A TREATISE

ON THE

LAW OF NEGLIGENCE.

BY

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TO MY BROTHER,

HENRY WHARTON,

THIS VOLUME IS AFFECTIONATELY INSCRIBED,

IN COMMEMORATION OF HIM FROM WHOM IN EARLY LIFE, WE BOTH RECEIVED NOT ONLY CAREFUL PARENTAL TRAINING, BUT AN ABIDING TASTE FOR THE SCIENCE OF JURISPRUDENCE.

CAMBRIDGE, *October*, 1874.

PREFACE.

Much of the material contained in the following pages was collected by me when engaged in examining the Law of Negligence in collateral relations. As to publication I at first hesitated, being deterred by the fact that the subject has already been discussed by several authors of deservedly high reputation.[1] But a closer examination has led me to conclude that so far as concerns the particular aspect of the law I purpose to present, I have not been preceded by any writer in the English language.[2] To explain this statement the following observations may not be out of place: —

Our Anglo-American Law of Negligence, it will be remembered, as well as that of Bailments, with which it is so closely associated, is drawn confessedly from the Roman Law. It so happened, however, that both Lord Holt and Sir W. Jones, who did so much to form opinion in these

[1] Negligence is one of the chief topics in Sir W. Jones's Treatise on Bailments; and Judge Story has given the subject the same prominence in his works on Bailments and Agency. We have also independent treatises on Negligence, by Mr. Saunders (London, 1871), by Mr. Campbell (London, 1871), and by Messrs. Shearman & Redfield, of New York, a third edition of whose valuable work was published a few weeks since.

[2] I must except, in respect to the theory of *culpa levissima*, the notes by Mr. Green, in the last (1871) edition of Story on Agency; and an article by the same able writer in the July number of the *American Law Review*; an article which was published after my own observations on this point were printed, but which, reaching the same result, though from a line of authorities distinct from those to which I have appealed, I should be glad to have placed by the side of my own conclusions on this topic.

departments, relied for authority on the scholastic jurists of the Middle Ages rather than on the classical jurists of business Rome; and it was but natural that Judge Story and Chancellor Kent, the treatise of Gaius not having been as yet discovered, and the chief accessible summaries of the Corpus Juris being those of the scholastic jurists, should have followed Lord Holt and Sir W. Jones.[1] Between the scholastic and the classical jurists, however, there is a conflict, as will be hereafter demonstrated, which runs through the whole line of the subject before us. This conflict may be at this point thus briefly epitomized: —

SCHOLASTIC JURISTS.	CLASSICAL JURISTS.
Culpa is of three grades: *culpa lata*, *culpa levis*, *culpa levissima*; and in agencies involving special trust, the agent is liable for *culpa levissima*.	*Culpa* has but two grades: *culpa lata* and *culpa levis*, the negligence of a specialist and that of a non-specialist; or, in other words, the negligence of one professing to be, and of one not professing to be, an expert. As to *culpa levis*, it exists where a specialist neglects the diligence usual with good specialists of his department; and if such diligence is applied, there is no negligence the law takes hold of. *Culpa levissima* the law does not punish, for *culpa levissima* is incident to all business, and to punish men

[1] The explanation of this is given in detail, infra, § 59 *et seq.*

for *culpa levissima* in their business would be to prevent them from doing business at all.[1]

In jure non remota causa sed proxima spectatur.

To causation responsible moral agency is essential; and causal connection is juridically broken, in cases of negligence, when between the first negligence and the damage intervenes the negligence of a second responsible person directly producing the damage.[2]

Mandatum (agency) is a gratuitous undertaking, and the mandatary (agent) is only bound to ordinary diligence.

Mandatum (agency) is not gratuitous; for in all cases a special action lies against the mandant in behalf of the mandatary for the recovery of his *salarium* or *honorarium*. And in any view, the mandatary (agent) who undertakes to act as a business man is required to exhibit the skill and diligence good business men in his department are accustomed to exhibit.[3]

If the plaintiff's negligence, no matter how trivial, contributes to the injury,

Injuria non excusat injurium. No matter how negligent the plaintiff may have been,

[1] Infra, § 26 *et seq.*

[2] Infra, § 87 *et seq.*, 134, and also Appendix.

[3] See infra, § 485.

he is barred, on the theory of *culpa levissima*, from recovery.

this does not excuse the defendant in negligently injuring him, if this injury could have been avoided by the exercise of the diligence good business men are accustomed to exercise in such matters. Nor can the plaintiff's *culpa levissima* bar his recovery. If it does, there is no plaintiff who can recover, for there is no human action to which *culpa levissima* is not imputable.[1]

The scholastic theories on the above topics are the products of a recluse and visionary jurisprudence scheming for an ideal humanity; the classical theories, as contained in the Corpus Juris, are the products of a practical and regulative jurisprudence, based, by the tentative processes of centuries, on humanity as it really is, and so framed as to form a suitable code for a nation which controlled, in periods of high civilization, the business of the globe. Hence, when the attempt was made, even under the high auspices of Lord Holt and Sir W. Jones, to enforce the scholastic jurisprudence in the business transactions of England and of the United States, it was but natural that judges should stagger at refinements so unsuitable for practical use;[2] and hence we can understand, also, how Judge Story, enthusiastic as was his admiration for the "civil law" (which includes, in his acceptation of the term, the scholastic jurisprudence), should have shrunk

[1] See infra, § 300–345.

[2] See for illustrations infra, § 44.

from judicially imposing the subtleties which he accepted as theoretically sound. The consequence was that our adjudications have been on one plane of jurisprudence, and our principles on another plane; the necessities of business life drove us to approach the law of business Rome, while the authority of our jurists induced us to still cling to the idealistic fictions of mediaevalism. In the following pages I have sought to avoid this incongruity, by substituting as a basis the Roman for the scholastic jurisprudence; striving in this way not only to present the law in logical consistency, but to arrange it in a shape which can be readily and quickly mastered by the practitioner. Some of our older decisions, based exclusively on the scholastic formulas, I have passed over without notice; but I think I can fairly claim to have noticed and discussed, in its proper place, every modern pertinent Anglo-American adjudication. And these adjudications I have classified so as to enable them to take their place in further exposition of that consummate system which the jurists of Rome framed as at once the outgrowth and the law of the business of the Roman Empire. It shows how much human nature, when subject to the highest strain, continues to exhibit the same characteristics, that we, in the nineteenth century, in the United States, should be instinctively and unconsciously constructing for ourselves, in defiance of the scholastic traditions we have been trained to reverence, a jurisprudence which rejects these traditions, and assimilates itself to the jurisprudence of Rome at her business prime.

F. W.

CAMBRIDGE, *October*, 1874.

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CORRIGENDA.

Page 52, 6th line from top, change "*lata*" to "*levis.*"
Page 92, at beginning of note 1, repeat "Salisbury *v.* Herchenroder, 106 Mass. 458."
Page 92, 4th line from bottom, insert after "R. R." the words "*v.* Gregory."
Page 94, at end of note 5, insert "George *v.* Skivington, L. R. 5 Ex. 1."
Page 115, at end of notes 5 and 6, add "see infra, § 553."
Page 122, in 3d line, read "proxima" for "proximo."
Page 148, note 1, for "McGraw," read "McGrue."
Page 175, at end of note 2, insert "City *v.* Dermody, 61 Ill. 431."
Page 189, at end of note 2, insert "R. R. *v.* Ward, 61 Ill. 130; R. R. *v.* Conroy, 61 Ill. 162."
Page 190, at end of note 1, insert "see De Graff *v.* R. R. 3 N. Y. Supreme Ct. 255; Malone *v.* Hawley, 46 Cal. 409."
Page 196, at end of first note, insert "see R. R. *v.* Ward, 61 Ill. 130."
Page 200, 9th line from top, change "employee" to "employer."
Page 204, note 1, 8th line, after "W., H. & G." insert "(5 Exch.)"
Page 305, note 1, 8th line from end, change "21 Ohio," to "22 Ohio."
Page 325, note 3, change "23 Penn. St." to "33 Penn. St."
Page 337, note 3, insert "see infra, § 650."
Page 338, end of first note, change "Aug. 8, 1874, p. 86," to "Aug. 1, 1874, p. 72."
Page 348, note, 2d par., 9th line, change "Evans" to "Eames."
Page 362, note 2, change "Fernew" to "Fernow."
Page 381, note 2, change "593" to "575."
Page 493, 11th line from top, change "sell tickets for him" to "act as his agent."
Page 631, note 1, erase "Pitt *v.* Holden, 4 Burr. 2060," and change "Pitt *v.* Galden" to "Pitt *v.* Yalden."
Page 675, note 2, at end, change "42 Mo." to "42 Ill."
Page 717, end of note 2, change "supra, § 783." to "supra, § 787."
Page 734, note 3, line 5, change "Grigg" to "Gagg."

BOOK I.

GENERAL PRINCIPLES.

CHAPTER I.

DEFINITION OF NEGLIGENCE.

Definition by Alderson, B., § 1.
Definition by Mr. Austin, § 2.
Definition here proposed is, that negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and regular sequence, damage to another, § 3.
Meaning of *culpa*, § 4.
Culpa sometimes used to include all wrong, § 5.
But in its distinctive legal sense does not include either *dolus*, or breaches of non-legal duties, § 6.
Aquilian law: its relation to *culpa*, § 9.
Inadvertence as an essential of negligence, § 11.
Does not exclude heedlessness or temerity, § 12.
Distinction between knowledge of an impending evil result and knowledge of a probable danger, § 15.
Not essential that the damage might have been "reasonably expected," § 16.
When the imperfection in the discharge of duty is so gross as to make it improbable that it was the result of mere inadvertence, then, in proportion to such improbability, does the probability of negligent injury diminish, and that of malicious injury increase, § 22.
Legal duty: definition and classification of, § 24.
Meaning of *damnum* and *injuria*, § 25.

§ 1. *Definition by Alderson, B.* — "Negligence," said Alderson, B., in words which have subsequently been frequently cited with approval by the courts, "is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[1] As a limitation, framed for the purpose of excluding accidents from the category of negligence, this definition is of much value. It fails, however, in unduly extending the definition so as to include within it all imprudent acts. Negligence (*i. e.* such

[1] Alderson, B., in Blyth *v.* Birmingham Water Works Co. 11 Ex. at p. 784.

negligence as is the subject of a suit at law) "is doing something which a prudent and reasonable man would not do." But it is notorious that there are many things which "a prudent and reasonable man would not do" (*e. g.* extravagance, gambling, even wild speculation with manufacturing, and similar enterprises which involve the welfare of multitudes of employees) which are not such negligence as is the subject of a suit of law.

§ 2. *By Austin.* — Mr. Austin's definition is not much more satisfactory. "The term 'negligent,'" he says,[1] "applies exclusively to injurious omissions; to breaches by omission of positive duties. The party omits an act to which he is *obliged* (in the sense of the Roman lawyers). He performs not an act to which he is obliged, because the act and the obligation are absent from his mind." "An omission," he declares "(taking the word in its larger signification), is the not doing a given act, without adverting (at the time) to the act which is not done." He distinguishes his omissions from forbearances, by saying that "a forbearance is the not doing a particular act with an *intention* of not doing it. The party *wills* something else, knowing that that which he wills excludes the given act." It is true this covers most of the phases of negligence if we so enlarge the term omission as to include positive offensive, though inconsiderate acts. But such an extension of the term is without support either in Roman or Anglo-American law. No doubt all negligences in performance of contracts may be styled, as will be seen more fully hereafter,[2] omissions. But such negligences as, in the Roman law, consist of a violation of the Aquilian statute, and in Anglo-American, of a defiance of the maxim *sic utere tuo ut alienum non laedas*, are as much positive and affirmative acts as are any others to which jurisprudence attaches penalties. Indeed, as will hereafter be more fully seen, the distinction between negligence *in faciendo* and negligence *in non faciendo*, — negligence of commission and negligence in omission, — is one which has been recognized by jurists of all schools as substantial. It has never been doubted that negligence includes both of these categories; the only question that has been agitated is whether they are to be regarded as of the same grade. That Mr. Austin contemplates the same comprehension will be seen from other portions of his exposition, which are given in a note. The diffi-

[1] Lect. on Juris. 3d ed. I. p. 439. [2] Infra, § 79–81.

culty is, that when he proceeds to express this in a definition, he uses the term "omission" in a sense unknown to other jurists, and inconsistent with the inclusion of negligence in derogation of the maxim *sic utere tuum ut non alienum laedas;* hence excluding also the almost equivalent class of the Aquilian delicts. Nor can we fail to observe that in both the definitions above given the *damnum* which is consequent on the *injuria* is left out of sight. Yet without the *damnum*, the *injuria*, though sometimes the subject of criminal prosecution, cannot be used as a basis of a civil suit.[1]

§ 3. The definition I propose is the following: *Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another.* The *inadvertency*, or want of due consideration of duty, is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based.[2]

It will be seen, therefore, that to constitute negligence, in the sense of the above definition, there must be: —

I. Inadvertence.

II. Imperfection in discharge of a duty.

III. A duty which is thus imperfectly discharged.

IV. Injury to another or the public, as a natural and ordinary sequence.

Two subjects, that of Omission as distinguished from Commission, and that of Causal Connection, which underlie each of the above conditions, will be considered hereafter independently.[3]

§ 4. *Meaning of culpa.* — Before, however, proceeding to a specific consideration of the constituents of negligence, as above expressed, it is important for us, in view of the large measure in which our law in this respect is founded on the Roman, to inquire into the meaning of the term *culpa*, of which our own term negligence is so frequently used as an equivalent.

[1] See infra, § 25.

[2] See infra, § 25.

"If the law casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures." Lord Brougham — Ferguson *v.* Earl of Kinnoul, 9 Cl. & F. 289; and see Brown *v.* Boorman, 11 Cl. & Fin. 44. See infra, § 24.

[3] See § 73–79.

§ 5. *Culpa sometimes used to include all wrongs.* — First have we to observe that *culpa*, like other general terms in our own law (*e. g.* "wrong," "fault"), is used by the Roman jurists sometimes as a *nomen generalissimum* to include all defects in the performance of duty. No doubt when we take the terms *dolus* and *culpa* in antithesis, *dolus* includes an intentional, *culpa* an inadvertent fault. Yet we must remember that unless the terms are used in sharp contrast, they are apt, as is the case with our own terms "malice," "wrong," and "negligence," sometimes to overlap each other's domains. Negligence, in a very large sense, may include malice even in our own diction; for constructive malice is a term sometimes used to describe a general or determinate evil intent, which is the result of ignorance or neglect correctly to examine the grounds of a wrong.[1] So, on the other hand, gross negligence is with us constantly treated as convertible with fraud or malice. In the Roman law we have the same confusion: a necessary consequent, indeed, of the inadequacy of language to fix conditions so apt to melt into each other as are advertence and inadvertence. Thus we not only find *dolus*, when used as a *nomen generalissimum*, applied to all breaches of duty, including *culpa*, but *culpa*, even in its distinctive sense, is regarded, when it is gross and flagrant, as stamped with the character of even distinctive *dolus*. Nowhere is this more strikingly exhibited than in the maxim, *magna negligentia culpa est, magna culpa est dolus*.[2]

§ 6. *But culpa, in its distinctive juridical sense, does not include either dolus, or breaches of non-legal duties.* — That *culpa*, in its distinctive juridical sense, does not include *dolus* (except so far as gross and flagrant *culpa* raises a presumption of *dolus*), will be presently more fully shown. This, however, is not the only popular expansion of *culpa* against which the practical jurists had to guard. As with us, "wrong" may be used to include felonies on the one extreme, and aberrations of taste on the other; so *culpa*, while popularly extended on the one side so as to include *dolus*, was by the speculative jurists of the Middle Ages and the *renaissance* so expounded as to include every breach of rule, whether legal, ethical, or æsthetic. Hence it was, to use the

[1] Compare Lord Bacon's remarks on his aphorism that "revenge is a wild justice."

[2] L. I. D. 47. 4.

illustration given by Hasse, in the remarkable treatise hereafter so constantly cited,[1] that a flute-player who by a false note violated the rules of his art, was spoken of as *in culpa;* and so it was also that the poet, in a license constantly exercised in our own time, declared, when the master chastised the servant who by his blunder spoilt the performance of a play, *culpam puniebat comoedi.* So, to ascend to a higher scale, a breach of high morality, even though not the subject of legal process, was, as in a celebrated passage of Cicero,[2] spoken of as *culpa.* Even in the *Corpus Juris*, *culpa* is used in one case to indicate a breach of family, as distinguished from public, law:—

"Si quis autem eam, quam sine dote uxorem acceperat, a conjugio suo repellere voluerit, non aliter ei hoc facere liceat, nisi *talis* culpa intercesserit, quae nostris legibus condemnatur. Si vero sine culpa eam rejecerit, vel ipse *talem* culpam contra innocentem mulierum commiserit, compellatur, ei quartam partem"—[3]

§ 7. The *culpa* here noticed is an infraction of family law, and of the conditions of the married relation. Yet the husband was not permitted to repudiate his wife on account of every infraction of the laws of marriage. A distinction is made between *culpa, quae legibus improbatur*, and *culpa quae legibus non improbatur.* This, however, would not have been logical if *culpa*, in its largest sense, did not include everything that militates against law. Yet the very passage before us, and especially the antithesis, *si vero sine culpa eam rejecerit* (that is, if he repudiated her without such a *culpa* as is here contemplated), brings us, according to Hasse's exposition, to the true juridical meaning of the term, with which alone we have to do. This meaning is *an infraction of justice and law, an illegal transaction.* In this, as is copiously

[1] Die Culpa des Romischen Rechts, eine civilistische Abhandlung von Johan Christian Hasse. Zweite Ausgabe, besorgt von D. August Bethmann – Hollweg. Bonn, 1838. This work is not merely the most authoritative and most judicious treatise on negligence now extant. It has a double office: destructive, as sweeping away the fictions of the scholastic jurists; and constructive, in showing that the law, as actually laid down by the jurists of business Rome, whose opinions are collected in the Digest, is practically the same as that which is produced by a sound jurisprudence acting on the business relations of our own times.

[2] In Verr. II. c. 17: "In hoc uno genere omnes inesse culpas istius maximes, avaritiae, majestatis, dementiae, libidinis, crudelitatis."

[3] L. 11. § 1. c. de repud. Justin. A. Hermog. Mag. Off.; Hasse, p. 9.

demonstrated by Hasse, the various definitions of the *Corpus Juris* are contained. Hence, in general, every person who illegally injures another is *culpae reus*. *Culpa*, it is true, when so defined, falls into two distinct heads: (1) when one who owes a duty to another wholly or partially neglects to perform such duty; and (2) when one injures another to whom he specifically owes no duty. The law of *culpa* is, therefore, by the Roman law, conterminous with the law of unlawful conduct. When, however, the term is used in antithesis to *dolus*, it implies distinctively, as has been just seen, inattention or negligence. In *dolus*, as Wening-Ingenheim [1] well says, the *will* is to blame, in adopting an evil intent; in *culpa* the *intellect* is to blame, for failure to act in the right direction. *Culpa* and *dolus* both express themselves in many acts, and neither is cognizable until such acts are executed to the damage of others. Hence while, to adopt the language of the same authority, the source of *dolus* is to be found in the heart, that of *culpa* is to be found in the intellectual attitude of the person involved, and that attitude must be understood before a right result is reached. *Culpa*, as distinguished from *dolus*, is a suspension of the attention necessary to perform an exterior duty, on account of which failure of attention consequences injurious to others ensue.[2]

§ 8. *Division of culpa as Aquilian and extra Aquilian.* — It is, however, impossible to understand the character of *culpa* as it exists in the Roman law, without taking into view the two distinct classes of *culpa* which that law made the subject of civil suit. The first of these is *culpa* as defined in the Aquilian law. The second is such *culpa* as is not included in the Aquilian law, embracing mainly *culpa* in the non-performance or imperfect performance of particular contracts. To comprehend this distinction more exactly, it is necessary to give a succinct notice of the Aquilian law, — a law which is one of the most conspicuous results of Roman legislation, to the exposition of which have been devoted the labors of some of the keenest juridical intellects in times both ancient and modern, and which lies at the basis of those of our

[1] Schadenersatze, § 45. I cite from a copy given by Mr. Sumner to the Harvard Library.

[2] The reader may perhaps notice the coincidence of this with those striking lines of Hood's, closing one of his finest poems: —

"For evil is wrought
By want of thought,
As well as by want of heart."

own adjudications which connect themselves with the maxim *sic utere tuo ut non alienum laedas.*[1]

§ 9. *Provisions of the Aquilian law.* — The Aquilian law (*lex Aquilia*), a plebiscite attributed to 467 U. C., contained the following provisions: —

1. Whoever unlawfully kills the slave or cattle of another is to pay the owner at the highest valuation of the preceding year.

2. The adstipulator who fraudulently releases a debt must save the stipulator harmless.

3. Whoever unlawfully injures the property of another in a way not specified in the first chapter, whether through burning, breaking, or other destruction, is to repay the owner at the highest valuation of the preceding thirty days.

At first this famous law was strictly construed. Gradually, however, its scope was extended by the equitable application of its principle to all cases of unlawful injury (*damnum injuria datum*, *damnum injuriae*); and by the mention of a new form of action, called in the Digest sometimes *actio in factum*, sometimes *actio utilis legis Aquiliae.*

The points in which the Lex Aquilia was equitably extended were as follows: —

1. The letter of the Lex Aquilia reached only to cases where damage resulted from corporal action on the thing injured (*damnum corpore datum*); this was subsequently extended to cases where the injury was consequential: *e. g.* where an animal is starved to death; where the damage is caused by the malicious provocation of an animal to fury, so that he injures property; where the rope fastening a boat is cut so that the boat is wrecked. *But a mere omission was held not to be the subject of an action unless accompanied with a positive act;* as when one fails to give notice when cutting down trees or casting tiles from a roof;[2] or when a surgeon neglects to apply the remedies necessary after an operation.[3] The principle is, that whoever does an act must do all necessary to keep such act from injuring others.

2. By the letter of the Lex Aquilia, to constitute a delict it is necessary that injury should be done to a particular thing

[1] See further infra, § 780, where the Aquilian law is discussed in its relations to our own jurisprudence.

[2] L. 31. D. Lex Aquil. 9. 2. See infra, § 843.

[3] L. 8. D. Lex Aquil. 9. 2. See infra, § 730–7.

(*damnum corpore datum*). This was subsequently expanded to include cases where one person causes the loss of a thing to another; as where the cattle of another are frightened and thus caused to stray, so that they are lost.

3. By the text of the Aquilian law, damages were restricted to cases where there was injury to a thing; this was expanded by Praetorian adjudications to cases of injury to persons.

4. By the text of the Aquilian law, the claim for damages could only be made by the owner of the thing injured. By subsequent adjudications, as published in the Justinian Digest, not merely the owner, but the possessor, and those holding equitable interests or liens, had a right to sue.[1]

§ 10. According to Hasse, we are to ascribe to the Lex Aquilia the following incidents: —

1. The repeal of all prior laws, inclusive even of the Twelve Tables, so far as they apply to *damno injuria dato*.

2. The comprehension of everything that is *damnum injuriae*, and the exclusion of everything that is not in the Lex Aquilia, from the category of *damnum injuria datum*.

3. Yet the term *damnum injuria datum* does not include every act, positive or negative, that inflicts injury to another and involves an invasion of right, but only such as is in itself illegal for the single and exclusive reason that it inflicts an injury.

4. Only such positive acts as injure the substance of a thing corporeal are included in the Lex Aquilia; and consequently only acts of this class were viewed as *damnum injuria datum*. It is true the act was constructively extended to cases where the substance was not distinctively touched; but this was when the thing in question was, through the defendant's action, lost. Beyond this the law was not stretched.

