Comm.*, 84 S. E. 242 (W. Va. 1915); *Krenz v. Ferguson Coal Co.*, 154 N. E. 35 (Ind. App. 1926); *Stacey Bros. Gas Const. Co. v. Massey*, 175 N. E. 368 (Ind. App. 1931); *Johnson v. La Bolt Oil Co.*, 252 N. W. 869 (S. D. 1934); *Big Jack Overall Co. v. Bray*, 171 S. E. 686 (Va. 1933); *Brown v. Casualty Co.*, 174 S. E. 359 (Ga. 1934); *Baggott Co. v. Commission*, 125 N. E. 524 (Ill. 1919); Annotation, 98 A. L. R. 205.

known cause, it is an accidental and, therefore, compensable injury.²⁰ The better view would seem to be that any event not intended or foreseen by the injured employee himself is an accident. At least, this view is more in alignment with the humane purpose of the Compensation Acts. That this is the attitude of the majority of the American courts, as well as the English, is patent. The contention that an external, violent, or accidental means is required to render an injury accidental, has been rejected by both federal and the majority of state courts.²¹ Injury by accident does not necessarily imply a direct application of external force. Accident, according to the majority construction, is "the unforeseen, inducing, circumstance or cause, that than the direct means by which the injury is produced."²²

The mere fact that the claimant may have a weakness in his body structure, or some predisposing physical condition, even a predisposition to hernia, or a preexistent ailment which has been accelerated or aggravated, has been held not to prevent recovery.²³

Hernia is unlike most other injuries; in that it is very difficult to trace its cause. The Michigan Court is not so unreasonable as it may at first blush appear, in regarding hernia as strictly as it does. There is much merit in its position that under its present statutory set-up, some fortuitous, unusual event, as an accident, must concur to render the injury compensable. Under the construction adopted, it is felt that the remedy lies not with the courts, but with the legislature, if a more liberal regard for hernia injuries is desired. That hernia cases are complex enough to warrant separate statutory treatment is evidenced by the number of acts which specifically deal with hernia, thus

²⁰ *Brown v. Casualty Co.*, *op. cit. supra* note 19.

²¹ *Pacific Employers Ins. Co. v. Pillsbury*, 61 Fed. (2d) 101 (C. C. A. 9th, 1932). See cases in note 19, *supra*.

A very liberal construction is uniformly given the Workmen's Compensation Acts by these courts. For example, the Indiana Court, in *Empire Health & Accident Ins. Co. v. Purcell*, 132 N. E. 664 (Ind. App. 1921), says: "The words, 'by accident,' as used in the Compensation Act should be given a liberal construction in order that the humane purpose of its enactment may be realized."

²² Comment (1917) 26 *YALE L. JOUR.* 328.

²³ *Johnson v. La Bolt Oil Co.*, *op. cit. supra* note 19; *Hurley v. Seldon Breck Construction Co.*, 159 N. W. 311 (Mich. 1916); *Puritan Bed Spring Co. v. Wolfe*, 120 N. E. 417 (Ind. App. 1918); *Retter v. Industrial Comm.*, 184 N. E. 654 (Ill. 1933); *Baker v. Industrial Commission*, 186 N. E. 10 (Ohio, 1933); *McCarthy v. Industrial Commission*, 215 N. W. 824 (Wis. 1927); SCHNEIDER, *WORKMEN'S COMPENSATION LAW* (2d ed. 1932) 603, 1815, 1827. Of course, the employee has the burden of proving a causal connection between the alleged injury and the resulting condition, and it therefore follows that should the reverse be established, to wit, a causal connection between the weakened physical condition and the resulting injury, recovery would be denied. *Sanitary District of Chicago v. Industrial Commission*, 175 N. E. 372 (Ill. 1931); *WORKMEN'S COMPENSATION ACTS*, 71 C. J. 622.

recognizing the social desire to compensate bona fide injuries of this nature, and at the same time provide a hedge against fictitious claims. These statutes require in effect that the complainant prove that the hernia was of recent origin.²⁴ For example, that inability to work immediately followed,²⁵ or that the hernia appeared suddenly or immediately and was accompanied with pain and did not exist prior to the alleged accident.²⁶

In the absence of any statutory requirement of corroboration, it should seem that no court ought arbitrarily attach to the remedy as a condition, corroboration of the claim, such as immediate prostration, breakdown or cessation of work. As often remarked, even by courts, it is well-known that hernias are frequently suffered without an immediate prostration.²⁷ If the majority holding means anything, it should mean that as long as the hernia is traceable to some fixed event occurring in the course of employment, whether or not there was some untoward or external cause, and whether or not there was an immediate prostration (in the absence of express legislation), the employee should recover. To prevent the floodgates of fictitious claims from opening, it would seem that the remedy would well lie with the respective legislatures, which should enact legislation of the second type noted above, incorporating the rules of the Commission of the State of Washington, commented on in footnote 24 herein.