5. The expression *damnum injuria* or *culpa datum* involves two divisible elements: (1) The act must have an illegal injury as its object. (2) The wrong must be imputable to a responsible person. But here, as Hasse at another point[2] remarks, we have to distinguish *dolus* from *culpa*. *Dolus* implies an imputable intentional injury. *Culpa*, in its narrow sense, implies an unintentional injury springing from imputable negligence. That both fall under the Aquilian law is expressly ruled. The *animus nocendi*, we are told in a famous passage,[3] is not essential; damages may

[1] See infra, § 780. [2] P. 64. [3] L. 5. § 1. D. ad L. Aq.

be recovered *etiam ab eo qui nocere noluit.* Frequently is the same statement substantially reiterated. *Culpa*, outside of *dolus*, according to Hasse, necessarily includes imputability. It is only necessary to show this to appeal to the rule *semper speciala generalibus insunt.* Wherever there is *culpa*, no matter of what grade, there is imputation. Imputation only ceases when accident (*casus fortuitus,* or *casus*) begins.

§ 11. *Inadvertence as an essential of negligence.* — The damage, as has been seen, must spring from *inadvertence.* When the injury is intentional, the case is infected with malice or *dolus*, and a suit for negligence cannot be maintained. It is essential, therefore, to consider what the idea of negligence excludes.

§ 12. *It does not exclude heedlessness or temerity.* — It is true that Mr. Austin tells us[1] that "Heedlessness differs from negligence, although they are closely allied. The party who is negligent *omits* an act, and breaks a positive duty. The party who is heedless *does* an act, and breaks a *negative* duty." He goes on to say, however, "The states of mind which are styled 'Negligence' and 'Heedlessness' are precisely alike. In either case the party is inadvertent. In the first case, he does *not* an act which he was bound to do, because he adverts not to it. In the second case, he *does* an act which he was bound to forbear, because he adverts not to certain of its probable consequences. Absence of a thought which one's duty would naturally suggest, is the main ingredient in each of the complex notions which are styled 'negligence' and 'heedlessness.' The party who is guilty of temerity or rashness, like the party who is guilty of heedlessness, does an act and breaks a positive duty. But the party who is guilty of heedlessness thinks not of the probable mischief. The party who is guilty of rashness *thinks* of the probable mischief; but, in consequence of a missupposition, begotten by insufficient advertence, he assumes that the mischief will not ensue in the given instance or case. . . . . The party runs a risk of which he is conscious; but he thinks (for a reason which he examines insufficiently) that the mischief will probably be averted in the given instance." As a matter of fact, negligence in the sense Mr. Austin gives (*i. e.* an omission to do a required thing), heedlessness, and rashness are coincident in cases which form the basis of suits for damages consequential on negligence. We may

[1] Lect. on Juris. 3d ed. I. 440; citing Bentham, Principles, &c. p. 86, 161.

take, for instance, a case frequently used as illustrative by the Roman jurists:

"Si quis in stipulam suam vel spinam comburendae ejus causa ignem immiserit et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit, requiramus, num imperitia vel negligentia id accidit; nam *si die ventoso id fecit, culpae reus est;* nam et qui occasionem praestat, damnum fecisse videtur."[1]

In other words, a man sets fire to underbrush on his own land, and the flames are communicated to his neighbor's house, by the force of a gale of wind at the time blowing in that direction. Now, supposing the gale to be such as is likely thus to communicate the fire, the defendant may be viewed as guilty of negligence (in Mr. Austin's sense), of heedlessness, and of rashness. He is guilty of negligence, in omitting to take proper precautions to prevent the spread of the burning, supposing it properly ignited. He is guilty of heedlessness, in doing the positive act of ignition without noticing the gale of wind. He is guilty of rashness if, on noticing the gale, he miscalculates its force in communicating fire. Now the *damnum* may here be attributed to either of these three conditions of mind on the defendant's part; but each of these conditions of mind is marked by the common feature of *inadvertency.* The consequences are imputed to the defendant, not because he considered them probable, but because in the natural and regular order of things they flowed from his inadvertence.[2]

[1] L. 30. § 3. D. ad leg. Aquil. 9. 2; infra, § 865–6.

[2] A similar case is to be found in Higgins *v.* Dewey, 107 Mass. 494, decided by the supreme court of Massachusetts in 1871. In this case, the evidence was that the defendant, for the purpose of destroying brush on his own land, set fire to the brush within six feet of the plaintiff's adjoining land, which was covered by brush; that shortly afterwards fire was discovered on the plaintiff's land, some sixteen rods distant; that if this fire was ignited by the defendant's fire, it was done by means of cinders carried by the wind; that the ground was very dry, and there was at the time a high wind blowing from the spot where the fire was started by the defendant to that where it was discovered on the plaintiff's land. There was a verdict for the plaintiff, and, on writ of error, Judge Gray disposed of the case as follows: "A man who negligently sets fire to his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and *whether he might or not have reasonably anticipated the particular manner in which it is actually communicated.*" For this he cites Tubervill *v.* Stamp

§ 13. The same criticism may be applied to the illustration given by Mr. Austin. "When I fire at the mark chalked upon the fence, it occurs to my mind that a shot may pierce the fence, and may chance to hit a passenger. But, without examining carefully the ground of my conclusion, I conclude that the fence is sufficiently thick to prevent a shot from passing to the road. Or, without giving myself the trouble to look into the road, I assume that a passenger is not there, because the road is seldom passed. In either case my confidence is *rash;* and through my *rashness* or *temerity*, I am the author of the mischief. My assumption is founded upon evidence which the event shows to be worthless, and of which I should discover the worthlessness if I scrutinized it as I ought." But I might at the same time, supposing it were lawful to me under the circumstances to practise target shooting, be charged with *omission*, in not placing between myself and the road a wall sufficiently thick to intercept and detain the bullets; and *inadvertence*, in practising at that particular spot without noticing that on the other side of the fence was a thoroughfare.

§ 14. It will be seen, therefore, that omission in performing a duty, heedlessness, and recklessness, are practically so blended that the attempt to separate them into distinct injuries, each to be distinctively described in pleading, would be productive of confusion and trouble not only immense but gratuitous. For, in point of fact, the culpability of each rests on the same basis, — *i. e.* the culpability of the defendant arising from his inadvertence, or want of due consideration of duty. And in actions both civil and criminal, the term negligence is used to include rashness and heedlessness, as well as omission, provided such rashness or heedlessness is traceable simply to inadvertence, and is not imputable to evil design.

§ 15. *Distinction between knowledge of an impending evil result and knowledge of a probable danger.* — In malicious injuries, the injurer foresees the specific evil result and wills it either explicitly

1 Salk. 13; Filliter *v.* Phippard, 11 Q. B. 347; Perley *v.* East. R. R. Co. 98 Mass. 414. The case may have been one of omission, or of heedlessness, or of rashness, on the part of the defendant; but if the damage is imputable to want of thought on his part, he is responsible for the consequences, although he "might not reasonably have anticipated the particular manner" in which the mischief took place. See also infra, § 865–67 *a*.

or implicitly; in negligent injuries he may foresee a probable danger, and may rashly risk the consequences, without being chargeable with a malicious intent. This distinction is established by the Roman law. To *dolus* it is essential that there should be a *scientia* as to the injurious consequences which the act in question involves. But *culpa* is not changed into *dolus* by the fact that the culpable person foresees that the act may become under certain contingencies dangerous. Thus, to revert to an illustration already introduced, the man who carelessly watches a fire is aware that an unwatched fire may spread. But he neglects either to connect this knowledge with the duty in which he is engaged, or he neglects to use the proper means by which this knowledge is to be made useful. Malice assumes a *scienter* attached to the act; negligence a *seienter* detached.[1]

§ 16. *Not essential to constitute negligence that the damage might "reasonably have been expected" from the negligence.* — It has been often said that a wrong-doer is at least responsible for the mischievous consequences "that may be reasonably expected to result under ordinary circumstances from his misconduct;"[2] and from this the converse has sometimes been drawn, that unless the consequence of an act or forbearance "might have been reasonably expected" by the defendant himself, no liability accrues.

§ 17. This, however, is not correct.[3] No doubt in actions for an *intentional* injury, the fact that the injury in question is one that could not have reasonably been expected from the act, goes far to negative an injurious intention. So, on the other hand, the fact that such consequence could not have been reasonably expected, goes far to establish a wrongful intention. Men are presumed to intend the natural and probable consequences of their acts. A man shoots into a crowd of persons. It is reasonably to be expected that some one of these will be hit. Just in proportion as this expectation increases in probability (from the density of the crowd, and the accuracy of his aim), does the presumption gather strength that the shooting was intentional. It is true that this is not, as has frequently been erroneously stated,

[1] See infra, § 76.

[2] Pollock, C. B. — Rigby *v.* Hewitt, 5 Exch. 243; "cited by Byles, J., Hoey *v.* Felton, 11 C. B. N. S. 573, and applied in Senior *v.* Ward, 1 E. & E. 385;" as stated in Broom's Com. 4th ed. 689.

[3] See infra, § 76.

a presumption of law.[1] It is simply a presumption or inference of fact, varying in intensity with the evidence in each particular case. The argument, reduced to a syllogism, is as follows: Whatever might reasonably have been expected it is probable was intended: this consequence was reasonably to have been expected; therefore it is probable it was intended. Of course the whole force of the reasoning depends upon the degree of "reasonable expectation." There are some kinds of "reasonable expectation" so strong (*e. g.* that of hurting when a blow is aimed at another's face), that a jury could have no hesitation in inferring a wrongful intention. There are other kinds more faint, in which other circumstances are required to make out the intent. But however strong or weak the inference, the reasonableness with which an event is to be expected is an important element in determining the actor's liability in all cases of intended injury.

§ 18. It is otherwise, however, in suits for negligence, which are suits for unintended as distinguished from intended injuries. For the plaintiff in such cases to prove that the particular injury is one which may reasonably have been expected by the defendant, may defeat his case, by showing that the defendant's act was intentional, and hence that the suit should have been trespass and not case. It is true that it is perfectly competent in such case for the plaintiff to show *that in the long run* injuries of the class which he has suffered were likely to ensue from the defendant's act; but to show that the particular wrongful act complained of was reasonably to have been expected from the defendant's negligence is to invite the inference that the defendant was guilty, not of negligence at all, but of *trespass vi et armis*.

§ 19. Nor if we examine concretely negligences which result in injuries, do we find that the particular injury is one which could have always been reasonably expected to have resulted from the particular negligence. A negligent lookout, for instance, on ship A occasions a collision with ship B, on a particular night. If such a collision, at such time, was reasonably to have been expected, we may assume that if ship A was adequately officered the lookout would not have been negligent.

[1] See this fully shown in Wharton's Crim. Law, 7th ed. § 709–712.

§ 19 *a*. So, to take a case elsewhere noticed,[1] a kicking horse is taken from the stables and put, for a single trip, into an omnibus. The horse has been known to have kicked back at the carriage once or twice before, but it is very improbable that he will kick on this particular trip. "He has only kicked in such a way as to strike the carriage one time out of a hundred," — so those in charge of the stable may naturally argue, — "and it is a hundred to one against his kicking now; and even if he does kick, the probabilities are strong against his hurting the heavy structure behind." So the horse is put in, and kicks, and knocks out a panel in the front of the omnibus, and injures a woman sitting next to the panel. A suit is brought against the proprietors for damages, and a verdict against them, with costs, is sustained in England, in 1872. Now, if when the horse was put in, the consequences could have been reasonably expected, an intention to produce these consequences could have been inferred, and the suit would have been for a malicious trespass. But as a matter of fact, if the consequences could reasonably have been expected, the horse would never have been put in; for the managers of the line would not have exposed themselves to the loss of money and character that ensued. The very gist of the action, as actually brought, was that the consequences were not reasonably expected; that there was no ground whatever to charge the defendants with a deliberate attempt to injure; but that though there was only a slight chance that such an injury would result, they were so negligent or heedless as not to provide against such chance.

§ 20. So, in a case already cited, which was decided by the supreme court of Massachusetts in 1871, where the defendant was charged with negligently making a fire on his own land, which fire spread to a neighbor's, Judge Gray, in giving the opinion, said that "a man who negligently sets fire to his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and whether he might or not have reasonably anticipated the particular manner in which it is actually communicated."[2]

[1] Simson *v.* London General Omnibus Co., L. R. 8 C. P. 390.

[2] Higgins *v.* Dewey, 107 Mass. 494; citing Tubervill *v.* Stamp, 1 Salk. 13;

§ 21. So, in a case in 1870, in the English exchequer chamber,[1] where the question was directly agitated, the evidence was that the defendants, a railway company, left a pile of dry trimmings and rubbish, in a hot summer, by the side of their track; that the pile ignited from sparks from the defendants' engines; and that fire crossed a hedge and stubble field, and consumed the plaintiff's cottage, at a distance of two hundred yards from the railway. Brett, J., when the question arose in the common pleas,[2] argued against the liability on the ground that "no reasonable man would have foreseen" that the cottage would have been thus burned. But the common pleas nevertheless held that the defendants were liable, and this was affirmed in the exchequer chamber. "It is because I thought, and still think," said Kelly, C. B., in the latter court, "the proposition is true, that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described, that I felt pressed at first by this view of the question; but on consideration, *I do not feel that that is a true test of the liability of the defendants in this case.* It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burned as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances that might result from this, and were responsible for all the natural consequences of it." "When there is no direct evidence of negligence," said Channell, B., "the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not; and this is what was meant by Bramwell, B., in his judgment in Blyth *v.* Birmingham Water Works;[3] but when it has been once determined that there has been evidence of negligence, *the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.*"[4]

§ 22. *When the imperfection in the discharge of duty is so*

Filliter *v.* Phippard, 11 Q. B. 347; Perley *v.* East. R. R. 98 Mass. 414.

[1] Smith *v.* London & S. W. Ry. Co., L. R. 6 C. P. 14.

[2] Law Rep. 5 C. P. 98.

[3] 11 Ex. 781.

[4] Smith *v.* London & S. W. Ry. Co., Law Rep. 6 C. P. 21.

gross as to make it improbable that it was the result of mere inadvertence, then in proportion to such improbability does the probability of negligent injury diminish, and that of malicious injury increase. — Was there malice, is the question that is to be determined in such case. If there was malice, then the defendant is responsible for the injury flowing from his malicious act, though on an issue and with pleading distinct from those which charge negligence. But whether there was malice is to be inferred by inductive reasoning as a matter subject to probable proof. Thus, to recur to the illustration already adduced, a farmer, by setting fire to his underbrush, causes his neighbor's house to burn down. Four distinct solutions of the act may be given: (1) It may have been by *vis major*, or by such incalculable and extraordinary natural interposition as is called in the books the act of God. (2) It may have been by the interposition of an independent human will. (3) It may have been by his negligence. (4) It may have been by his malice. And malice in this, as in all other cases, is to be inferred from facts: from the violence of the wind, from the proximity of the neighbor's house, from the closeness of intermediate inflammable material, and from the defendant's own condition of mind, evidenced, among other things, by prior attempts of a similar character. Half a dozen similar ignitions would go a great way to exclude the idea of inadvertence, and to establish that of design. Twenty similar ignitions, immediately preceding, after due knowledge of the consequences, would approach as closely to demonstrations of design as inductive proof usually approaches.

§ 23. In this light are we to understand the famous rule of the Roman law: *Magna negligentia culpa est, magna culpa est dolus.*[1] Mr. Austin, while giving to this and similar maxims an erroneous gloss,[2] concurs in the position that the question of *dolus*, in such case, is one to be determined inferentially from all the acts of the particular case. But he is in error in saying that the meaning of the Roman lawyers was, that, "judging from the conduct of the party, it is impossible to determine whether he *intended*, or whether he was negligent, or heedless, or rash. And such being the case, it shall be *presumed* that he *intended*, and his liability shall be determined accordingly, *provided the question arise in a civil action.* If the question had arisen in the course of

[1] L. 1. Dig. (47. 4).

[2] Lect. on Juris. 3d ed. I. 441.

a criminal proceeding, then the presumption would have gone in favor of the party, and not against him." I can find no trace of this distinction in the modern Roman jurists, nor is it alluded to by them as in any way recognized in the Digest. On the contrary, the doctrine always assumed by these jurists is, that malice is not a presumption of law, but an inference of fact (*unjuristische Wahrscheinlichkeit*, *presumtio hominis*, *presumtio judicis*), to be drawn by the process of ordinary inductive reasoning from the circumstances of each particular case. And the test is one they apply to criminal and civil issues alike.[1]

[1] See this point fully discussed in Wharton's Criminal Law, 7th ed. § 707–712.

"By the Roman lawyers," says Mr. Austin (Lectures, 3d ed. I. 441), "rashness, heedlessness, or negligence is, in certain cases, considered equivalent to '*dolus*;' that is to say, to intention, 'dolo comparatur.' 'Vix est ut a certo nocendi *proposito* discerni possit.' Changing the expression, they suppose that rashness, heedlessness, or negligence can hardly be distinguished, in certain cases, from intention.

"Now this, it appears to me, is a mistake. Intention, it seems to me, is a *precise* state of the mind, and cannot coalesce or commingle with a different state of the mind. 'To intend,' is to believe that a given act will follow a given volition, or that a given consequence will follow a given act. The chance of the sequence may be rated higher or lower; but the party *conceives* the future event, and believes that there *is* a chance of its following his volition or act. Intention, therefore, is a state of consciousness.

"But negligence and heedlessness suppose *un*consciousness. In the first case, the party does *not* think of a given act. In the second case, the party does *not* think of a given consequence.

"Now a state of mind between consciousness and unconsciousness, — between intention on the one side and negligence or heedlessness on the other, — seems to be impossible. The party thinks, or the party does *not* think, of the act or consequence. If he think of it, he *intends*. If he do not think of it, he is *negligent* or *heedless*. To say that negligence or heedlessness may run into intention, is to say that a thought may be *absent* from the mind, and yet, after a fashion, *present* to the mind. Nor is it possible to conceive that supposed mongrel or monster, which is *neither* temerity *nor* intention, but partakes of both — a state of mind lying on the confines of each, without belonging precisely to the territory of either.

"The party who is guilty of rashness *thinks* of a given consequence; but, by reason of a missupposition arising from insufficient advertence, he concludes that the given consequence will *not* follow the act in the given instance. Now if he surmise (though never so hastily and faintly) that his missupposition is unfounded, he *intends* the consequence. For he *thinks* of that consequence; he believes that his missupposition *may* be a missupposition; and he, therefore, believes that the consequence *may* follow his act.

"I will again revert to the example which I have already cited repeatedly.

§ 24. *Legal Duty. Definition and Classification.* — A legal duty is that which the law requires to be done or forborne to

"When I fire at the mark chalked upon the fence, it occurs to my mind that the shot may pierce the fence, and may chance to hit a passenger. But I assume that the fence is sufficiently thick to intercept a pistol-shot. Or, without going to the road in order that I may be sure of the fact, I assume that a passenger cannot be there *because* the road is seldom passed.

"Now if my missupposition be absolutely confident and sincere, I am guilty of rashness only.

"But, instead of assuming confidently that the fence will intercept the ball, or that no passenger is then on the road, I may surmise that the assumption upon which I act is not altogether just. I think that a passenger may chance to be there, though I think the presence of a passenger somewhat improbable. Or, though I judge the fence a stout and thick *paling*, I tacitly admit that a brick wall would intercept a pistol-shot more certainly. Consequently, I *intend* the hurt of the passenger who is actually hit and wounded. I think of the mischief, when I will the act; I believe that my missupposition *may* be a missupposition; and I, therefore, believe there is a *chance* that the mischief to which I advert may follow my volition.

"The proposition of the Roman lawyers is, therefore, false. The mistake, I have no doubt, arose from a confusion of ideas which is not unfrequent, — from the confusion of *probandum* and *probans*, — of the *subject* of an inquiry into a matter of fact, with the *evidence*.

"The state of a man's mind can only be known by others through his acts, through his own declarations, or through other conduct of his own. Consequently, it must often be difficult to determine whether a party *intended*, or whether he was merely negligent, heedless, or rash. The acts to which we must resort as evidence of the state of his mind may be *ambiguous;* insomuch that they lead us to one conclusion as naturally as to the other. Judging from his conduct, the man may have *intended*, or he may have been negligent, heedless, or rash. Either hypothesis would fit the appearances which are open to our observation.

"But the difficulty which belongs to the *evidence* is transferred to the *subject of the inquiry*. Because we are unable to determine *what* was the state of his mind, we fancy that the state of his mind was itself *indeterminate;* that it lay between the confines of consciousness and unconsciousness, without belonging to either. We forget that these are antagonist notions, incapable of blending.

"When it was said by the Roman lawyers that negligence, heedlessness, or rashness is equivalent, in certain cases, to *dolus* or 'intention,' their meaning, I believe, was this:

"Judging from the conduct of the party, it is impossible to determine whether he *intended*, or whether he was negligent, heedless, or rash. And such being the case, it shall be presumed that he *intended*, and his liability shall be adjusted accordingly, *provided that the question arise in a civil action*. If the question had arisen in the course of a criminal proceeding, then the presumption would have gone in favor of the party, and not against him.

"Such, I think, is the meaning which floated before their minds; although we must infer, if we take their

a determinate person, or to the public at large, and is correlative to a right vested in such determinate person, or the public at

expressions literally, that they believed in the possibility of a state of mind lying between consciousness and unconsciousness. If I attempted to explain the matter fully, I should enter upon certain distinctions between civil and criminal liability, and upon the nature of *praesumptiones juris*, or legal presumptions. It is, therefore, clear to me, that intention is always separated from negligence, heedlessness, or rashness, by a precise line of demarcation. The state of the party's mind is always *determined*, although it may be difficult, judging from his conduct, to ascertain the state of his mind.

"Before I quit this subject, I may observe that *hasty* intention is frequently styled *rashness*. For instance, an intentional manslaughter is often styled *rash*, because the act is not premeditated, or has not been preceded by deliberate intention.

"Before we can distinguish hasty from deliberate intention, we must determine the nature of intention *as it regards future acts*. But it is easy to see that sudden or hasty intention is utterly different from rashness.

"When the act is done the party contemplates the consequence, although he has not *premeditated* the consequence or the act.

"To resume: —

"It is manifest that negligence, heedlessness, and rashness are closely allied. *Want* of the *advertence* which one's duty would naturally suggest is the fundamental or radical idea in each of the complex notions. But though they are closely allied, or are modes of the same notion, they are broadly distinguished by differences.

"In cases of negligence, the party performs not an act to which he is obliged. He breaks a positive duty.

"In cases of heedlessness or rashness, the party does an act from which he is bound to forbear. He breaks a negative duty.

"In cases of negligence, he adverts not to the act which it is his duty to do.

"In cases of heedlessness, he adverts not to *consequences* of the act which he does.

"In cases of rashness, he adverts to those consequences of the act; but, by reason of some assumption *which he examines insufficiently*, he concludes that those consequences will not follow the act in the instance before him.

"And, since the notions are so closely allied, they are, as might be expected, often confounded. Heedlessness is frequently denoted by the term 'negligence;' and the same term has even been extended to rashness or temerity. But the three states of mind are nevertheless distinct; and, in respect of differences between their consequences, should be distinguished.

"But intention, negligence, heedlessness, or rashness is not of *itself* injury or wrong; is not of *itself* breach of duty; will not *of itself* place the party in the plight or predicament of guilt or imputability. Intention, negligence, heedlessness, or rashness will not place the party in the plight of guilt or imputability, unless it be followed or accompanied by an act, forbearance, or omission: by an act, forbearance, or omission which amounts to an injury or wrong, provided it be preceded and accompanied by that state of the mind. Action, forbearance, or omission is as necessary an

large.[1] "Every right, be it primary or sanctioning, resides in a person or persons determinate or certain; meaning by a person

ingredient in the notion of injury, guilt, or imputability, as the intention, negligence, heedlessness, or rashness, by which the action, forbearance, or omission is preceded or accompanied. The notion of injury, guilt, or imputability does not consist of either considered alone, but is compounded of both taken in conjunction.

"This may be made manifest by a short analysis.

"If I am *negligent*, I advert not to a given act; and, by reason of that inadvertence, I omit the act.