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²⁴ These statutes used as a model the rules adopted by the Commission of the State of Washington as long ago as 1914. *Zappala v. Industrial Ins. Commission*, 144 Pac. 54 (Wash. 1914). Therein, the court said: "The rules adopted by the Commission governing hernia cases are: (1) There must be an accident resulting in hernia; (2) The hernia must have appeared just following the accident; (3) There must have been present pain at the time; (4) The applicant must show that he did not have hernia before the accident; [and] (5) Hernia coming on while the man is following his usual work is not an accident." The statutes dealing specifically with the compensation of hernia have dropped the first and fifth rules. See, also, Note (1929) 38 *YALE L. JOUR.* 553; SCHNEIDER, *WORKMEN'S COMPENSATION LAW* (2d ed. 1932) 1122.

²⁵ *CONN. LAWS* (1927) c. 307, § 4; *N. J. COMP. STAT.* (Cum. Supp. 1924) c. 236, § 11. Under these statutes, see: *O'Brien v. Wise & Co.*, 143 Atl. 155 (*Conn.* 1928); *Schultz v. Keystone Watch Co.*, 48 *N. J. Law* 104 (1925). The construction under this type of statute denies recovery to the claimant if there is not an immediate incapacitation. It is submitted that such a statute is unnecessarily harsh on the claimant.

²⁶ *ALA. CIV. CODE* (1923) § 7551; *ARIZ. REV. CODE ANN.* (Struckmeyer, 1928) § 1439; *GA. CODE ANN.* (Michie, 1926) § 3154 (2); *IDAHO COMP. STAT.* (1919) § 6235; *KY. STAT.* (Carroll, 1922) § 4884; *MO. REV. STAT.* (1919) § 13609; *PA. STAT.* (Purdon, 1936) Tit. 77, § 652; *TEX. COMP. STAT.* (1928) Art. 8306, § 12 (b). The cases construing this type of statutory provision are generally liberal. See *WORKMEN'S COMPENSATION ACTS*, 71 C. J. 621, and cases cited.

²⁷ *Buncle v. Sioux City Stockyards Co.*, 185 *N. W.* 1391 (*Iowa*, 1921).

WILLS—SIGNATURE—PLACE OF SIGNATURE.—Scholars have doubted whether testamentary power to dispose of interests in either personal or real property existed in England during the Pre-Norman Period.¹ The Norman Conquest produced great changes in the social, political, economical and religious life of England. With the advent of the Norman Conquest, similar great changes were wrought in obtaining, holding and transferring interests in property. The Feudal System, resulting from the Conquest, drew a sharp distinction between personal and real property, and, as a result, the history of Wills became separate from that of Testaments.² After the Norman Conquest, the Ecclesiastical Courts administered the principles governing the law of Testaments while the principles governing the law of Wills were controlled by the Common Law Courts, thus producing changes in the substantive law in the two modes of the disposition of property.³ “This tendency of separation continued until 1857, at which time jurisdiction over wills and Testaments was placed . . . in the Probate Court.”⁴

It is generally agreed that after the Norman Conquest the power of disposing of land by will ceased, except as to a few particular estates. This limitation on the power of disposing of one's interest in land proceeded partly from method of transferring interests in land by livery of seisin which, of course, could not have been complied with in case of a last will; and partly from a jealousy of death-bed dispositions of interests in land; but principally from the general restraint on alienation incident to the rigor of the Feudal System.⁵ However, it was out of natural courses that an effort should be made to facilitate the devising of land. The demand for this power was accentuated by the development of the principle of primogeniture and the consequent desire of a father to protect his younger children. The landowner discovered that the Court of Chancery could aid him then through the medium of a use. Freehold estates could be enfeoffed by the livery of seisin to a person to hold the legal title to the use of the last will of the feoffor, and the latter might then devise the use, which devise was sustained in equity as an appointment by will, and the feoffee was regarded in equity as a trustee for the person designated by the last will of the feoffor. From the reign of Henry V to the enactment of the Statute of Uses, land was freely disposed of in this manner.