"If I am *heedless*, I will and do an act, not adverting to its probable consequences; and, by reason of that inadvertence, I will and do the act.

"If I am *rash*, I will and do an act, adverting to its probable consequences; but, by reason of a missupposition which I examine *inadvertently*, I think that those probable consequences will not ensue. And, by reason of my insufficient advertence to the ground of the missupposition, I will and do the act.

"Consequently, negligence, heedlessness, or rashness supposes an omission or act which is the result of inadvertence. To that inadvertence, *as taken or considered in conjunction with the omission or act*, we give the name of negligence, heedlesness, or rashness. But none of those names has the shadow of a meaning, unless the inadvertence, to which it is applied, be considered in conjunction with the omission or act of which the inadvertence is the cause.

"If I *intend*, my intention regards the present, or my intention regards the future. If my intention regards the present, I presently do an act, expecting consequences; or, I presently do an act, or am presently inactive, knowing that the act which I do, or the inaction wherein I am, excludes for the present the performance of another act. . . . . In the former case, I presently do an act, intending consequences. In the latter case, I presently forbear from an act.

"In either case, my intention is necessarily coupled with a present act or forbearance; and the word 'intention' has no meaning, unless the consciousness or belief to which it is applied be considered in conjunction with that act or forbearance.

"If my intention regard the future, I *presently* expect or believe that I shall act or forbear *hereafter*.

"And in this single case, it is, I think, *possible* to imagine, that mere consciousness might be treated as a *wrong;* might be *imputed* to the party; or might place the party in the plight or predicament which is styled *imputability* or *guilt*.

"We *might*, I incline to think, be *obliged* to forbear from *intentions* which regard future acts or future forbearances from action; or, at least, to forbear from *such* of those intentions as are settled, deliberate, or frequently recurring to the mind. The fear of punishment might prevent the frequent recurrence, and might, therefore, prevent the pernicious acts or forbearances, to which intentions, when they recur frequently, certainly or probably lead.

"Be this as it may, I am not aware of a *positive* system of law wherein an intention, without an act or forbearance, places the party in the predicament which is styled imputability. In

[1] See Lord Brougham's statement of this point, supra, § 3.

determinate, a person determined specifically." The *duty* may be to the public at large; *e. g.* a duty not to commit a nuisance; but in civil issues, the right to enforce this duty must reside in individuals. "Duties answering to rights which avail against the world at large are *negative;* that is to say, duties to forbear. Of duties answering to rights which avail against persons determinate, some are *negative*, but others, and most, are *positive;* that is to say, duties to do or perform. . . . . By most of the modern civilians, though not by the Roman lawyers, rights availing against the world at large are named *jura in rem;* rights availing against persons determinate, *jura in personam*, or *jura in personam certam*. . . . . The proprietor or owner of a given subject has a right *in rem;* since the relative duty answering to his right is a duty incumbent upon persons *generally and indeterminately*, to forbear from all such acts as would hinder his dealing with the subject agreeably to the lawful purposes for which his right exists. But if I singly, or I and you jointly, be obliged by bond or covenant to pay a sum of money, or not to exercise a calling within conventional limits, the right of the obligee or covenantee is a right *in personam;* the relative duty answering to his right being an obligation to do or to forbear, which lies exclusively on a person determinate." [1]

The expression, right *in rem*, is not unknown to our Anglo-

every positive system of which I have any knowledge, a mere intention to forbear in future is innocent. And an intention to act in future is not *imputed* to the party, unless it be followed by an act which accomplishes his ultimate purpose, or by an act which is an *attempt* or endeavor to accomplish that ultimate purpose. In either case, the party is *guilty*, because the intention is coupled with an *act;* and with an act from which he is *obliged* to forbear or abstain. For, though he is not obliged to forbear from the *intention*, he is obliged to forbear from *endeavors* to accomplish that intention, as well as from such acts as might accomplish his intention directly."

One additional exception, however, must be made to this lucid exposition. If *dolus* is to be regarded as always implying evil intent, then no doubt the exception taken by Mr. Austin to the Roman law in this respect is correct. But in the Roman law, as will be hereafter shown, *dolus*, in its most general sense, means crime, and may be consistent with a reckless disregard of law, though unaccompanied by any specific intent to break any particular law. That in the Anglo-American law malice may in such cases be inferred, has been elsewhere shown. Wharton's Cr. Law, § 712. Between the Roman law and our own, therefore, in this respect, the difference is but slight.

[1] Austin's Lect. on Juris. 3d ed. I. 47.

American law, though not ordinarily applied to the present topic. Mechanics' liens, admiralty liens and judgments, convey rights *in rem*, *i. e.* rights against all the world, so far as concerns the particular thing to which they attach. But rights *in rem* are not limited to property in the narrow sense of the term. Undoubtedly I possess a right *in rem* against all the world (requiring as a correlative duty, forbearance to molest me in such a right) in my field, or my house. But I hold a similar right *in rem*, sustained by similar sanctions, over any incorporeal thing I possess, such as a right of common or of way. I hold, also, a similar right *in rem* in my apprentice, or my child; in other words, in such cases, a right *in rem* in a person. So, also, I may have a right *in rem* in a franchise or monopoly, which right also avails against all the world. Hence we may accept as accurate Mr. Austin's classification of rights *in rem*: "1. Rights *in rem* of which the subjects" (Mr. Austin rejects the German terminology as to subjects and objects, making the subject the thing acted on) "are things, or of which the objects" (the relative duties) "are such forbearances as determinately regard specifically determined things. 2. Rights *in rem* of which the subjects are persons, or of which the objects are such forbearances as determinately regard specifically determined persons. 3. Rights *in rem* without specific subjects, or of which the objects are such forbearances as have no specific regard to specific things or persons."[1] 4. To this may be added, as rights availing against the public at large, the right of personal liberty, security, and reputation. Each of these, in the sense in which the term is here used, constitutes a *jus in rem*, that is to say, a right available against all by whom it may be assailed.

§ 25. *Meaning of damnum and injuria.* — We must remember, when we adapt the Roman law maxims of *damnum* and *injuria*, as is so often done by our judges, to our own practice, that *injuria* has a meaning distinct from that popularly assigned to our term "injury." *Injuria* is the feminine of the adjective *injurius*, and means, therefore, an unlawful act, or, as Pernice[2] defines it, an objective unlawfulness. From this, as this intelligent commentator well shows, is developed the idea of hurt illegally perpetrated, whether this hurt be to property or char-

[1] Austin's Lect. on Juris. 3d ed. I. p. 49.

[2] Sachbeschädigungen, 27.

acter. So far as concerns the actor, the language is, *facere imponere inferre jacere immittere injuriam;* so far as concerns the sufferer, *accipere pati ferre.* In the *Corpus Juris* the word, when juridically used, is applied exclusively to the outward act, never being used to express the relation to such act of the actor. The word, therefore, includes all *quod non jure fit;* that is to say, everything that is repugnant to law. If there is no such repugnancy in the concrete, there is no *injuria*, although in an abstract sense a law may have been violated. Thus, for instance, the actor may be acting in self-defence, or may be irresponsible, in which case, though hurt may be inflicted, there is no *injuria.* Of course, these qualifications are to be taken into consideration where particular cases are to be investigated. It is with such qualifications that we are to consider the general definition of Ulpian:[1] "Injuria ex eo dicta quod non jure fit . . . . hoc generaliter, specialiter autem injuria dicitur contumelia. Interdum injuriae appellatione damnum culpa datum significatur, ut in lege Aquilia dicere solemus."

Other passages to the same effect may be cited; but the terms of the Aquilian law are by themselves conclusive. No doubt the word is used by the jurists in a narrow technical sense, in its relation to attacks upon character; but this does not affect the principle that in a general sense whatever inflicts an illegal hurt on person and property (supposing the actor in his particular act be responsible) is an *injuria.* There may be therefore *damnum* without *injuria*, for the hurt may not have been perpetrated by a responsible agent, or it may have been inflicted lawfully. There can, however, be no *injuria* (so far as concerns civil proceedings) without *damnum.*[2]

[1] L. pr. de injur. 47. 2.

[2] "In the next place," says Mr. Broom (Com. 5th ed. p. 368), "it may be laid down, as a true proposition, that although bare negligence, unproductive of damage to another, will not give a right of action, negligence causing damage will do so:[1] negligence being defined to be "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do";[2] negligence, moreover, not

[1] See Broom's Com. 4th ed. 656; Whitehouse v. Birmingham Can. Co. 27 L. J. Ex. 25; Bayley v. Wolverhampton Waterworks Co. 6 H. & N. 241; Duckworth v. Johnson, 4 H. & N. 653.

[2] Per Alderson, B.— Blyth v. Birmingham Waterworks Co. 11 Exch. 784. Laches has been defined to be "a neglect to do something which by law a man is obliged to do;" per Lord Ellenborough, C. J. — Sebag

being "absolute or intrinsic," but "always relative to some circumstances of time, place, or person." [1]

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v. Abithol, 4 M. & S. 462; adopted per Abbott, C. J., Turner *v.* Hayden, 4 B. & C. 2.

[1] Judgm., Degg *v.* Midland R. C. 1 H. & N. 781; approved in Potter *v.* Faulkner, 1 B. & S. 800. As to proof of negligence, Assop *v.* Yates, 2 H. & N. 768; Pevren *v.* Monmouthshire R. C. 11 C. B. 855; Voso *v.* Lancashire & Yorkshire R. C. 2 H. & N. 728; Harris *v.* Anderson, 14 C. B. N. S. 499; Reeve *v.* Palmer, 5 C. B. N. S. 84; Manchester, &c. R. C. app. Fullarton, resp. 14 C. B. N. S. 54; Roberts *v.* Great Western R. C. 4 C. B. N. S. 506; North *v.* Smith, 11 C. B. N. S. 572; Manley *v.* St. Helen's Canal & R. C. 2 H. & N. 840; Willoughby *v.* Horridge, 12 C. B. 742; Templeman *v.* Haydon, Ibid. 507; Melville *v.* Doidge, 6 C. B. 450; Grote *v.* Chester & Holyhead R. C. 2 Exch. 251; Dansey *v.* Richardson, 3 E. & B. 144; Roberts *v.* Smith, 2 H. & N. 213; Cashill *v.* Wright, 6 E. & B. 891; Holder *v.* Soulby, 8 C. B. N. S. 254.

CHAPTER II.

DIFFERENT KINDS OF NEGLIGENCE.

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§ 26. *Distinction between diligence of expert and diligence of non-expert.* — If the law impose in one case a degree of diligence higher than it impose in another case, then, in the first case, liability is attached to a lesser grade of negligence than in the second. That such a distinction exists between the expert and the non-expert is a necessity both of business and of jurisprudence. A cottager who has a box left at his house by a passing traveller, and who does not in any way pretend to guard the goods so deposited, is only liable when by gross negligence, *e. g.* by leaving the door open at night and the box exposed, the box is lost. On the other hand a common carrier, who undertakes for hire to carry the same box from point to point, but who neglects to provide a suitable carriage, is liable in case of damage to the goods for the special negligence, which consists in his failure to exhibit the diligence which a good business man should exert in his par-

ticular line of business. So a person who is called upon, without any special qualification, to attend a sick man, is expected to apply only such diligence as is usually bestowed in such cases by persons of ordinary common sense, and is liable only for a failure in such diligence; while a physician claiming to be such is expected to apply the diligence which an ordinary expert in his profession would under the circumstances pay, and is liable for a failure in such special diligence. A specialist or expert, therefore, is liable for special care; a non-expert for ordinary care. And the distinction is not merely nominal. A defendant, for instance, is charged with lack of special care, *i. e.* such care as a professional person is accustomed to give. He says, however, "I am not a specialist in this department; I never claimed to be; the plaintiff knew I was not." If this be true, the defendant cannot be held liable, unless it be proved that he exhibited in the case *culpa lata*, *i. e.* ignorance of that which every ordinary person knows.[1]

§ 27. *Roman law adopts this distinction under the terms culpa lata and culpa levis.* — The distinction thus stated lies at the root of the well known division by the Roman law of *culpa* into *culpa lata* and *culpa levis*.

§ 28. *Meaning of culpa lata.* — By the Roman law, *culpa lata*, which, so far as our present inquiries extend, may therefore be viewed as corresponding to our gross negligence, is distinguished by the obviousness of the danger which it neglects to provide against, and of the means by which such danger is to be averted. With this corresponds the following definitions in the Digest: —

"Lata culpa est nimia negligentia, id est, non intelligere quod omnes intelligunt."[2] "Sententiarum. Latae culpae finis est, non intelligere id, quod omnes intelligunt."[3] The policy of the law, it was argued, requires that every man should keep his eyes open, and should be acquainted with the facts of which ordinary observation would advise him. If he does not do this, — if, on the other hand, he acts blindly, or inconsiderately, or recklessly, — if, in exercising dominion over his own things he treats with insolent contempt the rights and interests of others, not taking time to think what injury to others may incidentally result, — if, in other words, his conduct is that of a *homo deperditus et nimium securus*,[4] then

[1] See fully infra, § 754, 780.

[2] L. 213. § ult. D. de V. S. Ulpianus, lib. 1. Regularum.

[3] L. 223. eod. Paulus, lib. 2.

[4] L. 3 in f. D. de juris et facti ignor.

his ignorance, based on his *nimia securitas*, *crassa summa negligentia*, is no defence. The rule in such case is *cui facile est scire, ei detrimento esse debet ignorantia sua.* He must recompense others for the injury done to them by his recklessly negligent acts.[1]

§ 29. *Culpa* necessarily assumes a danger which can be averted by diligence and attention. The knowledge of the existence of such a danger does not necessarily involve malicious intent. Thus, for instance, the danger may be encountered as a sort of practical joke, as in cases elsewhere mentioned, where a drunken man is induced to continue to drink excessively,[2] and where false alarms are mischievously given. By the Roman law,[3] this *lusus perniciosus* is not *dolus*, but *culpa lata.* The same is held where the danger, from its very familiarity, ceases, though observed, to interest; and where the defendant does not notice the danger, though it is at the time obvious to ordinary observers, or where, though noticing the danger, he does not notice such means of averting it as are in like manner obvious to ordinary observers. It will be at

[1] "Les jurisconsultes Romains," says Demangeat (Cours de Droit Romain, III. 446; Paris, 1866), "avaient fini par admettre que la faute lourde, la *culpa lata*, doit être assimilée au dol, de sorte que le débiteur déclaré responsable de son dol doit par là même être considéré comme répondant également de sa faute lourde: *magnam negligentiam*, dit Gaius, *placuit in doli crimine cadere* [L. 1, § 5, *in fine*, D. *De oblig. et act.* (44, 7)]. De même, Celsus: *quod Nerva diceret*, LATIOREM CULPAM DOLUM ESSE, *Proculo displicebat; mihi verissimum videtur* [L. 32 (au commencement), D., *Depositi* (16, 3)]. Mais que faut-il entendre précisément par cette faute lourde? Cela signifie d'abord sans difficulté l'omission des soins que prennent même les hommes les moins attentifs: comme le dit Ulpien, *lata culpa est nimia negligentia, id est non intelligere quod omnes intelligunt* [L. 213, § 2, D., *De reg. jur.*]. Supposez un homme qui, débiteur d'objets précieux, les abandonne dans un en droit où tout le monde peut venir les prendre. Nous dirons à cet homme: 'Vous voudriez qu'ils fussent volés, vous ne feriez pas autrement.' Mais il faut aller plus loin: il faut dire qu'en principe un homme manque à la bonne foi et par conséquent commet, sinon un dol, tout au moins une faute lourde, en n'apportant pas à l'exécution de ses engagements le degré de diligence qu'il a l'habitude d'apporter à ses propres affaires. Cela me paraît conforme à la notion même de la bonne foi.

"Je conviens cependant que Celsus n'est pas tout à fait aussi affirmatif quand il dit: *Si quis non ad eum modum quem hominum natura desiderat diligens est, nisi tamen ad suum modum curam in deposita praestat, fraude non caret; nec enim salvâ fide minorem iis quàm suis rebus diligentiam praestabit* [L. 32, D., *Depositi*]. Le jurisconsulte a choisi une hypothèse dans laquelle évidement la faute se confond avec le dol."

[2] Wh. C. L. 7th ed. § 1002, 1012.

[3] L. 50, § 4 de furtis.

once seen that while *culpa lata* in this view excludes malice, it includes not only that mental torpor which is indifferent to surrounding danger, but that absorption in extraordinary topics which leaves no faculties for the observation of the ordinary incidents of life, and that insolence of power which deals with its own interests without condescending to consider how its dealing may affect others. The ordinary and obvious line of distinction, however, is that of expert and non-expert. Thus, to illustrate this again by the case of the cottager with whom a box is deposited by a traveller: every one knows that to leave a box at night in an open and unguarded room is to expose it to theft or damage; hence this is gross negligence for the cottager to so leave the box. It does not require the special skill of a man trained to a particular branch of business to know that a box is not to be so exposed; hence the exposure of the box in this way implies gross or common, as distinguished from slight or special negligence.[1] Or, reverting to the case of an ordinary unprofessional nurse called in to assist a person taken suddenly sick, such nurse, we must agree, is not liable for special or slight negligence, *i. e.* the lack of diligence and skill belonging to a professed physician; but is liable for gross negligence, *i. e.* the lack of diligence and skill belonging to ordinary unprofessional persons of common sense, such as omitting to watch, or to call in a substitute if obliged to suspend watching, in cases in which watching is required. But the physician is liable for *culpa levis*, if he either undertake the case without the ordinary qualifications of a physician under such circumstances, or manage it without the ordinary skill of such a physician.[2]

§ 30. *Meaning of culpa levis.* — *Culpa levis*, according to the Roman law, is therefore the *culpa* which exists when a person bound to a special duty neglects to enter upon and discharge it with the diligence belonging to a *diligens*, *bonus*, *studiosus paterfamilias*, "*qui sobrie et non sine exacta diligentia rem suam administrat.*"

§ 31. "*Bonus paterfamilias*" *to be regarded as equivalent to* "*good business man.*" — But *paterfamilias* is not to be understood in the homely and sometimes ludicrous sense in which the term is now received. The Roman and the English *paterfamilias* differ widely. The English *paterfamilias* is a domestic father, who,

[1] See infra, § 457.

[2] See infra, § 780.

when viewed in this sense, is chiefly occupied in serving his wife and children. The Roman *paterfamilias* was a man of high responsibilities, the chief of a tribe, invested with almost unlimited authority over his children, no matter of what age, until they were emancipated; wielding, therefore, possessions and prerogatives the due management of which required peculiar sagacity, business tact, keenness of apprehension, and promptness in executive action. Even in France, where the power attached to the *paterfamilias* is much higher than obtains with us, the term *diligent père de famille* is viewed as indicating business as distinguished from mere family excellence. Thus Lebrun, in his *Essai sur la prestation de fautes*,[1] reminds us, in construing this term, that the Roman *paterfamilias* was eminently the man of affairs; that the good *paterfamilias* was a good man of affairs, and hence that the term *bonus et diligens* paterfamilias is convertible with "conscientious and diligent business man," or "conscientious and diligent expert." To adopt Hasse's rendering, in reviewing Lebrun,[2] "*man sich unter einen* diligens paterfamilias *einen durchaus tüchtigen Mann zudenken haben, der ueber seine Angelegenheiten mit vollem Aufmerksamkeit und ganzem Fleisse zu wachen gewohnt sei.*" The *diligentia*, therefore, of a *diligens*, *bonus*, *studiosus paterfamilias* is not to be measured by what we might call the diligence of an ordinary English family man. It is rather, to adopt our own phraseology, the diligence shown by a good and trustworthy business man when dealing with his particular duties. And the diligence that such a man shows in the discharge of his particular duties is the diligence which a business man is required to show when he undertakes as a business to attend to the affairs of others. If he fails to do this, he is guilty of *culpa levis*, and is liable to make good the loss.

§ 32. *Culpa levis is the lack of the diligence belonging to a good business man in his specialty.* — Hence, to adopt the exposition of Hasse,[3] whoever undertakes the practice of a particular art or business must not only possess but apply the skill necessary to the due practice of such particular art or business. If he does this, he does only what is his duty; for no honest man undertakes, when duly informed, to do something which he knows he does not know how to do, or uses ordinary care in that which he knows requires extraordinary care. It is no defence to him in such

[1] Paris, 1813, p. 2. [2] Hasse, p. 508. [3] P. 93.

a case that his negligence was not gross, that his *culpa* was not *lata*, that the mischief that he failed to notice or remedy was not one which an ordinary observer would have noticed and remedied. The particular duty he has assumed requires from him a higher degree of diligence; the diligence, not of an ordinary observer, but the *diligentia diligentis paterfamilias;* the diligence of a good business man in his particular specialty. A man, for instance, who undertakes to mend a watch ought to be skilled in watch mending; and the mere undertaking to do the work without the skill is *culpa levis*. He is absolved, it is true, if he possesses and applies the diligence of a skilful expert. *Culpa autem abest si omnia facta sunt, quae diligentissimus quisque observaturus fuisset.* He is not liable simply because he does not rise to a height of mechanical genius, or apply an intensity of exertion unusual among experts in his particular branch. But he is required to possess the usual skill of such experts, and to diligently apply such usual skill. Consequently he is responsible not merely for *culpa lata*, *i. e.* for negligence in not doing what non-experts would do, but for *culpa levis*, *i. e.* for negligence in not doing what experts would do. From such persons the *diligentia diligentis* is required; and such persons, if they neglect to apply *diligentia diligentis*, are in this respect guilty of *culpa levis*. Hence *culpa levis* is the lack of the diligence belonging to a good specialist or expert in his particular work.

§ 33. *Mommsen's qualification of the definition that culpa lata is the lack of the diligence of a non-expert.* — It is proper to state, however, that the conclusions just given have been in some respects contested by a contemporaneous German jurist, well known not only as thoroughly versed in the Roman law, but as a practical statesman.[1] To understand *culpa lata*, so argues Mommsen, we must begin with the passages from the Digest already cited. The first is the definition of Ulpian: "Lata culpa est nimia negligentia, id est, non intelligere quod omnes intelligunt."[2] The second that of Paulus: "Latae culpae finis est, non intelligere id quod omnes intelligunt."[3] These passages, continues Mommsen, do not purport, it is plain, to give a systematic definition of *culpa lata*. No one now would maintain that an error of the

[1] Beiträge zum Obligations recht, von Friedrich Mommsen. Braunschweig, 1855, III. 347.

[2] L. 213. § 2. D. (50. 16).

[3] L. 223. pr. D. eodem.

character described in these passages is identical with *culpa lata* nor was this maintained by the jurists. What they meant to say was that negligence, in order to be *culpa lata*, must rest on negligence such as that here described; or, in other words, that the negligence must be so marked as to be only explicable by the supposition of some such gross and obvious error.

§ 34. If we keep this in mind, the passages just cited, he insists, are of the greatest value in the definition of *culpa lata*, since they lead us to the true point of investigation, namely, the character of the principle which lies at the basis of *culpa*. He proceeds to direct his inquiries, first, to the subject matter of error; and, secondly, the way error must operate in order to produce *culpa lata*. As to the first point of inquiry, the extracts just given, he claims, give us no aid, since there is no distinction in this respect between *culpa lata* and *culpa levis*. But the subject matter of error can readily be understood by a glance at the idea of *dolus*.

Under *dolus* we understand an intention knowingly to violate the law. To this it is essential, first, that the effect intended invades another's rights; and second, that the projected act or omission will produce such effect. In order that an illegal effect should be induced through *culpa* and not through *dolus*, it is necessary that the *scienter* in one of these two relations should fail. If the person doing or omitting, as the case may be, knows that his act or omission will lead to an illegal result, and knowing this, does not abstain from the act or omission, this involves an approval by him of the result; while such an approval is excluded by the idea of error. *Dolus* and *culpa* can be only viewed in such a case as alternatively possible, when the offender views the illegal result only as a merely possible contingency. If in such a case the offender approves such result in advance, this is *dolus* (the so-called *dolus eventualis)*; if, on the other hand, he does or omits to do the act under investigation in the hope that the illegal consequence will not be produced, this is *culpa*. We have, in the field of inquiry opened in this second case, the subject matter of error, which is the first point of examination.

§ 35. The second point, Mommsen urges, concerns the mode in which error operates in *culpa lata*. This makes it necessary to examine the points in which *culpa lata* differs from *culpa levis*. At the outset he claims that we are not here confined to

error as to notorious matters of fact. Obligatory relations are confined to specific persons, and the facts which are involved in such relations rarely bear the character of notoriety. We must therefore not attach the idea of notoriety to the words, *non intelligere quod omnes intelligunt.* There can, in fact, be no question that by these words is indicated an ignorance of those facts of which an ordinary person in the situation under examination would be cognizant, even though he would not be considered as attentive or careful. The word *omnes* is used in this sense in other passages of the jurists; one of which will be presently adverted to. Where, however, are the limits of this error to be placed? In answering this question we are led to the doctrine of Error, and especially to the division of Error into *probabilis* and *non probabilis.* The authorities bring pointedly before us the connection between the last kind of error (*non probabilis*) and *culpa lata.* In other words, *error non probabilis*, or stolid or rash ignorance, is, under various phrases (*supina ignorantia*, *negligentia crassa*, *dissoluta ignorantia*), constantly treated as convertible with *culpa lata.*[1]

§ 36. *Culpa lata* and *error non probabilis*, he proceeds to argue, approximate still more closely when we view them in their practical relations. The principle on which we practically determine inexcusable error is as follows: When the facts, ignorance as to which is to be investigated, are so open to the supposed offender that we cannot conceive him to be ignorant of them except through gross negligence, then it will be presumed that he was not thus ignorant. Thus in L. 14. § 10. D. de Aed. Ed. (21. 1): "Si . . . . talis morbus sit, qui omnibus (that is to say, by every one in the position of the seller, who like him saw the slave) potuit apparere . . . ejus nomine non teneri (venditorem) Caecilius ait: perinde ac si nominatim morbus exceptus fuisset. Ad eos enim morbos vitiaque pertinere Edictum Aedilium probandum est, quae quis ignoravit vel *ignorare potuit.*" Hence ignorance which is the result of gross negligence is no defence, *culpa lata* in this respect being assimilated to *dolus.* At the same time it is essential to *culpa lata* that the ignorance should be uniformly gross.

§ 37. Following the above views, Mommsen holds that *culpa lata* may be said to exist when the offender either did not know

[1] See L. 11. § 10. 11. D. (11. 1); Ed. (21. 1); L. 29. pr. D. mandati L. 6. D. (22. 6); L. 55. D. de Aed. (17. 1).

that his act or omission would produce a particular illegal result, or that the particular result so produced was illegal; supposing in both cases that his ignorance was based on an inexcusable error. It makes no difference whether the inexcusable error was as to only one of the above alternatives or as to both.

Yet the phases of *culpa lata*, he adds, are not yet exhausted. In L. 223, D. de V. S. Paulus says: "Latae culpae *finis* est, non intelligere id, quod omnes intelligunt." We have here described the *limits*, not the specifications of *culpa lata*. We must therefore contemplate as within the range of *culpa lata* cases where the offender foresees the illegal result as a possible consequence of his conduct, and yet proceeds in his course, not, on the one side, approving of the illegal act, and yet, on the other side, risking it either through frivolous levity, or through indifference produced by undue familiarity with the subject matter. These cases are more serious than those previously mentioned, since they exhibit an unconscientious disregard of the interests of others; and consequently they fall under the head of *culpa lata*. Negligence of this kind is called in one case in the Digest *lusus perniciosus*;[1] and sometimes we have attached to it the epithets *luxuria* and *lascivia*.[2]

§ 38. In this aspect *culpa lata*, so holds this able jurist, is to be assumed wherever a person having charge of the interests of another so distinguishes them from his own as to lead us to infer that the first are subordinated to the second. It is true that it may be said that such postponement may take place without the intention of injuring such other person's rights; but whoever omits, as to another's affairs which he manages, the precautions he exhibits in his own, or manages another's business, because it is another's, more negligently than his own, betrays in this respect an unconscientious indifference to the duties he undertakes. Such being the limits of *culpa lata*, we can define it as that kind of *culpa* which rests on an unconscientious indifference to the interests of others, or at least is of such a character that the charge of *dolus* can only be diverted by the plea of gross ignorance, — ignorance which is itself inexcusable. The proof of the correctness of this definition may be found in part in the foregoing observations. Two points are to be added: First, the practical treatment of *culpa lata* can only be approximated by this process; and secondly,

[1] L. 50. § 4. D. (47. 2.)

[2] L. 11. D. (47. 9); Gaius, III. § 202. § 11. I. (4. 1.)

that with this definition the particular cases of *culpa lata* given in the *corpus juris* fully harmonize.

§ 39. That *culpa lata* is assimilated in its effects to *dolus*, appears, so Mommsen justly goes on to hold, by a number of passages; and when *dolus* is spoken of generally, *culpa lata* is constantly included. In some cases *culpa lata* is expressly described as *dolus*.[1] This, he declares, is to be explained by the fact that in many cases *dolus* is made the basis of a suit: or the hindering of the fulfilment of an obligation is a release only so far as it was produced without the *dolus* of the debtor; and hence the *dolus* was extended to embrace *culpa lata*, so as to enable cases of *culpa lata* to be brought within the scope of the edict. Again, the juxtaposition of *culpa lata* with *dolus* may be viewed as an application of the maxim, that inexcusable ignorance is equivalent to a *scienter*. As the *scienter*, as an internal fact, is hard to prove, a practical necessity prompts us to place cases of error which are without any excuse on the same footing with cases in which actual knowledge is proved. No doubt this was first done in particular instances, as the emergency required. From these the jurists rose to the recognition of the general principle, that inexcusable error is to be regarded as knowledge. The assimilating of *culpa lata* to *dolus*, however, was a step in this process of juridical development; and this step was, as we learn, for some time contested.[2]

§ 40. Hence, so argues Mommsen, if we should regard the whole domain of tort (*Verschuldung*) as a field of whose surface *dolus* occupies one half and *culpa* the other half, *culpa lata* must appear only as a narrow strip next to *dolus*, while *culpa levis* occupies by far the greater part of the area assigned to *culpa*. It would conflict with this definition of *culpa lata* if *culpa lata* and *culpa levis* are to be regarded as two divisions of *culpa* of equal grade. This, Mommsen insists, is not the case, the common usage of the Romans being to treat *culpa lata* in the way just stated. This explains the fact that when they speak of *dolus* absolutely, *culpa lata* is included; and when they place *dolus* and *culpa* in antithesis, or when they speak of *culpa* in connection with *dolus*, they mean always *culpa levis*.

§ 41. Puchta, indeed, a deservedly high authority,[3] maintains, as Mommsen admits, that *culpa lata* is the negligence of an or-

[1] L. 32. D. (16. 3); L. 226. D. (50. 16); L. I. § 2. D. (47. 4.)

[2] L. 32. D. (16. 3.)

[3] Pandekten, § 266.

dinary man without special aptitude or experience in the business assigned to him: in other words, the negligence of a non-expert as distinguished from an expert. To this definition Mommsen [1] objects that it gives no fixed standard, and that it arbitrarily and unreasonably puts the non-expert, or the ordinary man, without special aptitudes or experience, in antithesis to the *diligens paterfamilias*.

§ 42. By the Roman jurists, so argues Mommsen, herein departing from the line marked out by Hasse, no peculiar mental requisites were needed by the *diligens paterfamilias*. Here, however, is the weak part of Mommsen's exposition. No doubt, to constitute the ordinary domestic *paterfamilias*, according to our present notions, no culture in any specific specialty is required. But to the ideal Roman *paterfamilias* it is essential, as has been already shown, that he should take up no business without being specially qualified for its performance. This position, adopted by all great modern expositors of the Roman law, Mommsen, when discussing the practical meaning of "*paterfamilias*," virtually admits. The Roman jurists, he concedes, appealed in this respect to the usages and analogies of their own times, when they seized upon the *diligens paterfamilias* as the standard; and we must do the same. We must take the principle the jurists presented rather than its symbol. The principle is that the amount of the skill, activity, and prudence, which is required of a person dealing with another's affairs, is not to be gauged by the personal capabilities of the defendant, but by the nature of the business itself and its surrounding incidents. When *culpa levis* is spoken of as *culpa in abstracto*, this is not because the circumstances of the particular concrete case are to be kept out of sight, *but because the standard itself is objective, and is the same* in all cases of a given character, and is not *subjective*, fluctuating with *the individuality of the person by whom the care is to be exercised*. To illustrate this we must go back to the Roman symbol. A *diligens paterfamilias* permits himself to undertake no business engagement which he has not capacity, experience, and skill enough to carry through. A *diligens paterfamilias* will not apply the same measure of exertion and prudence to everything he undertakes; he will adjust his attention to the needs of each transaction. An absolute inflexible standard cannot here be applied; on the con-

[1] III. p. 356.

trary, a *diligens paterfamilias*, we must maintain, will exert in each particular case that measure of activity and care which are necessary in order, apart from extraordinary incalculable disturbances, to avoid damage and bring about the desired end. Hence while in each case the amount of care and activity varies with the circumstances, the standard is constant, that of the *diligentia* of the *diligens paterfamilias*.

§ 44. *Difficulty in applying distinction attributable to the confusion of our terminology.* — No doubt the discredit into which the supposed Roman classification has fallen among us is attributable not merely to the absurdity of the hypothesis of a *culpa levissima*, — an hypothesis which we will soon see is rejected by the Roman standards, — but by our own capricious modes of translating *culpa levis* and *culpa lata*. *Culpa levis* is sometimes rendered in our books as *slight*, sometimes as *light*, sometimes as *ordinary*, sometimes, and more accurately, when we remember that it is the negation of the diligence of a specialist, as *special* negligence. But to *culpa lata* the most remarkable latitude of translation has happened. Chancellor Kent comes near to the definition of Ulpian, when he declares that "gross neglect is the want of that care which every man of common sense, under the circumstances, takes of his own property;"[1] though he leaves out the important qualification of "solet," so justly emphasized by Mommsen in a passage to be quoted. But, while by some eminent English judges *lata* is used as convertible with "gross," a term which, as is elsewhere seen, Lord Cranworth declares to be "vituperative," by others it is translated as "ordinary," while by Willes, J., "gross" negligence or *culpa lata* is declared to be the negligence of the expert; leaving us to the conclusion that *culpa levis* is that negligence of the non-expert of which Ulpian declares that it consists, not in not seeing what only specialists see, but in not seeing what everybody sees. "Gross negligence," to quote Judge Willes's own words,[2] "can only be said of a person who omits to use the skill he has, not of a person who is without

[1] 2 Comm. 560.

[2] Phillips *v.* Clark, 5 C. B. N. S. 884. In Austin *v.* The Manchester, &c. Railway Company, 16 Jur. 766, Cresswell, J., said: "The term 'gross negligence' is found in many of the cases reported on this subject, and it is manifest that no uniform meaning has been ascribed to those words, which are more correctly used in describing the sort of negligence for which a gratuitous bailee is held responsible, and have been somewhat loosely used with reference to carriers for hire."

skill." In effect that is what Cresswell, J., says in the case mentioned,[1] "and that is the civil law exposition of *crassa negligentia*, or *lata culpa*." Extraordinary as is the definition here given of gross negligence, still more extraordinary is the mistake which led so painstaking a judge to declare that the definition given by him was that of the "civil" law.[2]

§ 45. *But distinction between culpa lata and culpa levis*,

[1] Austin *v.* Man. R. R. Co. 16 Jur. 766.

[2] "While adverting to these authorities," says Mr. Campbell, in his excellent treatise on negligence (London, 1871, § 11), "I must make this observation, that although both C. J. Holt and Sir W. Jones follow the Roman law in excepting mandate from the ordinary rule, by which responsibility correlates with benefit, the necessity for this exception has not always been perceived by the English lawyers who followed them. The result has been a curious ambiguity in their use of the term *gross negligence*. Imagining that, to make the gratuitous commissioner liable, a case of gross negligence must be established, they have applied the terms 'gross negligence,' '*crassa negligentia*,' '*culpa lata*,' to mere want of the skill or care promised. For instance, it has been held that a person employed on account of the skill of a particular kind which he professes is liable, although acting gratuitously, if he fail to adhibit such skill as may reasonably be expected from his profession. In order to harmonize the case with the general rules of bailment, these lawyers thought it necessary to term such failure in skill *gross negligence*; and this misuse of the term gross negligence has even been imported into cases of contract for mutual benefit, where there is not the shadow of an excuse for such language. This absurd and misleading use of words has given fair occasion for the remark, that *gross negligence* is only ordinary negligence with a vituperative epithet. 1 Sm. L. Ca. 196; Grill *v.* Gen'l Iron Screw Collier Co., L. R. 1 C. P. 612. The truth is, that however confused their language, the instinct of English lawyers has led them practically to adopt the conclusion arrived at by the Roman law; so that except in the case of common carriers (who have peculiar liabilities of their own as will presently be seen), there is no distinction in law between the duty implied by mandate and that implied by work done for hire. Or if there be any difference it is merely this, that a jury may if they please, in acquitting from negligence, take into account the gratuitous nature of the service. (See cases commented on in Smith L. Ca. Vol. I. pp. 193–196.) I must while on this subject further observe, that having through the association of ideas above referred to imported the expression gross negligence into cases of ordinary contract, they then rationalized upon the words *gross*, &c., explaining them to mean considerable or palpable as opposed to slight or merely constructive negligence. I shall afterwards revert to this subject (§ 46, 54, 58, 60, 87, infra.) In the mean time note that, when we come upon the terms *gross negligence*, &c., in English law, it must be marked whether they are used in the sense of *culpa lata* as employed by the Roman lawyers, or merely in the sense of considerable or palpable negligence."

one of substance. — The importance of this distinction has been just seen. Even Mommsen, whose thoughtful criticism on the current authoritative doctrine of the Roman law has just been given, agrees that this distinction, under the terms of the *Corpus Juris*, must be applied. We are to understand, he says, by a *diligens paterfamilias*, a man who is fully equal to the particular duties he undertakes, and who devotes himself to the proper management, within its due orbit, of this business. Diligence such as this must be in any case shown so as to avert the charge of *culpa levis*. At the same time Mommsen agrees with Hasse that what is required is, as will presently be fully shown, neither rare talent, such as is only exceptionally found with peculiarly gifted men; nor an abnormal exertion of power, such as involves a concentration of every energy continuously in a way that the human frame is capable of only under short intermittent periods of excitement; nor that highly strung and intense cautiousness, of which some men in circumstances of danger may be sometimes capable, but which is inconsistent with firm and consistent business habits. But this diligence must be analogous to that which a *diligens paterfamilias* as a *general rule* exercises. It must, therefore, be the diligence of an expert when in the exercise of his specialty. And this question is one often of decisive importance. Is the defendant negligent in not bestowing in the particular case special care? Is the attendant of a sick person, for instance, liable for the non-possession or the non-application of the skill of a physician? In such case the question of liability or non-liability depends upon (1) whether the defendant claimed to be an expert, and (2) what degree of skill and diligence such an expert is expected to possess and apply. Hence there are many cases in which it is the duty of the court to tell the jury that the defendant, not claiming to be an expert, is not liable for *culpa levis* (the negligence of an expert), but is liable for *culpa lata* (the negligence of a non-expert). So far, therefore, from the terms meaning the same thing, they represent an important distinction, upon which the decision of a case frequently depends.

§ 46. *Importance of word "accustomed" in definition.* — Because a good business man sometimes blunders, it does not follow that the business man under trial is to be excused when he made the blunder complained of. The standard business man, whom this test appeals to, undoubtedly is occasionally careless.

Such exceptional carelessness, however, is not to be considered as a test. The diligence is *qualem diligens paterfamilias suis rebus adhibere solet. Solet* is the criterion. Were it not so, the appeal to the *diligens paterfamilias*, or the good business man, would be illusory. The answer would be, "The *diligens paterfamilias*," or "the good business man," "makes slips, and so do I; consequently I am doing just what is done by your model." The whole life of the *diligens paterfamilias*, however, with its occasional deflections from its average standard, is not to be reproduced. The test is, what is the *usage* of this *diligens paterfamilias?* And in applying this test it is not lawful to take up as an example those exceptional cases in which a good business man lapses into negligence. He who takes charge of another's affairs must exercise without intermission the attention of a *diligens homo*. He is permitted on no occasion to relax such attention. And it is one of the results of the constancy of assiduity thus required from him that the standard of this assiduity is not raised to a pitch of intensity to which human capacity could not as a constancy attain.

§ 47. *Probability of danger to be taken in view as determining not merely the grade but the existence of negligence.* — It has been seen that it is no defence in a suit for negligence that the defendant did not expect the particular injury complained of to occur.[1] We have now to notice that the same act may or may not be negligent as the probability of injury ensuing from it may be greater or less. Certain dangerous instrumentalities — *e. g.* steam — are essential to the welfare of society. It may be negligent to expose complicated steam machinery in a thoroughfare when it would not be negligence to expose it in a house. So with regard to poison. An apothecary may without negligence expose poison on his counter when he could not without negligence expose it on the table of a hotel where he may be boarding. So a common carrier is bound to exercise a higher degree of care as to the passengers inside his carriage, and the probabilities of whose danger he is obliged to be constantly canvassing, than he is to persons who may happen to unexpectedly appear on his track.[2]

§ 48. *Diligence required is proportionate to duty; and degree of negligence imputed corresponds to degree of diligence exacted;*

[1] See supra, § 16.

[2] See infra, § 635, 872–4. Pendleton St. R. R. *v.* Shires, 18 Ohio St. 255.

with the qualification, that the utmost degree of diligence exerted is that which a good business man is under the particular circumstances accustomed to show. — The limitation last expressed (that the utmost degree of diligence exacted is that which a good business man is under the particular circumstances accustomed to show) will be presently fully sustained.[1] At present we have to do simply with the position that between *culpa lata*, which approaches to *dolus* on the one side, and *culpa levis*, or the *culpa* of a good business man when neglecting to bestow his special accomplishments on his specialty, there are as many gradations as there are gradations between things to be done and between the persons by whom such things are attempted. In other words, *culpa* may be thus divided: —

Dolus.	*Culpa lata*, or the negligence of a non-expert.	*Culpa levis*, or the negligence of an expert (or of a good business man in his specialty).	*Culpa levissima*, or infinitesimal negligence.

Now betweeen *culpa lata* and *culpa levis* the distinction may sometimes be shadowy. We may find it difficult to predicate of a particular case whether it is *culpa lata* or *culpa levis*, just because it may be hard to determine whether the defendant claimed or did not claim to be an expert; and though there are many instances in which he is entitled to a verdict, should it appear that he did not claim to be an expert, simply because in such case he would be liable not for *culpa levis* but only for *culpa lata* which is unproved, yet, should it appear that he claimed to be an expert, liability attaches to him whether *culpa lata* or *culpa levis* be proved. When, however, we come to the distinction between *dolus* and *culpa* on the one side, and between *culpa* and *culpa levissima* on the other side, then the line is one which is in all cases of decisive importance. On the one side, *dolus* and *culpa* are not only morally and psychologically distinct states,[2] but when followed by *damnum*, they are the subject, both by Roman and Anglo-American law, of distinct forms of action. On the other side, *culpa levissima* is a fiction of the Schoolmen, which, as will presently be seen, is repudiated as much by the necessities of business as by the conclusions of philosophy.

§ 49. In inquiring, therefore, whether a particular case is *culpa*,

[1] See infra, § 57.

[2] See supra, § 6, 22.

we are limited to the Roman division of *culpa lata* and *culpa levis;* for if the case proves *dolus* on the one side, or merely *culpa levissima* on the other, then it is not *culpa*. But we must again remember that *culpa levis* does not prescribe an unelastic standard. Undoubtedly it appeals to "a good business man" as the model; but this is not to "a good business man" in the abstract, but to "a good business man" *in his particular specialty, as he is accustomed to act in circumstances such as the present.* Hence, while the *idea* of diligence in *culpa levis* is constant, the phase and tone of such diligence vary, just as much as one specialty differs from another, or the emergencies of one case differ from the emergencies of another case. It is in this sense that we are to understand the following excellent remarks of Judge Bradley, in a case decided by the supreme court of the United States in December, 1873: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities.[1] If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties, and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed."[2]

[1] 1 Smith's Lead. Cases, 6th Amer. ed., — note to Coggs *v.* Bernard; Story on Bailments, § 571; Wyld *v.* Pickford, 8 M. & W. 443; Hinton *v.* Dibbin, 2 Q. B. 661; Wilson *v.* Brett, 11 M. & W. 115; Beal *v.* South Devon R. Co. 3 Hurlst. & Colt. 337; L. R. 1 C. P. 600; 14 How. 486; 16 How. 474.

[2] New York Cent. R. R. *v.* Lockwood, 17 Wallace, 357.

Many judicial utterances to the same effect will be found in the following pages. That we should concur in rejecting the fiction of *culpa levissima* is a duty which, as has just been stated, and will presently be fully shown, we owe as much to the necessities of business, as to the claims of philosophical jurisprudence. That we should concede that *culpa levis*, or the negligence of the specialist, varies with the nature of the specialty and the intensity of the duty, is what both reason and authority demand. But it is a departure as much from the principles of common sense as from those of the Roman jurisprudence to hold either that a non-specialist is to be liable for not having the skill of a specialist, or that a specialist is only required to exhibit the skill of a non-specialist.[1]

§ 50. *While test (diligence of an expert as distinguished from non-expert) is constant, its application varies with agent and subject matter.* — In fact, if we analyze negligence (excluding, as in the above diagram, *dolus* on the one side and *culpa levissima* on the other), we will find that it involves two factors, each of which may be viewed in almost an infinite number of gradations. First, there is the *person acting*. The distinction between expert and non-expert has been already set forth; and it is a distinction which the standards emphatically prescribe, but at the same time present in

[1] See Todd *v.* Old Col. R. R. 7 Allen, 207; Goodale *v.* Worcester Ag. Soc. 102 Mass. 401; Toledo, W. & W. R. R. *v.* Baddely, 54 Ill. 20. "The measure of care," said Chapman, C. J., in 1871 (Gray *v.* Harris, 107 Mass. 492), "required in such cases must be that which a discreet person would use if the whole were his own." This is substantially true in all cases of *culpa lata*. But in *culpa levis, i. e.* when a business man undertakes as such to do a particular business, the standard is, "the care which *a good business man in this specialty is in such circumstances accustomed to show.*" This care, of course, varies with the emergency. Thus, for instance, the driver of a horse-car is bound to be more careful when he observes children and infirm persons in his way than he would be as to adults in full possession of their faculties. Schieshold *v.* N. B. & M. R. R. 40 Cal. 447. See Robinson *v.* Cone, 22 Vt. 213; Daley *v.* N. & W. R. R. 26 Conn. 561; Rauch *v.* Lloyd, 31 Penn. St. 370; infra, § 306–7. So the engineer of a locomotive is obliged to exercise diligence, as will hereafter be seen, in proportion to the critical and hazardous character of the agency he wields. So, as will be seen when we discuss the topic of Depositum, the care to be bestowed on an object is to be graduated by its value. So also, as will appear in our examination of the doctrine, *sic utere tuo ut non alienum laedas*, diligence in our relations to others is to be determined by the nature of the injury they are likely to receive from our negligence. Infra, § 785.

several varying aspects. Thus, for a person to undertake, without the necessary qualifications, a business requiring skill is in itself a *culpa*. Hence a surgeon who undertakes an operation for which he has not the proper qualifications is liable for the damage his unskilfulness works;[1] and so when a person undertaking to drive another to a particular spot has no aptitude to drive, or when he who undertakes to make up cloth into a coat spoils the cloth from his incapacity.[2] Indeed, the maxim is of universal application in all cases where the defendant claims to be an expert: "imperitia culpae adnumeratur."[3] The reason of this is that it is negligence for a person to undertake a duty for which he is incompetent: "cum affectare quis non debeat, in quo vel intelligit, vel intelligere debet, infirmitatem suam alii periculosam futuram."[4] He who thus intrudes when incompetent is not a *diligens paterfamilias*. At the same time we must not lose sight of the qualification already noticed, that there is nothing extraordinary or abnormal required to constitute the *diligentia* of a *diligens paterfamilias*. Hence if the actor brings to the undertaking adequate skill, and bestows on it a degree of care such as is usual in undertakings of a similar character, he is exonerated from the consequences of a disaster which could only have been averted by the exertion of a degree of vigilance and skill unusual among competent experts in this particular department. Yet at the same time the question whether the requisite degree of skill is possessed depends not merely upon the party's own particular degree of cultivation, but upon the relation borne by that cultivation (as will be more fully illustrated when we come to consider negligence by physicians) to the age and place in which he lives. Here, then, on the question of competency alone we see how numerous are the constituents, the change of any one of which may change the complexion of the whole case.