The Statute of Uses was passed in 1535 to remedy the consequent abuses. For a time thereafter, devises of land were not possible. But the demand for testamentary power of disposition of land was so strong

¹ REPPY AND TOMPKINS, HISTORICAL BACKGROUND OF THE LAW OF WILLS, DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION 4.

² REPPY AND TOMPKINS, *op. cit. supra* note 1, at 4.

³ REPPY AND TOMPKINS, *op. cit. supra* note 1, at 4. 5.

⁴ REPPY AND TOMPKINS, *op. cit. supra* note 1, at 5.

⁵ 2 COKE 517, n. 2.

that it could not be resisted very long, and, in 1540, the Statute of Wills was enacted, by which the power to dispose of land by will was given to tenants in *fee simple*. During the *interregnum*, full power of testamentary disposition over land was established in England. This power has continued to exist, subject to various restrictions upon its exercise imposed by the Statute of Frauds (1677), The Wills Act (1837), and The Wills Act Amendment Act (1852).

Before the brief period prior to the enactment of The Statute of Wills in 1540, the power of disposing of lands by will apparently had ceased to exist. Obviously, therefore, there were no requirements as to the execution of a will disposing of land. This Statute gave the power of disposing of property by "last will and testament in writing." Still there were no requirements as to the signing by a testator.⁶

Since there were no requirements under the Statute of Wills as to the signature, there were possibilities of fraud, and the result was the enactment of the Statute of Frauds in 1676, requiring devises to be in writing and signed by the party devising the same, or by some other person in his presence and by his express direction, to be enforceable. Thus the signature of the testator became necessary for the first time. Although necessary, it was held by the Court of Common Pleas in *Lemayne v. Stanley*,⁷ soon after the enactment of the Statute, that the place of signature in a will was immaterial. In this case the testator wrote his own will, the first sentence of which was: "In the name of God, Amen, I, John Stanley, make this my last will and testament." The Court held that this was a sufficient signing under the Statute of Frauds, notwithstanding that the name of the testator did not appear elsewhere in the instrument. But, of course, the signature had to be intended as a signing of the will.⁸ The decision in *Lemayne v. Stanley*, holding that the place of the signature was immaterial, remained the law in England until the Wills Act of 1837, which provided that the will had to be signed "at the foot or end thereof." It is said that probably the purpose of this Statute was to eliminate the necessity of inquiring into the actual intention of the testator in placing his name in the body of the will, and to avoid inquiry as to whether the instrument was intended to operate as a preliminary draft or as a final and complete instrument.⁹ "This produced so much confusion, litigation and injustice that an amendatory act was passed in 1852, which declared that the testator's signature might 'be at or after, or following, or under

⁶ PAGE ON WILLS (2nd ed.) § 260, citing: *Brown v. Sackville*, 1 Dyer 72a, 73 Eng. Rep. 152 (1553); *Stephens v. Gerrard*, 1 Sid. 315, 82 Eng. Rep. 1128 (1667); *Lawrence v. Kete*, Aleyen 54, 82 Eng. Rep. 912 (1648).

⁷ 3 Lev. 1, 83 Eng. Rep. 545 (1681).

⁸ *Lemayne v. Stanley*, *op. cit. supra* note 7.

⁹ PAGE ON WILLS (2nd ed.) § 4; *Trott v. Skidmore*, 2 Sw. & T. 12, 164 Eng. Rep. 894 (1860).

or beside, or opposite to the end of the will,' so long as it appeared from the face of the will that the testator intended to give effect by his signature to the writing signed as his will."¹⁰ Under this Statute, the whole will is not invalid because something is written after the signature but probate will issue with the provisions written beneath the signature omitted. This is so even though the provisions were written before the testator signed, and though he intended them to be testamentary.¹¹

Before the enactment of the Statute of Frauds, no formalities were required in the execution of testaments; they could be oral or written; and there were no requirements as to signature. This Statute placed certain restrictions on the execution of oral testaments, but it left written testaments unrestricted. Hence, even after the enactment of this Statute a signature was not necessary to the validity of a written testament.¹²