§ 51. So, also, independently of the question of *diligentia quam suis*, to be presently discussed, we may readily conceive of cases in which the peculiar characteristics of a mandatory or agent may enter into and modify the character of the duties with which he

[1] Infra, § 730.

[2] To these points Mommsen cites § 7. I. de leg. Aquil. (4. 3); L. 6. § 7. D. de off. prae. (1. 18); L. 7. § 8. L. 8. § 1. L. 27. § 29. D. ad leg. Aquil. (9. 2); L. 9. § 5. L. 13. § 5. D. locat. (19. 2.)

[3] L. 132. D. de R. J. (50. 17); L. 9. § 5. D. (19. 2); § 7. I. de leg. Aquil. (4. 3.)

[4] L. 8. § 1. D. (9. 2.)

is charged. It is true that there are certain broad and uniform duties which belong to specific obligations, and which all persons undertaking such obligations must perform. Yet there may be distinctive and peculiar obligations imposed upon an individual by virtue of his own particular and notorious qualifications. If, for instance, I employ a distinguished artist to paint a picture for me, and offer him a price corresponding to his abilities, I can demand more care and skill from him than from one who is without experience or capacity. According to Hasse,[1] I have a right to demand from the artist the degree of care which a *diligens paterfamilias*, if endowed with the artist's abilities, would bestow. But Mommsen, not without reason, modifies this by saying that the diligence I can claim is that which is required by the circumstances of the concrete case. Luca Giordana, whom he appeals to as an illustration, was a Neapolitan painter of the seventeenth century, endowed with extraordinary talents, but of such rapidity of execution that his works were not equal to his capacity. If he was commissioned to produce a particular picture, the person employing him, knowing his peculiarities, could not expect that Giordana would exhibit in the picture the skill that would be exhibited by a *diligens paterfamilias* with Giordana's talents. All that could be expected would be that Giordana would apply in the picture thus ordered the skill displayed by him in his other pictures. The test is not, so argues Mommsen, the skill employed by the artist when painting for himself; but the skill which he usually employed when working for others. To a certain extent this must be conceded. If I employ a successful painter who claims to be an expert in water-colors, he must show the diligence of such an expert; it will not be enough if he is accomplished as a painter in oils. If I employ a distinguished equity pleader, he must show himself an expert in the particular branch with which his reputation associates him. If I employ an oculist in large practice, he must show himself an expert in his specialty. But I cannot claim that either artist or practitioner should devote to me his whole time. Independently of other considerations, this would be incompatible with the very largeness of practice on which distinction is based.

§ 52. So is it scarcely necessary to repeat at this point that there are branches of business in which, to avert danger, an ex-

[1] Hasse, p. 145.

traordinary degree of activity and of watchfulness is required. Here, however, the *termini* already given are maintained. The transportation of glass, for instance, will have bestowed on it by the *diligens paterfamilias*, or good business man, greater care than he bestows on the carriage of stone. So also there are particular lines of business which require, as Mommsen well argues, at certain given periods, the absorption of the whole attention and energy of the party employed. Here the same test may be continued. A *diligens paterfamilias*, or good business man, will not undertake such a service without the proper qualifications, and without knowing that when the emergency comes which requires his undivided attention to be given to the particular duty, he can for the time disembarrass himself from his other engagements so as to concentrate himself on this. Here, also, we must keep in mind that if the defendant brings into play the qualifications and capacity for concentration usual among prudent workmen in his department, he will not be liable if a casualty occurs which could only have been avoided by the display of a degree of energy and watchfulness beyond that which by such prudent workmen is usually applied. And the same view applies to the use of valuable improvements possible, as yet unaccepted in practical life. Thus, it is negligence in a carrier to omit to furnish for his vehicles and machinery for the transportation of goods any improvement known to practical men, and which has actually been put into practical use; but a failure to take every possible precaution which the highest scientific skill might suggest, or to adopt an untried machine or mode of construction, is not of itself negligence.[1]

§ 53. Hence, viewing the question in relation to the thing to be done, in order to avert the charge of *culpa levis*, the amount of care bestowed must be equal to the emergency. It may be that only a small degree of exertion and caution is required, according to the usage of prudent workmen in the particular department; and it may be, so argues Mommsen, that the business is one which excludes, from its very nature, the idea of *culpa levis*, and requires only such attention, the withholding of which is *culpa lata*. Thus he who cuts down a tree is required, if a road is under the tree, to take such precautions as will warn persons travelling the road of the danger. The omission of such precautions is regarded as a *culpa;* and the person thus negligent is

[1] Steinweg *v.* Erie R. R. 43 N. Y. 123; infra, § 635, 872–4.

liable for the consequences, even though he was not aware that any one was passing. If, however, there was no road under the tree, then we cannot require that such precautions should be taken. For thus to watch when there is no such road or way involves an excess of caution and anxiety; and on the other hand, the traveller who forsakes the beaten road, and strikes across the fields, is required to look out for himself. Hence, in such a case, a person cutting the boughs of a tree is only liable for negligence in case he should have seen a traveller coming up to the tree and then lets the bough drop without warning. Thus it is declared, in view of the latter case: "*Dolum duntaxet praestare debet, culpa ab eo exigenda non est.*" Now as in such a case *culpa levis* is excluded, so *culpa levis* in certain specific directions is excluded in other cases. The commodatar and the hirer, for instance, have to exhibit the care of a *diligens paterfamilias*, one element of which is the *diligentia in custodiendo*, the *custodia*; yet at the same time the circumstances of a particular case may be such that peculiar vigilance as to the thing lent or hired may not be necessary, so that *culpa levis* will not be imputed, as remission of *custodia* cannot be under the circumstances charged. In fine what is the diligence of a good business man or expert in his specialty (which corresponds, as has been already so frequently said, with the *diligentia* of the good and diligent *paterfamilias*) depends upon the qualifications of the party discharging the duty, taken into connection with the duty to be discharged. And the test is, when the transaction is one of business, *what a good and diligent business man, in such a specialty, is under such circumstances accustomed to do.*

§ 54. *Meaning of* diligentia quam suis, *or such diligence as is shown by the party charged in his own affairs.* — Yet, while we must expect that every man professing to be an expert or business man must show the diligence and skill, in his particular department, of a conscientious and diligent expert and a conscientious and diligent business man, there are cases, we must admit, arising from a special relationship of confidence existing between the parties (*e. g.* partnership), in which a person charged with *culpa* or negligence may show that the diligence he exercised in the particular instance complained of was of the same grade as that which he exercised in his own affairs. In the classical Roman law this is called *diligentia quam suis rebus adhibere solet*, or

diligentia quam suis ; by modern Roman jurists the want of such diligence is sometimes called *culpa in concreto*, as distinguished from *culpa levis*, which is called *culpa in abstracto*. But that this concrete negligence — this omission to exhibit in our management of another's affairs the diligence we exhibit in management of our own — was not, by the classical jurists, regarded as a distinct form of *culpa*, and cannot now be reasonably regarded as such, has been abundantly demonstrated.[1] In neither Code, Digest, or Institutes, as will presently be more fully seen, do we hear of more than two kinds of *culpa*, — *culpa lata* and *culpa levis*. And from the nature of things the *diligentia quam suis* is rather a matter of evidence, to be used in strengthening or weakening the proof of culpability in a particular case, than an abstract and general elementary test to be applied to all cases alike. Is, for instance, a trustee to be charged with *culpa lata*, which is so great as to be equivalent to *dolus* (fraud) ? Then the plaintiff puts in evidence the fact that the trustee exposed the trust funds to greater risks than he exposed his own. Does the trustee seek to relieve himself from the charge of *culpa levis* or special negligence ? Then, if he proves that what he did to the trust funds he did to his own ; and if it appear that he was selected by the *cestuis que trust*, or those under whom the *cestuis que trust* claim, on account of confidence felt in his particular business discretion, then he is relieved from the charge of *culpa levis*, or special negligence.

§ 55. So there may be cases in which it is clear that a principal in selecting an agent, or a partner[2] in selecting a copartner, has manifestly the intention that the person so selected should exhibit in the business so committed to him the same characteristics that he exhibited in his own affairs. So, also, it may be well argued that the diligence shown by an agent in his own affairs is all that can be required of him in an office in which he is thrust without his own consent. Hence the standard applied in such case is *diligentia quam suis rebus adhibere solitus est :* and this most generally in extenuation, rarely in aggravation of responsibility.[3] These cases, however, are exceptional. In suits based on the Aquilian law, or, to adopt our English mode of putting the Aquilian principle, on the doctrine *sic utere tuo ut non alienum*

[1] See particularly Hasse, § 49.

[2] See this topic illustrated more fully hereafter, § 515–16.

[3] See § 2. Inst. quib. mod. re. (3. 14) ; L. 5. § 2. D. commodati (15. 6) ; Puchta Institutes, III. 279.

laedes, *diligentia quam suis* is never the test; and it is to be applied to obligations, as will be hereafter shown, only exceptionally, as an evidential qualification, for the purpose of determining intent.

§ 56. At the same time, in the definition of *culpa in concreto*, with its antithesis of *diligentia qualem suis rebus adhibere solet*, the word *solet*, as Mommsen[1] remarks, is peculiarly to be kept in mind. It is not enough, therefore, in order to defeat the charge of *culpa in concreto*, that the defendant can be shown to have been *in a single instance* as negligent in his own affairs as he was in the agency which he is charged with negligence in conducting. As in *culpa levis* the continuous, not the exceptional, conduct of a *diligens paterfamilias* is the standard, so here have we to inquire whether the negligence in question is what the agent showed in his own affairs continuously as distinguished from exceptionally. Hence must we conclude that *culpa in concreto* is essentially coincident with *culpa levis* when the party charged acts in the particular business as a *diligens paterfamilias*. Hence we may further infer that a particular action or omission will not be sufficient to relieve the party charged from the liability of *culpa in concreto*. If the party charged had formerly in his own affairs exhibited a similar neglect and thereby had suffered injury, this very injury may have been the reason why after this he began in his own affairs to show greater care. Hence, to clear the agent on the charge of *culpa in concreto*, it is not enough to show a similar act of negligence by him in his own affairs, but he must show that such acts of negligence were common with him, or that his general mode of conducting his business was the same as that with which he conducted his trust.

§ 57. *Culpa levissima*, or the omission to ward off every possible casualty, which is the antithesis of *diligentia exactissimi*, or the most exact diligence, is a grade of negligence much insisted on by the scholastic jurists, as well as by several eminent commentators of modern times. In discussing this question, a question which affects the whole doctrine of negligence, I propose to show: —

§ 58. (1) That the doctrine of a third grade of *culpa*, called *culpa levissima*, is taken by Lord Holt and Sir W. Jones, not from the classical Roman law, which was the law of business Rome,

[1] Beiträge zum Obligationenrecht, III. 374.

but from the scholastic jurists, who dealt with the question, as belonging rather to speculative than to regulative jurisprudence.

(2) That by present authoritative expositors of the Roman law it is rejected.

(3) That while it lingers still in Anglo-American text-books, it is practically dropped by Anglo-American courts.

(4) That it is incompatible with the necessities of business jurisprudence.

(5) That the classification in the two degrees, *culpa lata* (gross negligence) and *culpa levis* (slight or special negligence), is sufficiently exact for all philosophical purposes, and sufficiently flexible for the purposes of practical jurisprudence.

§ 59. *That the doctrine of a third grade of* culpa, *called* culpa levissima, *was taken by Lord Holt and Sir William Jones, not from the classical Roman law, which was the law of business Rome, but from the scholastic jurists, who dealt with the question as belonging rather to speculative than to regulative jurisprudence.* — The Justinian Digest, as is well known, is a compilation of the legal opinions of thirty-nine jurists, the earliest of whom, Q. Mucius Scaevola, was a contemporary of Cicero; the latest of whom died two hundred years before the Digest was compiled. The jurists thus quoted form, therefore, a chain of high juridical intellects who, during an era of four hundred years, were moulded by and in their turn moulded the commercial and social activity of Rome.

The relations which they were called upon to determine were of unparalleled extension and complexity. Rome, during this period of four centuries, was mistress of the world, and the business of the world had to be directed by her courts. Her genius was eminently administrative; and the powers of intellect which she applied to the determination of the multitudinous practical issues which it became necessary for her to settle, were at least equal to those which she lavished so exuberantly in the departments of oratory, of history, and of poetry. Nor, as the dates which have just been given show, was the development of this high juridical activity limited in the sense in which our modern jurisprudences are limited. Our Anglo-American jurisprudence, in its commercial side, cannot be said to be over two hundred years old; and during these two hundred years it has been occupied as much in the adoption of new doctrines, as in the logical

application of old. Distinctive German jurisprudence, now so elaborate and authoritative, is scarcely one hundred years old; distinctive French jurisprudence not much older. But the Roman jurists, whose opinions the Digest collects, began to write when Roman jurisprudence had assumed a settled shape; and when it was virtually an induction, definite though still unsystematized, of the business regulations of an empire whose genius was administration, whose mode of expression at once the most stately, the most impressive, and the most exact, and whose field was all civilization. Hence these great jurists, who, for four hundred years were occupied in defining and applying these settled business rules, wrote not speculatively but regulatively. Their genius was necessarily practical. They did not deal with men as an ideal, as we will presently more fully see; and this fact is worthy of peculiar weight in the discussions in which we are about to engage. They recognized — they were forced by experience to recognize — the truth, that no abstract speculative refinements could be imposed as rules of business action. Hence, dealing with business as it actually arose, they dealt with it in the concrete, laying down only such general maxims as the experience of the past and present told them would be of value in the determination of business issues in the future. If we seek in the Digest for a series of all embracing principles, each logically subdivided with the exactness and delicacy with which, on a blank piece of paper, straight lines may be made to radiate from a given centre, then we will seek in vain. As Dr. Johnson once said, you may walk in a straight line on a desert, but you cannot walk in a straight line on Cheapside. Speculative engineering runs its railroads over valleys, under mountains, and through wilds; practical engineering makes such deflections and curves as are called for by the peculiarities of the face of nature, and the demands of population. To illustrate this by turning to the point immediately before us, speculative jurisprudence divides negligence (*culpa*) into a series of grades; and it declares that in certain cases it exacts a *diligentia diligentissimi* or *diligentia exactissimi*, — a standard as we will presently see, which is impracticable and absurd. The practical jurisprudence of the classical jurists, however, dealing with men as they really are, and with business as it actually arises, rejected these excessive refinements. Of the *diligentia diligentissimi* or perfect diligence, with its antithesis of *culpa levissima* or infinitesimal

negligence, the Digest, viewing the terms as categorical, knows nothing. The words *diligentia diligentissimi* and *culpa levissima* undoubtedly appear a few times in the *Corpus Juris*. They do not, however, express distinct grades of *diligentia* and of *culpa*. They are used, on the contrary, simply to designate such particular intensities of business duty as require that such business duty should, in the special case, be performed with particular care. The jurists do not say, "There is such a thing as perfect diligence to be exacted, and infinitesimal negligence to be punished;" for they know that no business transaction is conducted with perfect diligence and without infinitesimal negligence; and hence that to exact perfect diligence and punish infinitesimal negligence in any particular enterprise would be to prevent such enterprise from being undertaken. Hence they content themselves with a simple, obvious, easily applicable, and yet at the same time necessary distinction. Is a transaction one of business, or not of business? If of business, then the person undertaking it is bound to display the business diligence of a good business man, when exercising his particular business; *diligentia diligentis; diligentia quam diligens paterfamilias in suis rebus praestare solet*,[1] a diligence analogous to that which a vigilant head of a household exercises in his domestic affairs. If the transaction be not of business; if, as in the illustration already given of a *depositum*, a thing is simply left with another person, with no obligation exacted or confidence specially imposed, as to its safe keeping; then the diligence required is simply that which is exercised by a person without business qualifications, — a person, therefore, who only sees and guards against perils such as persons not experts in the particular business see and guard against, and hence the bailee or *praestator* in such case is only liable for *nimia negligentia*, i. e. *non intelligere quod omnes intelligunt*. To negligence or *culpa* of the first class was assigned the term *culpa levis*, — *slight* or special negligence. To negligence or *culpa* of the second class was assigned the term *culpa lata*, — gross or ordinary negligence.

When, however, cases of *culpa* came to be adjudicated, there were occasions in which, either in aggravation or excuse, the question, as has been seen,[2] might be invoked whether the *praestator*, or party called upon to make good his conduct,

[1] As to meaning of *paterfamilias* see supra, § 31.

[2] Supra, § 54.

showed in the particular transaction investigated the diligence he showed in his own affairs, — *diligentia quam suis rebus adhibere solet*, or *diligentia quam suis*. Hence *culpa*, in the law of business Rome, as exhibited in the *Corpus Juris*, may be thus tabulated: —

What diligence is exacted:	*Correlative negligence:*
I. In business transactions, *diligentia diligentis*, or diligence of a good business man, exercising a diligence in his particular business analogous to that which a vigilant head of a family exercises in his domestic affairs.	I. Business negligence, *culpa lata*, slight or special negligence; the lack of such diligence as a good business man in the particular transaction investigated, such transaction relating to his business, would show in such business.
II. In transactions not of a business character; common and ordinary care, such as a person not professing the particular specialty is likely to exercise.	II. *Lata culpa;* gross or ordinary negligence, the neglecting of the ordinary care that is taken by persons not such experts; *non intelligere quod omnes intelligunt.*

As evidential phases of both of these kinds of negligence, but not forming a distinct class, comes in the *diligentia quam suis rebus adhibere solet; the diligentia quam suis* which has been already noticed.[1]

§ 60. *Causes of adoption of a more speculative and unreal classification.* — Such is the classification made by the business jurists of Rome, when at her prime.[2] The last of these jurists, as has been mentioned, died nearly two centuries before the formation of the Justinian compilation, and they ceased to speak, therefore, as Rome began to decline. In the dark ages, jurisprudence as well as business, was asleep; and jurisprudence was

[1] See supra, § 54.

[2] "These older professors of Roman jurisprudence," says Hallam (Middle Ages, Vol. II. ch. 9, pt. 2), speaking of the scholastic jurists, "are infected, as we are told, with the faults and ignorance of their time; *failing in the exposition of ancient laws through incorrectness of manuscripts and want of subsidiary learning, or perverting their sense through the verbal subtleties of scholastic philosophy.* . . . . But the Code of Justinian, stripped of its impurer alloy, and of the tedious glosses of its commentators, will form the basis of other systems, and mingling, as we may hope, with the new institutions of philosophic legislators, continue to influence the social relations of mankind long after its direct authority shall be abrogated. The ruins of ancient Rome supplied the materials of a new city; and the fragments of her law, which have been already wrought into the recent codes of France and Prussia, will probably, under other names, guide far distant generations by the sagacity of Modestinus and Ulpian."

the first to awake. It assumed, however, at its awakening, a speculative rather than a regulative type; for in fact, like other sciences at that era, not having the subject matter of reality on which to work, it was forced to occupy itself with the purely ideal. The jurists of this revival took, indeed, the *Corpus Juris* as their basis, but for the *Corpus Juris* their treatises soon became substitutes. For the *Corpus Juris* is an immense work; and of this the Digest, consisting of extracts, by no means systematically classified, of opinions of the great business jurists on cases stated, constitutes three fourths. The Digest, as now reproduced in Mommsen's magnificent edition, contains twice as much material as do the Revised Statutes of New York. Of the Revised Statutes of New York, however, there are innumerable copies, and each copy has an adequate index. Of the Digest there were very few copies, even in the fourteenth century; and indeed it was for a long time an accepted fact that until the discovery by Lothar II. in 1136, of the Florentine Manuscript, the work in its completeness was lost. Of the works of the jurists which are condensed in the Justinian Digest only two survive: the first is the *Sententiae* of Julius Paulus, which, however, is only an epitome, and which shared the long oblivion of the Digest; the second is the *Institutiones* of Gaius, which was discovered, in 1816, by Niebuhr, in a monastery at Verona, covered by writings of St. Jerome.[1] It is

[1] "The original work of Gaius," says Professor Hadley (Lectures, p. 71), "was until recently supposed to have shared in the general wreck which has overtaken the body of literature to which it belonged. But about fifty years ago it was discovered under circumstances so remarkable as to deserve a somewhat particular statement.

"The manuscript which contains it is of the class called palimpsest or rescript — *palimpsest, i. e.* 'rubbed again,' 'scraped again,' so as to efface the text first written on them, and make clear space (*carte blanche*) for a new text; or *rescript, i. e.* 'written over again' with a new text after the first had been cancelled.

"The old world suffered sorely for want of something to write on, something abundant, easily procured, and inexpensive, such as the later world has learned to manufacture from its rags. If the ancients had possessed paper like ours, they would hardly have failed to invent printing, which, indeed, as it was, they narrowly missed doing. Parchment — the best material which they had — was never abundant, and of course always costly. Hence it was a very common practice, especially with the monkish scribes of the early Middle Ages, to write on parchment that had been written on before. If the owner cared little for the old text, or if he had it in some other copy, he would wipe it out with a sponge, often scraping the surface to make the obliteration more complete,

shown abundantly by Güterbock, in his treatise on Bracton,[1] that by Bracton, whose diligence and intelligence cannot be disputed, the *Corpus Juris* was only known through the scholastic expositions. The jurists of business Rome were no longer read. Their

and would then write the new text in its place. Rescripts have been found in which parts of the Bible have thus been blotted out to make way for scholastic divinity or monkish legends.

"In many cases the old letters are still traceable under the new; in others they can be made traceable by applying a solution of nutgalls, or some other chemical re-agent, to freshen up the ink with which they were written. By such processes a good deal that is valuable has been read out, since the beginning of this century, from palimpsest manuscripts, especially by Cardinal Mai, the late keeper of the Vatican Library. But the recovered Institutes of Gaius is perhaps worth all the rest put together. The discovery was made by the historian Niebuhr. In 1816 he was sent by the Prussian Government as minister to Rome, in order to pursue there the researches necessary for his Roman history. On the way he stopped at several cities to examine palimpsest manuscripts preserved in their libraries.

"Among the rest he looked into the Chapter Library at Verona, spending parts of two days in the place; and there he discovered a palimpsest of considerable extent, which a hasty examination showed him to contain in its original text the work of some Roman jurist. Savigny, to whom he wrote an account of his discovery, recognized the work as being the lost Institutes of Gaius.

"The Prussian Government being called upon for aid, sent immediately to Verona two men, one eminent as a jurist, the other distinguished for his knowledge of manuscripts, who spent several months in deciphering the text, and made out nearly everything which diligence and skill could accomplish. The task was difficult throughout, and in some parts utterly desperate. About a quarter of the parchment had twice gone through the process of obliteration and rewriting, so that the clearly legible text was the third which had been written upon it.

"It should seem that some old monk, wishing to copy certain works of St. Jerome, cast his eyes upon this parchment of Gaius, and thought it well fitted for his purpose. A book of law, and especially obsolete law, would not be of much value in his eyes.