The Wills Act of 1837 placed the same restrictions on *testaments* and *wills*, in regard to formalities of execution. Thus, the signature of the testator became a requisite to the validity of a testament for the first time. Section 9 of The Wills Act of 1837 placed restrictions upon *all* wills, in the matter of execution, in the most sweeping language. It does not repeat the elaborate provisions of the Statute of Frauds of 1677 for safeguarding nuncupative wills. Only an express exception could save the oral testament. Such an exception was made in Section 11 of The Wills Act, in favor of soldiers "being in actual military service," and in favor of sailors "being at sea," who may dispose of their personal property as they might have done before the enactment of this Statute.¹³

Under statutes in this country, there seems to be a distinct division as to the requirements concerning the signature of the testator and the place of such signature.¹⁴ The statutes of several states, relating to the place of signature of the testator in the execution of a will, follow the provisions of the English Statute of Frauds, requiring merely that the will be in writing and signed. It is immaterial where the testator's signature is placed, if it was placed there with the intention of authenticating the instrument.¹⁵ Accordingly, it has been held that, if intended as a signature, a signing by the testator of his name at the beginning

¹⁰ REPPY AND TOMPKINS, *op. cit. supra* note 1, at 33.

¹¹ Goods of Evans, 128 L. T. R. 669 (1923).

¹² REPPY AND TOMPKINS, *op. cit. supra* note 1, at 32 citing: *In re Taylor*, 1 Hagg. 641, 162 Eng. Rep. 104 (1829).

¹³ REPPY AND TOMPKINS, *op. cit. supra* note 1, at 10.

¹⁴ WILLS, 68 C. J. 661.

¹⁵ *In re Norris' Estate*, 221 Mich. 430, 191 N. W. 238, 29 A. L. R. 884 (1922), and Annotation, at p. 892.

of the will,¹⁶ in the body of the will,¹⁷ in the attestation clause,¹⁸ at the commencement of the will and in the attestation clause,¹⁹ or after the attestation clause,²⁰ is a sufficient signing. However, it is essential that the signature, wherever located in the will, must have been made with a design of authenticating the instrument and that the testator contemplated no further signing.²¹ And whether a signature is so intended is a question of fact to be determined by the evidence in each case.²² In the other states, the statutes, relating to the place of testator's signature, provide that the will be signed or subscribed by the testator *at the end or foot thereof*.²³ As a general rule, it has been held that noncompliance with this requirement renders the will void in toto;²⁴ and it is not entitled to probate.²⁵ In England, however, under The Wills Act Amendment Act of 1852, which is much wider in scope than most statutes in this country, it has been uniformly held that only that portion of the will which follows the signature is rendered void by non-compliance with the provisions of the Act.²⁶

The purpose of these statutes, requiring the testator's signature at the foot or end of the will, is that it shall appear from the face of the instrument itself that the testator's intent was consummated and the instrument was complete as well as to prevent fraudulent or unauthorized alterations of or additions to the will.²⁷ These statutes, it has been said, are subject to strict construction and should not be frittered away by lax interpretations or the engrafting of exceptions.²⁸ And while it is a cardinal rule of construction in the law of wills that the intention of the testator as expressed must govern, yet the intention to make a will, although clearly stated or proved, will be ineffectual unless the execution thereof complies with the statutory requirements. It is the intention of the legislatures, not that of the testator, which is to be considered in determining whether the statute has been complied with,²⁹ even though the application of this principle in some cases will work a

¹⁶ *Meads v. Earl*, 205 Mass. 553, 91 N. E. 916, 29 L. R. A. (N. S.) 63 (1910), and Annotation.

¹⁷ *Better v. Hirsch*, 115 Miss. 614, 76 So. 555 (1917).

¹⁸ *Matter of Acker*, 5 Dem. (N. Y.) 19; SCHOULER, *LAW OF WILLS, EXECUTORS AND ADMINISTRATORS* (6th ed.) § 495.

¹⁹ *Meads v. Earl*, *op. cit. supra* note 16.

²⁰ *Hollowell v. Hollowell*, 88 Ind. 251 (1882).

²¹ 1 JARMAN ON WILLS 70, and authorities cited.

²² *Better v. Hirsch*, *op. cit. supra* note 17.

²³ WILLS, 68 C. J. 662.

²⁴ *Sears v. Sears*, 77 Oh. St. 104, 82 N. E. 1067, 17 L. R. A. (N. S.) 353 (1907), and Annotation.

²⁵ *In re Seaman's Estate*, 80 Pac. 700 (Cal. 1905).

²⁶ *In the Goods of William Gee*, 78 L. T. R. (N. S.) 843 (1898).

²⁷ *Musgrove v. Holt*, 153 Ark. 355, 240 S. W. 1068 (1922).

²⁸ *Irwin v. Jacques*, 71 Oh. St. 395, 73 N. E. 683, 69 L. R. A. 422 (1905).

²⁹ *In re Andrew's Will*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662 (1900).

hardship and thwart the intended disposition of property.³⁰ It is better that this should happen under a proper construction of the statute it was said, "than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills."³¹ In accordance with these principles, if the signing of the will is not in compliance with the statutory requirements, the will is void regardless of the testator's intention in good faith to make a valid disposition of his property.³²

In those jurisdictions where the statutory provision requires the signature of the testator to be at the end or foot of the will, the question is as to just what constitutes the *end*. Although it would seem, and has been so held by some jurisdictions, principally New York, that the end of the writing in point of space may be taken as the end of the disposition of testator's property for the purpose of determining whether the will has been signed at the end in compliance with the statutory requirements,³³ the end of the will, within the meaning of the statute, is the "logical end" of testator's disposition of his property, wherever that end manifestly appears on the paper; and not the point which is spatially farthest removed from the beginning or, as otherwise expressed, the physical end.³⁴ The latter interpretation of what constitutes the end of the will is the most prevalent view in this country and the few jurisdictions which formerly adhered to the physical end view are rapidly swinging to the more reasonable and just interpretation. And where the will is on separate sheets or pages and constitutes more than one paragraph, it is to be read according to the obvious inherent sense and adaptation of its parts,³⁵ and there must also be a sequence of such pages or paragraphs which relate to its logical end and inherent sense, and the signature, in such cases, must be placed at the sequential end.³⁶ This end must not permit the substitution or interpolation of pages in advance unless they are connected as indicated.³⁷ Courts have sustained wills where the testator began the dispositive clauses on page one, continued them in logical sequence on page three and then returned to page two and completed them at which place he affixed his signature. Courts have also sustained wills where the signature of the testator appeared on the first sheet to which

³⁰ *Irwin v. Jacques*, *op. cit. supra* note 28.

³¹ *In re Andrew's Will*, *op. cit. supra* note 29.

³² *In re Andrew's Will*, *op. cit. supra* note 29.

³³ *Irwin v. Jacques*, *op. cit. supra* note 28; *In re Andrew's Will*, *op. cit. supra* note 29.

³⁴ *In re Stinson's Estate*, 228 Pa. St. 475, 77 Atl. 807, 30 L. R. A. (N. S.) 1173 (1910).

³⁵ *In re Swire's Estate*, 225 Pa. St. 191, 73 Atl. 1110 (1909).

³⁶ *In re Maginin's Estate*, 278 Pa. St. 89, 122 Atl. 264, 30 L. R. A. 413 (1923); *In re Stinson's Estate*, *op. cit. supra* note 34.

³⁷ *In re Maginin's Estate*, *op. cit. supra* note 36.

other sheets and schedules were attached and properly referred to on the first page at the bottom of which the testator's signature was placed. If the court can read all the provisions of the will in a logical and inherent sense, it will not invalidate it even though the signature is not at the physical end of the will.³⁸

Another question arises, in determining whether a will is signed at the end thereof to satisfy the provisions of the statutes, when there are written clauses after the signature of the testator. Where these clauses appear below the signature of the testator, there seems to be two distinct views. The first view contemplates two situations, namely, that if the clauses are dispositive in nature the will is invalid in toto and not entitled to probate,³⁹ or if the clauses, though not testamentary in character, materially affect the construction of the dispositive clauses preceding the signature, the will is invalid in toto.⁴⁰ On this last point, however, the law is not definitely settled. The second view is to the effect that where a dispositive clause is found beneath the signature of the testator, the presumption is, in the absence of evidence to the contrary, that the clause was written after the execution of the will, and only so much of the will as precedes the signature is valid.⁴¹ This seems to be the majority view. But where the signature of the testator precedes matters not of a dispositive or material nature, except as already stated in this connection, the will is considered as signed at the end to satisfy the statutory requirements as to the place of signature.⁴² Too, although there is some authority to the contrary, it has been almost uniformly held that notwithstanding a blank space left in the body of the will or between the dispositive part of the will and the signature, the will is considered as signed at the end in satisfaction of statutory requirements,⁴³ even though it is most imprudent as affording an opportunity for fraudulent practice. The extent of the space so left is immaterial.⁴⁴