"Having erased the old text by rubbing and scraping, he began to copy his St. Jerome, but, for some reason unknown to us, gave up his work when he had used only a quarter of the writing material thus obtained. The parchment must have fallen afterward into the hands of some other person, perhaps a brother of the same convent, who also wished to make a copy of St. Jerome, but was not satisfied with the beginnings of his prede-

[1] Güterbock, Henricus de Bracton und sein Verhältniss Zum Römischen Rechte, 1862. Of this work a translation, with valuable notes, was published in Philadelphia, in 1866, under the title, Bracton, and his Relations to the Roman Law, &c. by Carl Güterbock, translated by Brinton Coxe.

See also Savigny, Geschichte des Römischen Rechts im Mittelalter, IV. In the second edition, p. 580, will be found an essay by Wenck on Glanville and Bracton.

place was assumed by scholastic jurists who dealt with society not as a reality but as an ideal.

cessor. He therefore erased what the latter had written, and used the whole, or nearly the whole, parchment for his own manuscript. In these processes the leaves were arranged without reference to the original order, but only three leaves were wholly lost. When these are added to the parts which, after all use of glasses, re-agents, and guessing, were found entirely undecipherable, it appears that about a tenth part of the original work is gone.

"The nine tenths that remain have thrown great light on the condition of the Roman law in its best period, and have given a new impulse to the study of its history.

"It is a noticeable fact that the letters of the recovered text show by their forms that they must have been written before the time of Justinian. It may be doubted indeed whether the work was ever copied after Justinian's legislation had given it a new form, and made the old one obsolete and invalid."

The history of the Roman law of Delicts is thus skilfully traced by Demangeat (Cours de Droit Romain, III. 411; Paris, 1866): —

"La loi des douze Tables avait attaché certaines peines au délit d'injures. *Poena injuriarum ex lege* XII. *Tabularum*, dit Gaius, *propter membrum quidem ruptum talio erat; propter os verò fractum aut collisum, trecentorum assium poena erat constituta, et videbantur illis temporibus in magnâ paupertate satis idoneae istae pecuniariae poenae esse.* Comment. III. § 223. Comp. Inst. § 7 (1er alinéa) *De injur.* Suivant Paul (*Sent.* V. IV. § 6), la loi des douze Tables statuait *de famosis carminibus, membris ruptis et ossibus fractis.*

"Du temps de Gaius, à la place de ce système des douze Tables, on suivait un système établi par le Préteur. Paul dit, en parlant de se second système, qu'il a été introduit *more* ou *moribus* (*eod. loc.* § 6 et 7.)

"Le Préteur permet à la personne injuriée d'estimer elle-même l'injure: le juge a un pouvoir discrétionnaire pour condamner soit au montant de l'estimation ainsi faite, soit à une somme moindre. Mais, le Préteur ayant coutume d'estimer l'injure atroce, lorsqu'il fixe pour quelle somme sera fait le *vadimonium* [Le *vadimonium* est la promesse faite par le défendeur de se représenter *certo die.* Voy. Gaius, IV. § 184, et suiv.], la même somme est indiquée dans la formule, et le juge, bien qu'il puisse condamner à une somme moindre, n'ose habituellement pas user de ce pouvoir, *propter ipsius Praetoris auctoritatem* (7). Gaius, III. § 224, Comp. Inst. § 7 (2e alinéa) *De injur.* Il faut surtout remarquer dans ce système le pouvoir discrétionnaire laissé au juge. L'appréciation personnelle joue ici le plus grand rôle. On peut supposer deux juges également intégres également éclairés: saisis de la même *actio injuriarum*, il est à peu prés certain qu'ils n'arriveront pas au même chiffre de condamnation.

"Dans le droit de Justinien, le système établi par les Préteurs est encore en usage, *in judiciis frequentatur. L'aestimatio injuriae* dépend de la qualité et de l'honnêteté de la personne. Ságit-il même de l'injure faite a un esclave, une certaine gradation doit être observée par le juge eu égard à la condition de cet esclave. Inst. § 7 (3e alinéa) *De injur.*

"Indépendamment de l'action d'injures réglementée par le Préteur, la

§ 61. *Speculations of particular scholastic jurists.* — Of these jurists, the earliest, so far as concerns the question immediately

loi Cornelia en avait introduit une autre en faveur de celui qui prétend avoir été poussé ou frappé ou qui prétend qu'on est entré de force chez lui. Inst. § 8. *De injur.* En vertu de cette loi Cornelia, on peut agir soit *civiliter*, soit *criminaliter*. Marcien, L. 37. § 1. D. *De injur.* Il importe de savoir si l'injure est ou n'est pas atroce. L'atrocité de l'injure peut résulter *ex facto*, *ex loco* ou *ex personâ*. *Ex facto:* la personne a été blessée ou frappée de verges. *Ex loco:* la personne a été injuriée au théâtre ou sur la place publique ou en présence du Préteur. Ex personâ: c'est un magistrat qui a été injurié ou bien l'injure a été faite à un sénateur par un homme de basse condition, à un ascendant ou à un patron par son descendant ou par son affranchi. Justinien ajoute que l'atrocité de l'injure peut encore résulter de la place où l'on est frappé, *veluti si in oculo quis percusserit:* l'injure alors est atroce, sans distinguer si elle a été faite à un *paterfamiliâs* ou à un filiusfamiliâs. Gaius, III. § 225; Inst. § 9. *De injur.* Quel intérêt pratique y at-il à savoir si l'injure est ou n'est pas atroce? L'intérêt existe sous plusieurs rapports:

"1° Comme nous l'avons vu, l'injure addressée à un esclave n'est censée atteindre le maître qu'autant qu'elle est atroce. Ci-dessus, p. 410.

"2° L'action *injuriam* ne peut être intentée par un affranchi contre son patron, par un enfant *sui juris* contre son ascendant, qu'autant que l'affranchi ou l'enfant se plaint d'avoir reçu une injure atroce. Ulpien, L. 7. § 2 et 3. D. *De injur.*

"3° La condamnation est plus forte quand l'injure est atroce. Par application de cette idée, nous voyons qu'une injure ayant été addressée à un fils de famille, le coupable peut être condamné plus sévèrement en tant qu'il a injurié le fils, moins sévèrement en tant qu'il a injurié le père, si, par exemple, le fils était revêtu de quelque dignité. L. 30. § 1 et L. 31. D. *De injur.*

"4° Enfin nous savons que, du temps de Gaius, c'était habituellement le Préteur lui-même qui estimait l'injure atroce. Ci-dessus, p. 411. L'action *injuriarum* n'est pas donnée seulement contre l'auteur de l'injure, contre celui *qui percussit.*

"Elle est donnée également contre l'instigateur du délit, contre celui *qui dolo fecit vel curavit ut cui mala pugno percuteretur.* Inst. § 11. *De injur.* Le délit d'injures a ceci de particulier que, pour qu'il existe, il ne suffit pas de la mauvaise intention d'un homme, intention même réalisée par des actes:

"Il n'y a délit qu'autant que l'injure est ressentie par celui à qui elle s'addresse. C'est ce qu'on exprime en disant que l'action d'injures *dissimulatione aboletur.* La personne ne se sentant pas offensée, il ne peut naître à son profit aucune action d'injures. *Ideò*, dit Justinien, *si quis injuriam dereliquerit, hoc est, statim passus ad animum suum non revocaverit, posteà, ex poenitentiâ, remissam injuriam non poterit recolere.* Inst. § 12. *De injur.*

"De même qu'il n'y a point délit si dès le principe la personne injuriée a dédaigné l'injure, de même le délit est complétement effacé si la personne qui d'abord s'était émue de l'offense l'a ensuite pardonnée. Aussi l'action *injuriarum* est elle éteinte *ipso jure* par un simple pacte. Par suite de la même idée, l'action ne peut être intentée que dans l'année, et elle s'éva-

before us, was Accursius (1182-1260), whose *Apparatus Authenticorum* was published in Lyons in 1589, and was constantly appealed to, as Holtzendorff tells us, in the courts as then reorganized; and whose speculations therefore were received as undoubted law by magistrates to whom the examination of the *Corpus Juris* would have been impracticable. By Accursius, *culpa latissima* and *dolus* were made convertible; and *culpa*, outside of *dolus*, was divided into the three grades of *culpa lata*, *culpa levis*, and *culpa levissima*. But with this poverty of analysis subsequent theorists were not contented. "Corasius," we are told by Wening Ingenheim,[1] added to *culpa lata*, *levis* and *levissima*, a *levior;* and Sebast. Medices announced six grades, *culpa lata* itself, theretofore intact, being subjected to subdivision." Faber (1280-1340), who is cited as authoritative by both Pothier and Sir W. Jones, and who fell back on the three grades, is declared by Sir W. Jones "to have discovered no error in the common

nouit par la mort de celui qui pouvait l'intenter.

"Une autre particularité de l'action *injuriam*, c'est qu'elle peut quelquefois être exercée par un fils de famille. Il y avait dans l'Edit du Préteur une disposition ainsi conçue: *Si ei qui in alterius potestate erit injuria facta esse dicetur, et neque is cujus in potestate est praesens erit, neque procurator quisquam existat qui eo nomine agat, causâ cognitâ ipsi qui injuriam accepisse dicetur judicium dabo.* L. 17. § 10. D. *De injur.* Dans les, §§ suivants, Ulpien commente cette disposition de l'edit.

"Lorsqu'un fils de famille a été injurié s'il devient ensuite *sui juris* à lui seul désormais peut appartenir l'exercice de l'action *injuriam.* Ulpien, L. 17. § 22. D. *De injur.* Enfin, lorsqu'un fils de famille a reçu l'une des trois injures prévues par la loi Cornelia, lui seul, non son père, peut intenter l'action civile de cette loi. Ulpien, L. 5. § 6. D. *De injur.*

"Tout délit d'injures permet d'agir soit *criminaliter*, soit *civiliter.* Inst. § 10 (1er alinéa) *De injur.* Seulement, ici il faut choisir entre l'action criminelle et l'action civile: on ne peut pas exercer l'une et l'autre.

"Cela s'explique, parceque le but poursuivi est toujours le même: *ut vindicetur, non ut damnum sarciatur.* Voy. Paul, L. 6, et Ulpien, L. 7. § 1. D. *De injur.* Lorsque c'est l'action criminelle qui est intentée, elle n'aboutit pas necessairement à une simple condamnation pécuniare, mais *officio judicis extraordinaria poena reo irrogatur.* Pour les détails, Voy. le Titre, déja cité, des *Sentences de Paul* (V, IV).

"En général, dans une action criminelle on doit comparaître en personne; et spécialement, pour la matière qui nous occupe, Paul disait autrefois: *Injuriam non nisi praesentes accusare possunt. Sent.* Tit. cit. § 12. Mais une Constitution de Zénon, rappelée par Justinien, décide que les *viri illustres* et ceux qui sont encore au-dessus d'eux peuvent même par procureur poursuivre l'action criminelle d'injures ou y défendre. Inst. § 10 (2e alinéa), *De injur.*"

[1] Die Lehre vom Schadensersatze, Heidelberg, 1841, p. 104.

interpretation;" though by eminent German critics it is asserted that while Faber limited himself to three grades, these were very different as to definition from those of Accursius. Zasius (1461-1535), Duarenus (1509-1559), and Vinnius (1588-1657), whom both Sir W. Jones and Pothier invoke, accepted, on the authority of their predecessors, the triple subdivision, though with much fluctuation of definition; while Coccejus (1644-1719), receiving the triple division as established, added as a distinct head that of *culpa in concreto*, or *culpa* in respect to *diligentia quam suis*, which has been already noticed.[1] It is true that Donellus (1527-1591), with a far keener insight of the *Corpus*, declared that he could find no classical authority for the third grade of *culpis levissima*, and argued that the institution of such a test was incompatible with the resuscitation of commercial activity. But Donellus had but few followers; and, indeed, the then uncertainty of the text of the Digest, and the high authority which in that age scholastic jurisprudence had obtained, interposed almost insuperable difficulties in the way of a revision of the accepted opinion. Hence we can understand why Pothier (1699-1722), whose intellectual subtlety found so much with which to sympathize in the refinements of the scholastic jurists, declares, after citing them, that the triple division of *culpa* is the *doctrine commune de tous les interprètes sur le prestation de la faute:* and at the close of his reply to Le Brun, who struggled to revive Donellus's doctrine,[2] adds: "Telle avait été jusqu-à present la doctrine *unaniment* tenue par tous les interprètes des lois Romaines, et par les auteurs de traités de droit." And we can also understand how Sir W. Jones (1746-1794), misled by Pothier, should state:[3] "I cannot learn whether M. Le Brun ever published a reply, *but I am inclined to believe that his system has gained but little ground in France, and that the old interpretation continues universally*

[1] Salicetus, in his gloss to L. 32. D. depos. gives *levis*, *levior*, and *levissimus:* "Nam inter superlativum et positivum est medium necessarium, scilicet comparativus." He admits, however, that the law does not sustain him in this: "Tamen de ista culpa media, quam leviorem appellamus, non curaverunt legislatores specialiter disponere." Upon this Hasse, with more truth than deference, remarks: "Man sollte denken, dass diese. Scholastische Aberwitz nunmehr von unsern Lehrstühlen, wie aus unsern Schriften, gänzlich verbannt sei."

[2] *Essai sur la prestation de fautes*, &c. par Le Brun, avec une dissertation due Célèbre Pothier, Paris, 1813.

[3] Bailments, p. 31.

admitted on the Continent both by theorists and practicers." Relying on Sir W. Jones, this judgment has been adopted as conclusive by a series of subsequent eminent Anglo-American expositors, including Judge Story.

§ 62. 2. *By the present authoritative expositors of the Roman Law the doctrine of a triple division of culpa* (culpa lata, culpa levis, culpa levissima) *is rejected.* — Of France it is enough to say that in the present French Code *culpa levissima* finds no recognition. The only form of diligence known in the Code (art. 1137), as distinguished from the ordinary diligence of a common and inexperienced agent, is the *diligence* of a *bon père de famille ;* which, as expounded by Le Brun, is a diligence in a particular business analogous to that which is exhibited by a prudent and intelligent head of a family in the management of his household.[1]

[1] Demangeat adds the following valuable comments (Cours de Droit Romain, III. 450 ; Paris, 1866) : —

"Le système qui vient d'être rapidement exposé est, au fond, le système de M. Hasse. *Die Kulpa des roem. Rechts.* Kiel, 1845, 2e édition, par M. de Bethmann Hollweg, 1838.

" Anciennement, on suivait un autre système, encore reproduit par Pothier, mais déjà critiqué par Lebrun. [Voici à cet égard, ce que dit Pothier lui-même : ' Dans les différents traités que j'ai donnés des différentes contrats et quasi-contrats, j'ai suivi la doctrine commune de tous les interprétes sur la prestation de la faute qui a lieu dans chaque contrat, par rapport à la chose qui en fait l'objet. . . . . C'est la doctrine des Accurse, des Alciat, des Cujas, des Duaren, des d'Avezan, des Vinnius, Heineccius ; et ceux mèmes qui se sont le plus appliqués à combattre les opinions communément reçues et à proposer des nouveautés, tels qu'Antoine Faber, ne s'en sont jamais écartés. Neanmoins il a parce, en 1764, une dissertation *sur la prestation des fautes*, dans laquelle M. Lebrun, avocat au Parlement de Paris, combat cette doctrine. . . . . Cet auteur soutient que la doctrine que nous avons exposée est une pure invention des interprètes, qui n'ont pas pris le véritable sens de lois. . . . . Quelque spécieux que soient les arguments par lesquel il prétend établir son système, je n'ai pas été convaincu.'] . . . .

" D'après ce système, il y a trois sortes de fautes : la *culpa lata*, la *culpa levis*, la *culpa levissima*. La *culpa lata*, c'est à dire la négligence très-grossière, est la seule dont réponde le débiteur qui rend un service purement gratuit, tel que le dépositaire. La *culpa levis* est l'omission des soins que prennent en général les bons pères de famille : les débiteurs qui répondent et de la *culpa lata*, et de la *culpa levis* sont ceux qui sont tenus en vertu d'un contrat intévressé de part et d'autre, comme la vente ou le louage. Enfin la *culpa levissima* est une faute que commettent même des hommes soigneux, à laquelle échappent seulement les hommes d'une diligence extraordinaire : c'est l'omission de soins tellement minutieux que très-peu de personnes les prennent. On rend responsable même de cette *culpa levissima* le débiteur qui reçoit dans le contrat un

§ 63. Germany requires more specific attention, for it is in Germany that the first conclusive vindication of the right doc-

service purement gratuit, tel que le commodataire. En faveur de ce système des trois fautes, on invoquait surtout les textes suivants: la L. 5, § 2, *in fine*, D. Commod. où il est dit que, le contrat étant uniquement dans l'intérêt du commodataire, *verior est Quinti Mucii sententia, existimantis et culpam praestandam et diligentiam;* — la L. 18 pr. du même Titre, où Gaius décide que le commodataire doit apporter la même diligence *qualem quisque diligentissimus paterfamiliâs suis rebus adhibet, ità ut tantùm eos casus non praestet quibus resisti non possit.* Il est à remarquer que Gaius, comme Ulpien, compte expressément parmi les cas fortuits qu'on ne peut jamais imputer à faute les *fugae servorum qui custodiri non solent.* Enfin la L. 1, § 4, D. *De obligat. et act.* on nous voyons que le commodataire *exactissimam diligentiam custodien,* — *dae rei praestare compellitur.*

"Ces textes ne sont point probants. En effet, dans la L. 5, § 2, *in fine Commod.*, quand le jurisconsulte, après avoir dit et *culpam praestandam*, ajoute *et diligentiam*, c'est simplement pour exprimer que la faute du commodataire doit être appréciée *in abstracto.* Et, dans les deux autres textes, si on emploie le superlatif, il ne faut y attacher aucune importance: car nous avons la preuve qu'en cette matière on se sert indifféremment du positif ou du superlatif. Ainsi, d'après le système des trois fautes, le locataire répondrait de la *culpa levis*, non de la *culpa levissima;* or, d'après les Institutes, *ab eo custodia talis desideratur qualem diligentissimus paterfamiliâs suis rebus adhibit.* § 5. *De locat. conduct.* (III. 24.)

"Réciproquement, d'après le système des trois fautes, la diligence du commodataire devrait être *exactissima;* or, d'après les Institutes, *exactam diligentiam custodiendae rei praestare jubetur.* § 2. *Quib. mod. re contrat. oblig.* (III. 14.) D'ailleurs, nous avons des textes formels qui mettent sur la même ligne le vendeur et le commodataire, le cas où le contrat est dans l'intérêt des deux parties et le cas où il est seulement dans l'intérêt de la partie dont il s'agit de déterminer la responsabilité. Voici d'abord ce que dit Paul: *Custodiam venditor talem praestare debet quam praestant hi quibus res commodata est, ut diligentiam praestat exactiorem quàm in suis rebus adhiberet.* L. 3. D. *De peric. et comm. rei vend.* (18. 6.) Et voici maintenant comment s'exprime Ulpien: *Si cui inspiciendum dedi, sive ipsius causâ sive utriusque, et dolum et culpam mihi praestandam esse dico, propter utilitatem, periculum non. Si verò meî duntaxat causâ datum est, dolum solum, propè depositum hoc accedit.* L. 17. § 2. D. *De praescr. verb.* (19. 5.)

"Je suppose un débiteur qui, en vertu du contrat, n'est tenu que du dol et de la faute lourde: c'est par exemple, un dépositaire. La chose venant à périr par suite de sa *culpa levis in committendo*, ne devons-nous pas dire que, s'il ne peut point être poursuivi par l'action *depositi directa*, il peut de moins l'être par l'action de la loi Aquilia? M. Hasse admet l'affirmative, et sa manière de voir est assez généralement suivie. En effet, il est difficile de comprendre que, parce qu'un homme s'est obligé envers le propriétaire, il ne sera pas tenu d'une faute dont ce propriétaire pourrait demander compte au premier venu. Je suis néanmoins disposé à faire une distinction. J'admets parfaitement la

trine was published, and the true sense of the *Corpus Juris*, by the aid of those processes of historical exegesis which began with the present century, was first brought to light. The first of this line of commentators was Thibaut (1772–1840), an eminent professor first at Jena, and then at Heidelberg, known in Anglo-American literature by the passages quoted from him in the incomparable lectures of Mr. Austin, and by the expressions of affectionate reverence and admiration with which Mr. Austin speaks of him. Thibaut, who may be regarded as reviving, though with some just modifications, the theory of Donellus, was followed by von Löhr, in his Theorie der *culpa*, and by Schömann in his Lehre vom Schadenersatze. According to these authors (I condense here the summary given of their writings by Wening Ingenheim, not having access to the original works), while the distinction between negligence in commission and negligence in omission was brought sharply out, the notion of a *culpa levissima* was declared to be without authority in the *Corpus Juris* and in right reason. The most conclusive vindication, however, of this position is to be found in the treatise of Hasse on the *Culpa des Römischen Rechts*, of which the first edition was published in 1815, and the second, revised by Bethmann-Hollweg, well known as one of the most prominent jurists and statesmen of his day, in 1838. Of this work, whose exegesis of the *Corpus Juris* is now accepted in Germany as uncontrovertible,[1] and which Lord Mackenzie, in a passage hereafter to be quoted, declares to have "the merit of

possibilité d'exercer l'action de la loi Aquilia lorsque le fait qui amène la perte de la chose ne s'explique point par le contrat intervenu, lorsque ce fait est étranger à la qualité de dépositaire.

"Par exemple, on m'a remis à titre de dépôt une caisse contenant un objet précieux et fragile; pour le faire admirer à quelqu'un, j'ouvre la caisse, je retire l'objet, mais malheureusement je le laisse tomber et il se brise: il y a eu là de ma part un acte que ma qualité de dépositaire n'explique pas: je ne suis pas tenu comme dépositaire, car je ne suis coupable ni de dol ni de faute lourde; mais la loi Aquilia m'est applicable comme elle le serait en pareil cas à toute autre personne. Il ne doit plus en être de même lorsque le fait qui amène la perte de la chose se rattache à mon obligation de dépositaire. Ainsi, quand je déménage, il faut bien que j'emporte avec mes propres meubles la chose déposée: si par suite d'une faute légère, même *in committendo*, cette chose périt dans le voyage, je ne dois pas en être tenu. Comp. M. de Vangerow, t. III. § 6, 1, p. 612, et suiv.

[1] See Holtzendorff's Encyc. tit. *Culpa*; Mommsen's Beiträge zum Obligationrecht, Bd. III.

having established the true Roman theory, and of having forever extinguished the system of the three degrees of fault," copious extracts will hereafter be given. It is enough now to say that by all subsequent commentators of the Digest the idea of *culpa levissima* is declared to be without basis in the authoritative jurists, and to be a mere figment of scholasticism. The only question as to which there is any doubt is as to whether the *diligentia quam suis*, or diligence exercised by a man in his own affairs, is to be viewed as a distinct form of diligence, or as simply an evidential phase of the two great forms of diligence (ordinary or non-expert diligence, and extraordinary or expert diligence), which find their root in the necessities of business life.

§ 64. 3. *While the hypothesis of a culpa levissima still lingers in Anglo-American text books, it is practically discarded by Anglo-American courts.* — It is true that in expressing our distinctive Anglo-American doctrine of the implied insurance of goods by common carriers (the only material point as to bailments in which we differ from the Roman law), the term *culpa levissima* is sometimes used as indicating the liability of the carrier. But the insuring element in common carrying is utterly different from the *diligentia diligentissimi* of the Schoolmen. In the first place, the *diligentia diligentissimi* is applied by the Schoolmen to all obligations; the insuring doctrine is applied by us only to common carriers, and to these only as to the carriage of goods. In the second place, the lack of the *diligentia diligentissimi* is by the Schoolmen a *culpa; culpa levissima*, but *culpa* still. That such is not our view is shown by the fact that while we hold that a carrier can make no limitation of his duty which will remit the consequences of *culpa*, we have constantly declared that he can by agreement relieve himself from insurance.

Outside of the relations of the common carrier to goods, which, as has been seen, have no bearing on this particular issue, though the term *culpa levissima* sometimes appears in our reports, yet this is done inartificially, as indicating only an intense phase of the *culpa levis*, or negligence of expert, and is to be regarded simply as announcing the truth that in affairs of extreme difficulty and responsibility an expert is to use extreme care.[1] On

[1] An exception to the statement in the text is to be found in Culbreth *v.* Phil., W. & B. R. R. 3 Houston (Del-aware), 392, where the court, following the old terminology, ruled that diligence was capable of three degrees:

the other hand, the notion that, as a matter of law, there are three distinct grades of diligence, with three correlative grades of negligence, has been frequently repudiated. Several illustrations of this have been already noticed. Among the most significant, however, is the following from an eminent jurist, who for a time occupied a seat on the supreme federal bench: "The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation."[1] Other expressions in the same opinion indicate that by this high authority the negligences of the expert and of the non-expert were recognized as distinguishable as separate grades, which, though running into each other at their common boundary, nevertheless have generally distinct *differentia*. But this is not so with *culpa levissima*, on which as a subtlety of pure scholastic jurisprudence, the condemnation just cited distinctively falls. That it is condemned in practice by our courts will be hereafter abundantly seen when we treat concretely of the diligence of experts whether in law, medicine, engineering, or special lines of industry. It will be then seen that in no case is *diligentia diligentissimi*, or diligence beyond the range of ordinary capacity, required, but that the test substantially is uni-

First, the diligence required of the common carrier as to goods, which is the highest species of diligence, and which makes the carrier the insurer of the goods, and hence responsible for the slightest negligence, *culpa levissima*. Secondly, the diligence required in ordinary bailments, when the bailee (*e. g.* as is the case of the common carrier after the goods are stored by him for hire in his warehouse) is bound to show the diligence of a prudent business man (bonus et prudens paterfamiliâs), and is responsible only for ordinary negligence. Thirdly, the diligence required of the mere gratuitous depositary, such as is the railway company who warehouses goods without hire, in which case the company is liable only for gross negligence. Culbreth *v.* Phil., Wil. & B. R. R. 3 Houston, 392.

[1] Curtis, J., in Steamboat New World *v.* King, 16 How. U. S. 469.

form, that the diligence required is that which a good and faithful business man in the particular specialty is accustomed to apply in a transaction such as that under investigation.[1]

[1] See particularly infra, § 631, 635, 872. Thus the fact that a mare ordinarily gentle is in the habit of kicking when in heat, does not make it obligatory on the owner to restrain her at other times; and his failure to do so, though it may be *culpa levissima*, does not make him liable for her kicking when not in heat. Tupper *v.* Clark, 43 Vt. 200. In an excellent note by Mr. Green to the last (1874) edition of Story on Agency, § 183, we have the following: —

"The word *culpa* nearly coincides in meaning with the English law term negligence. It was formerly thought that three degrees of *culpa* or negligence were recognized by the Roman law. These were, the *culpa lata*, the *culpa levis*, and the *culpa levissima:* gross negligence, negligence, and slight negligence. Lord Holt brought this theory into the English law, by his opinion in Coggs *v.* Bernard, 2 Ld. Raym. 909. In his essay upon Bailments, Sir William Jones adopted it from Pothier, and from the case of Coggs *v.* Bernard, and brought it into great prominence. Mr. Justice Story also gave his countenance to the theory.

"Hugo Donellus, in the latter part of the sixteenth century, proved that there was no *culpa levissima* as a distinct degree. The works of Donellus were for a long time neglected; but since the beginning of the present century they have acquired a great reputation, especially in Germany, where their author is by many regarded as the greatest of the jurists. In 1764, Lebrun, an advocate of the Parliament of Paris, published an essay in which he maintained that his threefold division had no real foundation in the Roman law, but was a pure invention of the commentators. See Jones on Bailments, p. 26, *et seq.* Thibaut and Löhr, distinguished German professors of law, also repudiated this division. But the work of Hasse (Die Culpa des Römischen Rechts), published in 1815, seems to have caused the doctrine of the three degrees to be generally regarded as an exploded theory of the past. The Prussian law codified in the last century, in conformity to the theory then in vogue, defines three degrees of negligence; but this division is not found in the Austrian, the French, or the Dutch Code, these codes having been formed since the opposite view gained the ascendency.

"The doctrine of three degrees fails in reconciling those texts of the Roman law, to which, if correct, it should be applicable. The terms *lata, latior; levis, levior, levissima; diligens, diligentissimus; exacta, exactissima;* where they occur in the *Corpus Juris*, are now considered simply as variations of style, used without a thought of the distinctions which the commentators endeavored to found upon them.

"According to the now established opinion, the Roman law in most cases required of a person the conduct of a prudent man — *diligentia diligentis patris familias* (the care of a prudent person who is *sui juris*). In a few cases, as, for instance, in suits between partners, the defendant might show in defence that he conducted the partnership affairs with as much care as he used about his own; it being his partner's loss if he chose to enter into that relation with a careless man.

§ 65. 4. *The hypothesis of a culpa levissima is incompatible with a sound business jurisprudence.* — Where is the *diligentissi-*

Goudsmit, Pandects, § 76; Ortolan, Explication Historique des Instituts, L. 3, p. 353; Demangeat, Droit Romain, t. 2, p. 444; Lagrange, Manuel de Droit Romain, p. 468, n. 2; Maynz, Droit Romain, t. 2, § 259. — G."

We may therefore regard our own law as following the Roman in its true sense, as that law is expressed in the following admirable passage by Lord Mackenzie: —

"In considering the doctrine of responsibility for fault or neglect arising under the different contracts, a controversy has arisen among civilians which merits notice here. Until lately, the theory generally received — and adopted, among others, by Sir William Jones, in his Essay on Bailments — was, that the Roman law distinguished three degrees of fault, *culpa lata*, *levis*, *levissima;* and the rules of responsibility were determined in the following manner: In contracts beneficial only to the owner, as mandate or deposit, good faith alone being required in the custodier, he was only held liable for *culpa lata*, or gross neglect. Next, where the benefit was reciproeal to the two parties, as in sale, hiring, or partnership, they were both held liable for *culpa levis*, — that is, for the care of a good father of a family, so as to be responsible for ordinary neglect. And, finally, where all the advantage was reaped by one of the parties, as in commodate, the slightest fault, *culpa levissima*, was held to subject him in a claim for indemnification. However plausible this theory may appear, it is now rejected by the most eminent continental jurists, who maintain that it is not supported by the original texts of the Roman law, and is a pure invention of the commentators, contrary to equity. Already in the sixteenth century, Doneau had declared that the Roman law admitted only two degrees of fault; but his system, which was defective in other respects, found few partisans. Lebrun, an advocate before the Parliament of Paris, broached the same doctrine; but his essay, published in 1764, besides being superficial, abounded with serious errors, and was disapproved of by Pothier. To M. Hasse, who published a dissertation on this subject in 1815, is ascribed the merit of having established the true Roman theory, and of having forever extinguished the system of the three degrees of fault. The substance of his argument is shortly given by Maynz, in his Elements of Roman Law. It is said the term *culpa levissima* occurs only once in the Corpus Juris, in a fragment of Ulpian, and in that passage it has no technical signification; in particular, it is not opposed to *culpa lata* or *culpa levis*. As *culpa levis* imports the want of care of a good father of a family, — that is, of a man essentially attentive and careful, — *culpa levissima* must mean the want of still greater care; but the Roman law nowhere requires a higher degree of diligence than that of a man essentially careful and attentive; and the original texts never mention anything but *culpa levis*, when it is intended to indicate an intermediate degree between an inevitable casualty and *culpa lata*, so that no place is left for *culpa levissima*. Finally, it is said that the theory of three degrees of fault is unjust in itself, as well as contrary to the fundamental principles of the Roman law, which distinguishes only between two

mus or *exactissimus* to be found who is to be taken as the standard by which the *diligentia diligentissimi*, with its antithesis of *culpa levissima*, are to be gauged? This question is put by Le Brun, without any reply made by his astute antagonists; and it is repeated by Hasse, with the confident assertion that the search is one that will be made in vain. Is Cæsar, asks Hasse, taking up one of the stock illustrations of the Schoolmen, the type of a *diligentissimus?* But waiving the obvious comment made by Hasse, that there are but few Cæsars, and that these few are not likely to undertake ordinary bailments, still even Cæsar, — with all his intense sensibility, during a crisis, to impending dangers, his incomparable fertility in expedients, and his almost preternatural coolness, promptness, and intrepidity in applying the right remedy at the right moment to the right thing, — even Cæsar, when the crisis was over, sometimes yielded to a *negligentia* which was not merely *levis* but *lata*. No one more diligent than Cæsar can, it must be admitted, be found. But it is absurd to apply the diligence of Cæsar to the ordinary bailee. First, the ordinary bailee has not the genius of Cæsar; has not and cannot have the exquisite sensibility and prescience — the eyes behind as well as before, the intense activity — of the great captain. Secondly, even with these unparalleled gifts Cæsar was often unquestionably negligent. *Magnus Apollo dormitat.* And Cæsar, if tried by a scholastic court, according to scholastic refinements, could rarely have escaped the liabilities imposed on *culpa levissima*.[1]

cases, — that in which we derive no benefit from the contract, and that in which we derive benefit from it; that in the first we are generally liable only for gross neglect, while in the second we are liable for the care of a good father of a family." [1]

[1] Lord Macaulay struck this point when speaking, in his first article on Lord Chatham, of the execution of Admiral Byng. "We think the punishment of the admiral altogether unjust and absurd. . . . . He died for doing what the most loyal subject, the most intrepid warrior, the most experienced seaman, would have done. He died for an error of judgment, an error such as the greatest commanders — Frederick, Napoleon, Wellington — have often committed, and have often acknowledged. Such errors are not proper objects of punishment, for this reason, that the punishing of such errors tends, not to prevent them, but to produce them. . . . . Queens, it has often been said, run far greater risk in childbed than private women, merely because their medical attendants are more anxious. The surgeon who attended Marie Louise was altogether unnerved by his emotions. 'Compose yourself,' said Bonaparte;

[1] Mackenzie's Roman Law, 2d ed. p. 197.

§ 66. For, from the essential imperfection of human activity, so it is well argued by Hasse, there is no continuous duty which we can engage in without being justly chargeable, at some time or other during its discharge, with this *culpa levissima*, or infinitesimal negligence. The successful general, it has been said by those who were themselves great generals, is he who commits the fewest blunders. There is no past campaign, even of the most consummate strategists, of which we cannot say, "There was a blunder which was only saved from being injurious by a greater blunder on the other side." And as with great affairs, so with little. We may take the case of an ordinary common carrier of goods. This carrier, if he studied the weather bulletins, might have prognosticated a sudden storm by which the goods carried by him were soaked. If he had properly examined the architecture of a great city (*e. g.* as in Chicago, before the fire of 1870), he would not have stored his goods in the city, so that they were burned up, but would have taken them to the outskirts, or not stored them at all. If he had carefully scanned the map of the country, he would have seen that by making a long detour he could have crossed an intervening railroad by a bridge, instead of attempting to cross on a level, where his horses took fright. But to exact diligence in cases corresponding to the first two of these illustrations would require a skill and extensiveness of apprehension incompatible with the occupation of an ordinary common carrier; to require precautions so excessive as those indicated by the second illustration would be incompatible with the prompt performance of his bailment. In other words, to pass from the concrete to the abstract, the human mind, from its limitedness of vision, is incapable of perfect diligence. In certain periods of great excitement such diligence may for a time be approached. But in any continuous work such intense diligence is intermittent. And when the intermission comes, there is *negligentia levissima*. The *diligentia diligentissimi*, for the time at least, has waned.

§ 67. So also must we conclude, viewing the question induc-

'imagine that you are assisting a poor girl in the Faubourg Saint Antoine.' . . . . Bonaparte knew mankind well. As he acted toward this surgeon, so he acted toward his officers. No sovereign was ever so indulgent to mere errors of judgment; and it is certain that no sovereign ever had in his service so many military men fit for the highest commands."

tively, from an examination not merely of the person acting, but of the thing acted on. Is there any enterprise of any importance to society that can be conducted without some *culpa levissima?* Has there ever been such? And if the managers of such enterprises are to be held responsible for *culpa levissima*, would such enterprises ever be undertaken? Have we not illustrated the impracticability of such a superlative standard of diligence by the fact that our Anglo-American common carrier's liability for insurance of goods is now, with the approval of the courts, almost universally excepted away? In other words, some slight deflection from a perfect standard is incident to all human labor; and as whatever is so incident cannot rightfully be subjected by the law to penalty, so these deflections, when only so slight, are not the subjects of juridical condemnation. Or, to fall back on the postulates of the older jurists, the law deals with men, not as perfect mechanisms, capable of pursuing a perfectly exact line, but as imperfect moral agents, who must use imperfect machines, and depend upon uncertain natural agencies. To exact continuously the *diligentia diligentissimi* is not only unjust, but is destructive to business, by imposing on it conditions under which it cannot be performed. It is sufficient if we say to the non-expert (*e. g.* a non-professional nurse, or a farmer in whose barn a box is temporarily left by a traveller for his own convenience), "You are required only to use such diligence as ordinary persons commonly use in ordinary affairs;" and if we say to the expert (*e. g.* the physician, or the railroad company, or the pilot), "You are required to use the diligence which a skilful and faithful expert in your own branch uses as to work in his particular line." The only qualification to this is that which arises, as has been heretofore shown, when, either as matter of aggravation or excuse, it is proper to show how the agent charged with negligence acted as to his own affairs.

§ 68. *Classification of contracts in respect to grade of negligence.* — Mommsen lends his high authority to the position that the grade of negligence is, as a general rule, to be determined by the question of advantage.[1] Is the contract solely for another's benefit? Then I am liable only for *dolus* and *culpa lata*. Am I, to take the alternative, to reap a benefit from the contract, either for myself alone or in company with others? Then I am

[1] Beitrage zum Obligationenrecht, III. 391.

liable for *culpa* in its fullest sense. But to this rule Mommsen makes the following exceptions: —

(a) *Mandate* and *Negotiorum gestio*, in which the delinquent is liable for *culpa* of both classes, though he reaps no advantage from the undertaking. Mommsen agrees with Donell in the opinion that this strictness results from the fact that in these contracts success is conditional upon the diligence of a *diligens paterfamilias;* and that in *Mandate* the mandatary tacitly undertakes to bring to bear the *diligentia* of a *diligens paterfamilias*. With the *negotiorum gestio* the additional circumstance is to be considered, that the *negotiorum gestor* may be a volunteer who intrudes himself (*se obtulit*) into the conduct of another's affairs.

(b) There are some obligatory relations in which the delinquent is liable for *dolus* and *culpa*, the *culpa* however being subject to the modification of *culpa in concreto*. This is the case with the obligation of the guardian, of the partner, of those concerned in the *communio incidens*, and of the husband (by the Roman law) as to the *dos*. In partnership, in the *communio incidens*, and in respect to the *dos*, the delinquent is usually liable for *culpa* generally.[1]

[1] Demangeat (Cours de Droit Romain, III. 447; Paris, 1866) thus discusses the classification of contracts: —

"Un débiteur qui d'apres la nature du contrat, doit répondre même de la faute legère peut valablement convenir qu'il n'en répondra seulement de son dol; et, réciproquement, celui qui d'apres la natur du contrat, ne doit répondre que de son dol peut valablement convenir qu'il répondra aussi de sa faute. Mais un débiteur ne peut jamais convenir qu'il ne répondra pas de son dol. Ulpien, L. 23 (vers la fin), D., *De reg. jur.* Nous aurons bientôt à expliquer d'une manière générale ce texte important.

"E'n l'absence de convention spéciale, de quoi répondent les différents débiteurs tenus d'une action de bonne foi?

"1° Lorsqu'il s'agit d'un débiteur qui rend à l'autre partie un service purement gratuit, comme le dépositaire et le commodant, ce débiteur est responsable seulement de son dol. On admet la même règle on ce qui concerne le *mensor*, contre qui le Préteur avait établi une action *in factum*. Ulpien, L. 1. § 1. D., *Si mensor fals. mod. dix.* (11. 6). Par exception, le *negotiorum gestor*, bien que rendant un service purement gratuit, répond et du dol et de la faute. Inst. § 1. *in fine De oblig. quasi ex contr.* (III. 27.) Il en est de même du tuteur; mais, quant au mandataire, les juriconsultes romains paraissent n'avoir pas été d'accord: *In mandati judicio*, dit Modestin, *dolu, non etiam culpa, deducitur, quamvis singulariter denotare liceat in tutelae judicio utrumque deduci, cùm solius pupilli, non etiam tutoris, utilitas in administratione versetur. Collatio leg. mosaic.* Tit. X. ch. II. § 3. Ulpien, au contraire, traite le mandataire exactement comme le tuteur. L. 23. D. *De reg. jur.*

§ 69. *Hasse's Classification.* — The following we owe to Hasse, whose authoritative labors on this topic have already been frequently noticed: —

" 2° Lorsqu'il s'agit d'un débiteur qui ne rend point un service purement gratuit, mais qui est interessée dans l'operation, soit qu'il en profite seul, soit que les deux parties y trouvent leur avantage, comme un commodataire ou comme un vendeur, ce débiteur ne répond pas simplement de son dol, il répond aussi de sa faute, et généralement la faute est appréciée *in abstracto.*

" 3° L'operation est bien intéressée de la part du débiteur; mais, de plus, ce débiteur est co-propriétaire de la chose due: il répond alors de la faute appréciée *in concreto.* Cela s'applique: 1° à l'associé. [Inst. § 9. *De societ.* (III. 25.) *Sufficit talem diligentiam in communibus rebus adhibere socium, qualem suis rebus adhibere solet: nàm qui parùm diligentum socium sibi, adsumpsit, de se queri debet.* Evidemment la raison n'est pas bonne; car il y a bien d'autres cas où je choisis également celui avec qui je contracte, et où néanmoins je puis le faire condamner sil n'apporte pas la diligence d'un *bonus paterfamiliâs*, quelque négligent qu'il soit d'habitude pour ses propres affaires. De plus nous allons le voir immédiatement, le simple communiste, que je n'ai point choisi, est tenu absolument comme celui avec qui je me suis associé.] 2° Au simple communiste qui n'est point devenu tel par l'effet d'un contrat. Paul, L. 25. § 16. D., *Famil. ercix.* (10. 2.) 3° Au mari qui est bien propriétaire unique des choses dotales, mais qui cependant jusqu'à un certain point peut être considéré comme étant seulement co-propriétaire avec la femme. Paul, L. 17 pr. D. *De jure dot* (23. 3).

" 4° À la personne qui, dans l'ancien droit, acquérait une chose *contractâ fiducia*, en s'engageant par *fiducie* à la rendre dans une certaine hypothèse. [D'apres la L. 18 pr. *in fine* D., *Commod.* (13. 6), lorsque le commodat intervient, non pas dans l'intérêt du commodataire, mais, dans l'intèrêt des deux parties, on peut dire que le commodataire répond de sa faute, *ut ità culpae fiat aestimatio, sicut in rebus pignori datis et dotalibus aestimari solet.* Il est tres-probable que Gaius, au lieu de *pignori datis* avait écrit *fiduciae datis;* les commissaires de Justinien ont supprimé partout la mention de la fiducie.]

" 5° À la personne grevée de legs ou de fidéicommis l'orsqu'il doit lui rester quelque chose de la succession. Ulpien, L. 22. § 3. D., Ad Senatusc. Trebell. (36. 1.) Comp. Africain, L. 108. § 12. D., *De leg.* 1°. Nous savons que le tuteur répond de sa faute; peut-être faut-il l'appréeier *in concreto.* Telle paraît, du moins, avoir été l'opinion d'Ulpien, qui s'exprime ainsi, en parlant de l'action directe de tutelle: *In omnibus quae fecit tutor, cùm facere non deberet, item in his quae non fecit, rationem reddet hoc judicio, praestando dolum, culpam et quantam in rebus suis diligentiam.* L. 1 pr. D., *De tutelae et ration.* (27. 3.)

" Quelle est donc précisemént la différence entre la condition de ceux répondent seulement de leur dol (ce qui comprend la *culpa lata*) et la condition de ceux qui répondent bien de leur faute, mais appréciée *in concreto*, par exemple, entre la condition du dépositaire et la condition l'associé? C'est au point de vue de la preuve qu'existe surtout la différence, c'est au point de vue de la preuve que la con-

A. When agency is established.

a^1 This may occur voluntarily, in which case the agent

dition du dépositaire vaut un peu mieux que celle de l'associé.

" La chose déposée a peri le dépositaire ne peut pas la restituer ; pour qu'il soit tenu à des dommages-intérêts envers le déposant, il faudra que celui-ci réussissie à prouver que de la part du dépositaire il y a eu dol ou qu'il y a eu une faute que le dépositaire ne commet pas habituellement dans ses propres affaires. Cela résulte de ce que le dol ne se présume pas et de ce que la faute lourde est assimilée au dol. Au contraire, un associé, qui avait entre les mains une chose sociale, ne peut pas la restituer parce qu'elle a péri : doit-il des dommages intérêts ? Oui, à moins qu'il ne prouve qu'elle a péri par cas fortuit, ou, si c'est par sa faute, tout au moins qu'il ságit d'une faute qu'il commettait habituellement dans ses propres affaires. C'est la conséquence du principe général suivant lequel, une fois établi que telle a personne a contracté une dette, si elle se prétend libérée, il lui incombe de justifier de la cause qui lui a procuré sa libération.

" La texte fondamental dans cette matière des fautes est un fragment d'Ulpien que j'ai déjà eu l'occasion de citer, la L. 23. D., *De reg. juris.* Les anciens interprètes l'appellant souvent la Loi CONTRACTUS, d'après le premier mot. Beaucoup d'interprètes proposent de faire subir à ce texte des corrections ou tout au moins des transpositions; elles sont toutes arbitraires, et je crois qu'il n'en est pas besoin pour arriver à un sens satisfaisant. Ulpien pose d'abord ce principe. *Contractus quidam dolum malum duntaxat recipiunt, quidam et dolum et culpam.* Quels sont les contrats dans lesquels le débiteur est tenu seulement de son dol ? Ulpien n'en cite que deux : le dépôt et le précaire. Nous n'avons pas à revenir sur le dépôt. Quant au précaire, il ressemble beaucoup au commodat. Il en diffère surtout : 1° En ce que le concessionnaire à précaire a la possession *ad interdicta*, tandis que le commodataire est *tantùm in possessione.* Voy. notre t. 1. p. 428 et 429.

" 2° En ce que le concessionnaire à précaire répond uniquement de son dol, tandis que le commodataire répond même de sa faute légère. Voy. le même Ulpien, L. 8. § 3. D., *De precario* (43. 26).

" Maintenant, quels sont les cas dans lesquels le débiteur répond et du dol et de la faute ? Ulpien cite le mandat, le commodat la vente, le gage, le louage, la dot, la tutelle, la gestion d'affaires, la société et l'indivision. Pour ces deux dernier cas, la faute s'apprécie *in concreto.* Pour le mandat, pour le commodat, pour la vente, pour le gage, pour le louage, elle s'apprécie *in abstracto.* Reste trois cas dans lesquels on est tenu *quasi ex contractu*, savoir : *dotis datio, tutelae, negotia gesta.* Dans le dernier, la faute s'apprécie certainement *in abstracto :* et c'est là sans doute ce qu' Ulpien a voulu exprimer par ces mots : *in his quidem et diligentiam.* Mais dans les deux autres, je crois qu' Ulpien était d'avis d'apprécier la faute *in concreto.* [Ulpien dit, à la fin de cette L. 23 : *Animalium, casus, mortes quaeque sine culpâ accidunt, fugae servorum qui custodiri non solent . . . . a nullo praestantur.* Cela vient bien à l'appui de l'explication donnée, d'après M. de Savigny, ci-dessus, p. 310 et 311.]"