Where a clause appointing an executor appears below the signature of the testator, there is a conflict of authority as to whether such clause should be regarded as a part of the will so as to prevent the signature of the testator from being a signature at the end of the will. As to the importance of such a clause, Underhill says: "In England an instrument appointing an executor will be admitted to probate where

³⁸ In re Brands, 73 N. Y. S. 1073, 68 App. Div. 225 (1902).

³⁹ In re Ryan's Will, 252 N. Y. 620, 170 N. E. 166 (1930); Irwin v. Jacques, *op. cit. supra* note 28.

⁴⁰ Baker v. Baker, 51 Oh. St. 217, 37 N. E. 125 (1894).

⁴¹ In re Taylor's Estate, 230 Pa. St. 346, 79 Atl. 632, 36 L. R. A. (N. S.) 66 (1911).

⁴² Baker v. Baker, *op. cit. supra* note 40.

⁴³ Musgrove v. Holt, *op. cit. supra* note 27.

⁴⁴ Musgrove v. Holt, *op. cit. supra* note 27.

it disposes only of real property over which the executor has no control, though a will relating exclusively to real property will not be probated in England, if it appoints no executor; and such wills have been refused probate, even where an executor has been appointed. . . . The naming of an executor was regarded as an indispensable part of a will of personal property, and a will which did not appoint an executor would not be probated in the church courts. But this rule has long been abolished, and the statutes usually provide for the appointment of an administrator with the will annexed. . . ."⁴⁵ If, of course, the appointment of an executor was essential to the validity of a will, such a clause was an integral part of the will, and if the signature of the testator was not placed below it the will was not signed at the end. Where, in this country, such a clause is not necessary to the validity of the will, it has been held that where a will contains a clause, following or below the testator's signature, appointing an executor and giving him power to sell the property for division, if necessary, there is a signing at the end.⁴⁶ On the other hand, in some jurisdictions it has been held that a clause appointing executors is a part of the will, and that if the testator's signature is above such a clause the will is not signed at the end and the entire will is not entitled to probate.⁴⁷

A will is considered as sufficiently signed at the end thereof within the meaning of the statute notwithstanding that clauses of a testamentary character are written in the margin of a page or pages of the will if such clauses are properly numbered as to indicate where they should appear in the will or where they should be read in relation to other provisions of the will so as to have a connected sense and render the will entirely clear.⁴⁸ But where the marginal clause is not so indicated, some courts, as in a celebrated Ohio case,⁴⁹ where the marginal clause appeared on the last page of the will extending about an inch below the signature of the testator and was so inserted before his signature was affixed to the will and at his expressed command, adopt the view that the whole will is invalid. Other courts have permitted the admission of parol evidence allowing a marginal writing to be considered as

⁴⁵ 1 UNDERHILL ON THE LAW OF WILLS (1900) 10, 11.

In *Ward v. Putnam*, 85 S. W. 179, 181 (Ky. 1905), the court said: "While at common law the appointment of an executor was essential to a will, under our statute, it is entirely unnecessary."

⁴⁶ *Ward v. Putnam*, *op. cit. supra* note 45.

In *In re Blair's Will*, 32 N. Y. S. 845 (1895), *aff'd*, 152 N. Y. 645, 46 N. E. 1145 (1897), the will contained a clause giving the executors a power of sale of certain real estate, and use of the proceeds to pay legacies, if necessary. The testator signed below this clause; but the signatures of the witnesses were above it. Held, the will was not signed at the end.

⁴⁷ *Appeal of Wineland*, 118 Pa. St. 37, 12 Atl. 301 (1888).

⁴⁸ *In re Swire's Estate*, *op. cit. supra* note 35.

⁴⁹ *Irwin v. Jacques*, *op. cit. supra* note 28.