By Ortolan, in his Explication Historique des Instituts, III. 360, 8th ed. Paris, 1870, is given the following : —

" Sont responsables, non-seulement

is responsible for *omnis culpa;* not merely for the neglect of ordinary diligence, but for the neglect of the diligence of a good business man. Under this head falls, —

du dol, mais de toute faute, c'est-à dire de la faute mesurée sur les soins du père de famille le plus diligent; plus de soin qu'ils n'ont coutume d'en apporter dans leurs propres affaires: 1° le commodataire (ci-dess., No. 1217) et le déposant, parce que la contrat est intervenu dans leur unique intérêt; 2° tant celui qui a donné que celui qui a reçu le gage, dans le contrat de gage (ci-dess., No. 1228); tant le vendeur que l'acheteur, dans le contrat de vente (ci-dess., No. 1472); tant le locateur que le locataire, dans le contrat de louage (ci-dess., No. 1514), parce que le contrat est intérrésse de part et d'autre; 3° tant le mandataire que le mandant, bien que le contrat intervienne communément dans l'unique intérêt de ce dernier; mais á cause de la foi religieuse de ce contrat (ci-dess., No. 1553); enfin 4° le *negotiorum gestor* (ci-dess., tit. 27. § 1), parce qu'il s'est ingéré volontairement et spontanément dans les affaires d'autrui. A moins qu'il ne l'eût fait que comme contraint par des sentiments d'amitié (*affectione coactus*), dans un cas de nécessité urgente. (Dig. 3. 5. *De negot. gest.* 3. § 9. f. Ulp.) Il rentrerait alors dans la catégorie qui va suivre.

"1651. Sont responsables, au contraire, uniquement du dol, et de la faute dans la mesure de leur caractère personnel, autant de soin qu'ils ont coutume d'en apporter dans leurs propres affaires; car c'est manquer à la bonne foi que d'agir autrement (*nec enim salva fide minorem iis quam suis rebus diligentiam praestabit*): 1° le commodant et le dépositaire (ci-dess., No. 1221), parce qu'ils ont rendu, dans le contrat, un service purement gratuit, et qu'á l'egard du dépositaire c'est au déposant à se reprocher d'avoir choisi un dépositaire négligent; 2° les associés (ci-dess., No. 1535), les communistes, les cohéritiers, dans le gestion de la chose commune, et le mari dans celle des biens dotaux. Dig. 17. 2. *Pro socio.* 72. f. Gai. 10. 2. *Famil. ercix.* 25. § 16. 23. 3. *De jur dot.* 17. pr. f. Paul. et 24. 3. *Solut. matrim.* 24. § 5. f. Ulp.

"Parce qu'il s'agit pour eux non-seulement de l'affaire d'un autre, mais de leur propre affaire, et qu'ils ont en conséquence une cause personnelle pour s'en mêter: 'Hic propter suam partem causam habuit gerendi. Dig. 10. 2. Famil. ercix. 25. 10. f. Paul.

"Partageant avec les autres le péril de leur mauvaise gestion, leur propre intérêt est une garantie: ajoutez accessoirement, quant a la sociétié, que celui qui s'est donné un associé peu diligent doit s'en prendre á lui même; 3° enfin, le tuteur et le curateur, parce que, leurs fonctions leur étant imposées, ils ont aussi une cause personnelle et nécessaire d'agir pour autrui. Dig. 27. 3. *De tutor. et rat. distrah,* 1 pr. f. Ulp.

1652. Quant à la *culpa lata* mesurée d'une manière absolue, sur le commun le plus grossier des hommes, ne pas comprendre ce que tout le monde comprend (ci-dess., No. 1641); malgré l'idee qu'on peut s'en faire au premier abord, il n'y a rien de particulier à en dire; elle vient se confondre dans les deux séries de responsabilité que nous venons d'indiquer: soit parce que dépassant généralement en gravité les fautes marquées dans ces deux séries, elle est comprise *a fortiori* dans le responsabilité de chacune de ces séries; soit parce que, si, par impossible, quelqu'un s'etait choisi un dépos-

a^2 The Mandator.

b^2 The *negotiorum gestor*, who as a rule is liable only for the particular business conducted by him; and there is no obligation on him to undertake other affairs of his absent principal.[1] If he displaces other agents, he is liable for whatever damage occurs from his want of good business diligence.[2] He is liable, if he venture his absent principal's property in speculations such as that principal was not accustomed to undertake, even for *casus*, though if he makes anything in these *novis et insolitis negotiis*, he can set this off against his losses, for such profit cannot be credited to the *dominus negotiorum*.[3] But the *negotiorum gestor*, when he undertakes a desperate commission, and rescues property which otherwise would have been wrecked, is liable only for *dolus* (fraud) and *culpa lata* (gross negligence).[4]

a^1 Under compulsion of law. In such case the agent is protected if he can show that he has bestowed the *diligentia quam suis*, or the diligence applied by him to his own affairs. In this class fall the *tutor* and the *curator*.

B. Where no agency is established; but where the bailee is required by an obligation to perform a duty as to a thing.

a^1 Where the bailee has no advantage from the bailment. In this case he is liable only for *dolus* and *culpa lata*. But he is chargeable with *dolus* or *culpa lata* (fraud or gross negligence), if it appears that he has acted in the bailment with a *negligentia suis rebus non consueta*. Under this class falls, —

a^2 The Depositar. If he has forced himself in the bailment he is liable for *culpa omnis*, or negligence of both grades.[5] The same rule holds when he obtains any benefit for his services, though this benefit do not consist in hire.[6]

itaire ou s'etait donné un associé assez borné, assez idiot, pour être même audessous de ce que tout le monde comprend, ce serait toujours d'après ce niveau personnel inférieur qu'il faudrait juger de la responsabilité d'un tel être."

[1] L. 24. C.
[2] L. 6. § 12. D. de negot. gest.
[3] L. 11. D. de negot. gest.
[4] L. 3. § 9. D. eod.
[5] L. 1. § 35. D. depos.
[6] L. 2. § 24, D. *de vi* bon.

b^2 The Universal Fiduciar.

c^2 The Singular Fiduciar and the Legatar.

d^2 The creditor put by process of law in possession of his debtor's goods.

b^1 Where the bailee derives advantage from the bailment. In this case he is bound not merely to show common diligence, but the diligence of a good business man. Under this head fall, —

a^2 Sale, when the goods are held in the vendor's hands as yet undelivered to the vendee.

b^2 Hiring. In L. 23 de R. I. and L. 5. § 2 commod. *locatio conductio* is placed in the category of contracts which require *diligentia diligentis*, and in which the bailee may be liable for *culpa levis*, or special negligence. The same is negatively shown in L. 11. § 3. and L. 13. § 1. D. locat. Liability for accidents in hiring ceases only when there is no negligence, gross or special, on part of the bailee (*si culpa careret conductor*).

c^2 The Pledgee (holder in pignus or pawn). By Ulpian in L. 9. § 5. de reb. auct. jud. possib. the rule in *pignus* or pawn is declared to be that *non solum dolus malus, verum culpa quoque debeatur.* So in L. 30. D. de pignorat. act., only *culpa* (and *dolus*), embracing, therefore, both phases of *culpa*, but not *vis major*, can be charged. In L. 25 eod. Ulpian speaks of *instruere pignoratos servos;* and tells us, *negligere enim creditorem dolus et culpa, quam praestat, non patitur. Culpa* is here used in its general sense. In L. 22. § 4, D. eod. when the sale of the pawn is discussed, this qualification is added: *Si modo sine dolo et culpa sic vendidit, et ut paterfamilias diligens id gessit.* Hence the person to whom an article is pawned is responsible not only for *culpa lata* but for *culpa levis.* And indeed the *pignus*, in respect to *praestatio culpae*, is expressly placed, in L. 13. § 1. L. 14. D. de Pignor., is on the same basis with the Commodat.

d^1 The Usufruct.

e^1 The *bonæ fidei possessor* in the *rei vindicatio post litem contestatem*.[1]

f^1 The heir in relation to the Legatar and Singular fidei commissar.[2]

g^1 The Commodatar, when he alone derives benefit from the contract.[3] If the position of the parties be reversed so that the Commodant only has benefit from the contract, then the Commodatar like the Depositar is liable only for *dolus*.[4] If both parties derive advantage from the contract, then the bailment is for a common object and the adventure is considered a *Societas*, and falls under the next head.

C. Where the contract concerns a business which the contracting parties are conducting in common. In this case each party is liable not only for fraud but also for *culpa*. As to the *culpa*, however, there is this subordinate distinction. The bailee must exert *diligentia*, but his liability ceases if he can show that his diligence is the same as that displayed by him in his own affairs. The reason is that in joint business each party chooses the other on account of personal qualities which it is fair to take as the gauge of liability. Under this head falls, —

a^1 *Societas*, analogous to our partnership.

b^1 The *rerum* communio (c. incidens).

c^1 The relation of the husband to the *dos*, and to the Paraphernen which are intrusted to him for the common purposes of the marriage.[5]

[1] L. 45. L. 33. L. 51. L. 36. § 1. L. 63. D. de R. V.

[2] L. 50. § 4. D. ad leg. Falcid.; L. 47. § 4. 5; L. 59. D. de legat.

[3] L. 5. D. Commod.; L. 1. § 4. D. de O. et A. and other references.

[4] L. 5. § 10. D. Commod.

[5] L. 17. pr. D. de jure dote; L. 18. § 1. in f.; L. 24. § 5; L. 25. § 1; D. solut. matr.; L. 11. D. de pactis conventis; and other passages cited by Hasse, p. 377.

CHAPTER III.

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I. DEFINITION OF CAUSATION.

§ 73. A NEGLIGENCE is the juridical cause of an injury when it consists of such an act or omission on the part of a responsible human being as in ordinary natural sequence immediately results in such injury. Such, in fact, we may regard as the meaning of the term "Proximate cause," adopted by Lord Bacon in his maxims.[1] The rule, as he gives it in Latin, is: "In jure non remota causa sed proxima spectatur," which he paraphrases as follows: —

"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking for any further degree."

This proposition he contents himself with illustrating by a series of cases from the Year Books, of which the following is the first: —

"As if an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have access unto him for his counsel; yet, nevertheless, the annuity is not determined by this *nonfeasance*. Yet it was the grantee's act and default to commit the treason, whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not giving counsel was compulsory and not voluntary, in regard of the imprisonment."

A series of similar black-letter cases follow, showing that Bacon's object was rather to explain the maxim by authorities with which the ordinary legal mind was then mainly conversant, than to bring his own matchless powers to bear in the philosophical expansion of the maxim. Of the latter mode of treatment we have but a glimpse in the following: —

"Also you may not confound the act with the execution of the act; nor the entire act with the last part, or the consummation of the act."

In the Cambridge manuscript, as given by Mr. Heath, we have the following rendering of this passage: —

"Also you may not confound the act with the execution only of the act, and so the cause of the act with the execution of the act, and by that means make the immediate cause a remote cause."

Of this qualification we will find numerous illustrations in the

[1] Reg. I.

following pages. Thus the servant's negligence when the master is sued is, to use Bacon's language, the "execution of the act," or the "last part" of the act; and the master's negligence, in employing the servant, therefore, is the "immediate cause and not the remote cause." So also we may say as to the gross negligence of a railroad company in running down cattle. The cattle, if more sagacious, might have left the track; and at all events, their staying on the track is a condition immediately precedent to their being run down. A condition of prior precedence is the negligence of the engineer. Yet the latter is, in a suit against the railroad, to recur to Bacon's phraseology, the "immediate" and not the "remote" cause.

Yet, though Bacon avoids philosophical and even juridical exposition of his text, it is natural to infer that he does so because the text is itself virtually from Aristotle, whose works were then in the hands of jurists as well as of philosophers, and whose authority even the powerful criticisms of Hume and of Mr. J. S. Mill has failed to shake. By Aristotle causes are divided into four heads; the *material*, the *formal*, the *efficient*, and the *final*. The *material* cause is the matter from which a thing is made, and without which it cannot be made; as marble is the matter of a statue. The *formal* cause is the *archetype*, as the idea of the sculptor is the formal cause of the statue. The *efficient* cause is the principle of change or motion which produces the thing; as, in a juridical sense, the will of the sculptor is the prompting power which produced the application of his idea to the marble, and, in a theological sense, the Divine will is the prompting power which evolved the Divine idea in the formation of both sculptor, of marble, and of the everlasting hills from which the marble is dug. This is the Αρχὴ τῆς κινήσεως; the *causa efficiens*, to which the jurists constantly advert. The *final* cause is the object of a thing; the ultimate beneficial purpose for which it is designed; το ου ἕνεκα και το ἀγαθον, *causa finalis*. This classification is expressly accepted by Bacon in his "De Augmentis."[1] It is true that he declines to enter upon the discussion of *final* cause, "the inquisition" of which he declares "is barren," "like a virgin consecrated to God." But his mode of treating the "causa efficiens" makes it plain that he regards it as convertible with the "proximate cause" of the maxim.[2]

[1] Book III. ch. v.

[2] *Meaning of* term "*proximate*," *il-*

§ 74. *Not necessary that the specific injury should have been foreseen.* — It is true that we are frequently told that liability in negligence attaches, when the party charged has reasonable grounds to expect the damage that occurred in consequence of his

lustrated by insurance cases. The term "proximate" is illustrated by a series of cases which, though not in the direct line of the present inquiry, may be invoked for their juridical value. "Perils of the sea" are insured against in our marine policies. Is the loss of a particular ship chargeable to a peril of the sea? It has been generally ruled that the peril must be the *proximate* and not the *remote* cause of the disaster. Taylor *v.* Dunbar, L. R. 4 C. P. 206; Seagrave *v.* Union Mar. Ins. Co., L. R. 1 C. P. 320; Hagedorn *v.* Whitmore, 1 Stark. N. P. C. 157; Grill *v.* General Iron Co., L. R. 3 C. P. 476; *S. C.*, L. R. 1 C. P. 600; Livie *v.* Janson, 12 East, 653, citing Green *v.* Elmslie, Peake N. P. C. 212; Hahn *v.* Corbett, 2 Bing. 205; Walker *v.* Maitland, 5 B. & Ald. 171; Waters *v.* Louisville Ins. Co. 11 Peters, 220; Columbia Ins. Co. *v.* Lawrence, 10 Peters, 517; Patapsco Ins. Co. *v.* Coulter, 3 Peters, 222; General Mut. Ins. Co. *v.* Sherwood, 14 Howard (U. S.) 354; Patrick *v.* Commercial Ins. Co. 11 Johns. R. 14; and other cases cited in Broom's Legal Maxims (5th Lond. ed.) 216 *et seq.*

"A policy of insurance," says an able article on this topic in the American Law Journal for January, 1870, p. 214, "is a contract of a fixed form. By use its terms have obtained a settled meaning. Its subject matter is extensive. It is a contract made in the interest of trade. Large amounts of property are covered by policies containing the same stipulations. The contract is one of indemnity. In determining the question, whether a peril insured against was the proximate or the remote cause of a loss, or, what is the same question, whether a loss of that general description was intended by the parties to be covered by the policy, the peculiar nature of a policy of insurance, and the class of interests it covers, are taken into account. The particular intent of the parties is subservient to the public bearing of the question. The terms proximate and remote, in their application to questions of insurance, thus receive in some respects a more enlarged, and in some a more restricted, signification than they have when they are used in giving a construction to other contracts. But the maxim is as well applicable as a rule of construction for all contracts.

"In actions for negligence, a defendant is held liable for the natural and probable consequences of his misconduct. In this class of actions his misconduct is called the proximate cause of those results which a prudent foresight might have avoided. It is called the remote cause of other results.

"In determining the amount of damages in an action of contract, the breach of contract is called the proximate cause of such damages as may reasonably be supposed to have been contemplated by the parties. If there are other damages, of those it is called the remote cause.

"There is no settled rule for the application of the maxim in determining the damages in actions of tort. In such actions the damages, which are called proximate, often vary in proportion to the misconduct, recklessness, or wantonness of the defendant."

neglect; and this is sometimes pushed to the extent of maintaining that when there is on his part such reasonable grounds of expectation, then he is liable, and that he is not liable when there are no such reasonable grounds of expectation. Thus we are told by Pollock, C. B., that "every person who does a wrong is at least responsible for all the mischievous consequences that may be reasonably expected to result under ordinary circumstances from such misconduct;"[1] and constantly the idea of "reasonableness of expectation" is made convertible with imputability.

It has however been already shown,[2] that there may be cases in which there is such a reasonable expectation in which there is no imputability of negligence.

§ 75. Illustrations to the same effect may be drawn almost without limit from an ordinary observation. The miner, the manufacturer, and the merchant, so argues a vigorous German thinker of our own day,[3] must regard it as probable that the weapon to which each contributes his share may be used to commit a wrong; the roof coverer must regard it as probable that a tile may at some future time be detached and may strike some one walking in the street. So parents, especially such as are not themselves distinguished for their reverence for law, must regard it as not improbable that their children may become law breakers. In neither of these cases, however, does this perception of probability by itself create liability. Even when this probability approaches the highest grade, there are cases in which liability is by common consent excluded. For instance, a man is suffering with a sickness which in a few days will terminate fatally, unless he submits to a perilous operation which, if not successful, will cause his death in a few hours. He is unconscious; and therefore unable to give or withhold assent. A surgeon performs the operation skilfully but unsuccessfully, and the patient dies, not of the disease but of the operation. The surgeon saw that it was highly probable that death would ensue; yet he is nevertheless not liable for the death, for he acted, notwithstanding this probability, according to the rules usually accepted in practical life. If desperate operations are not risked in desperate cases, improvement in surgery is greatly hindered; and besides this, it is in conformity with the

[1] Pollock, C. B. — Rigby *v.* Hewitt, 5 Exch. 243; cited by Byles, J. Hoey *v.* Felton, 11 C. B. N. S. 143.

[2] Supra, § 16.

[3] Bar, Causalzusammenhange, 1871, p. 13.

ordinary rules of society to risk a few days of unconscious or of exquisitely painful existence for even a slight probability of recovery. So, also, there exist, to follow the argument of this acute reasoner, certain necessary though dangerous trades, of which we can say statistically that in them will be sacrificed prematurely the lives not merely of those who voluntarily engage in them, but of third persons not so assenting. Yet in such cases (*e. g.* gas manufactures and railroads), we do not hold that liability for such injuries attaches to those who start the enterprise foreseeing these consequences. If the consequence flows from any particular negligence, according to ordinary natural sequence, without the intervention of any independent human agency, then such consequence, whether foreseen as probable or unforeseen, is imputable to the negligence. But if the agency by which the harm is done is conducted with proper precautions, and is itself one of the necessary incidents of our social life, the persons concerned in managing such agencies are not liable for injuries incidentally inflicted on others, even though such injuries were foreseen.

§ 76. *The foreseeing of an injury may however be an incident from which both dolus and culpa may be inferred.* — It must not be supposed, however, that the foreseeing an event as probable has nothing to do with the imputation of liability. It is true that it is not enough to make a person liable for hurt done through his agency that he foresaw the probability of such hurt in general, for the hurt may be one of the regular and lawful incidents of a lawful employment, such as the making of gunpowder. So, on the other hand, if such hurt is one of the incidents of improper conduct on the part of the person charged, he cannot relieve himself by proof that he did not foresee it, because it was his duty to have marshalled the probabilities, and he is liable for negligence in omitting so to do. At the same time it must not be forgotten that the probability of a particular result has much to do in explaining the motive prompting to such result. Motive is the creature of probabilities. A certain result is probable, and I do what will lead to this result. Two extremes however, in this view, are to be avoided. The *absolute* foreseeing of a result is not essential to the imputation of negligence, for this is incompatible not only with the idea of negligence, but with that of moral agency which precludes absolute foreknowledge. So the foreseeing of a harm as remotely and slightly probable does not

involve the imputation of such a harm, for there is nothing that we can do that may not remotely produce some harm, and therefore if we are to avoid such imputation we must do nothing. But if an event regularly (*i. e.* not uniformly, but in accordance with natural laws) follows a cause, then it is a contingency which a prudent man would expect; and so, on the other hand, that a prudent man would expect it is strong proof that it regularly follows in accordance with natural sequence.

§ 77. Nor, on the other hand, as has been already shown,[1] can we claim that the fact that a particular consequence could not be reasonably foreseen relieves its negligent author from imputability. The fact is that the consequences of negligence are almost invariably surprises. A man may be negligent in a particular matter a thousand times without mischief; yet, though the chance of mischief is only one to a thousand, we would continue to hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held that it is no defence that a particular injurious consequence is "improbable," and "not to be reasonably expected," if it really appear that it naturally followed from the negligence under examination.[2]

§ 78. "*To be reasonably expected*" *means no more than* "*in ordinary natural sequence.*" — Nor, when we scrutinize the cases in which the test of "reasonable expectation" is applied, do we find that the "expectation" spoken of is anything more than an expectation that some such disaster as that under investigation will occur *on the long run* from a series of such negligences as those with which the defendant is charged. Indeed, even by Pollock, C. B., whose language is so frequently quoted as sustaining this test, the phrase is used, as we find from other expressions of the same judge, simply for the purpose of excluding those contingencies which are so remote that they are not, in the long run,

[1] Supra, § 16, 74.

[2] Higgins *v.* Dewey, 107 Mass. 494. See White *v.* Ballou, 8 Allen, 408; Luce *v.* Dorch. Ins. Co. 105 Mass. 297; Dowell *v.* Steam Nav. Co. 5 E. & B. 195; Dymen *v.* Leach, 26 L. T. Ex. 221; Clarke *v.* Holmes, 7 H. & N. 937; Senior *v.* Ward, 1 E. & E. 385; Williams *v.* Clough, 3 H. & N. 258; Burrows *v.* March Gas, &c. Co. L. R. 5 Ex. 67; Gould *v.* Oliver, 2 Scott N. R. 257; Smith *v.* Dobson, 3 Scott N. R. 336; Taylor *v.* Clay, 9 Q. B. 713; Tuff *v.* Warman, 2 C. B. N. S. 740; *S. C.* 5 Ibid. 573; Witherley *v.* Regent's Canal Co. 12 C. B. N. S. 2, 7; Morrison *v.* General Steam Nav. Co. 8 Exch. 733. See more fully supra, § 15–16.

within the range of experience. "I entertain considerable doubt," so it is said by this high authority,[1] "whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." It is clear that this learned judge, therefore, simply intends to say that imputation exists as to all "reasonable contingencies;" and this means that imputation exists as to consequences that in a long series of events appear regular and natural, not consequences only such as the party may at the time "reasonably foresee." And Lord Campbell makes this still clearer when he tells us that "if the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action."[2] This is substantially the test adopted in the text. The particular damage must be viewed concretely, and the question asked, "Was this in ordinary natural sequence" from the negligence? If so, the damage is imputable to the party guilty of the neglect.[3]

[1] Greenland *v.* Chaplin, 5 Ex. 248.

[2] Gerhard *v.* Bates, 2 Ell. & Bl. 490.

[3] This view is sustained in 1 Smith's Lead. Cas. (Eng. ed.) 132.

"The cause of an event," says Appleton, C. J., in Moulton *v.* Sanford, 51 Maine, 134, "is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. *Ordinarily that condition is usually termed the cause, whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event.*" Cited, with approval, in Sutton *v.* Wauwontosa, 29 Wisc. 21. This definition, which, down to the part in italics, is substantially that of J. S. Mill, is open in this respect to objections which will be more fully stated in the Appendix. The objection to the part in italics is, that it includes material conditions as well as moral causes. Jeffersonville, &c. R. R. *v.* Riley, 39 Ind. 568. See supra, § 15–16.

II. DISTINCTION BETWEEN ACTS AND OMISSIONS.

§ 79. Distinction between *culpa in faciendo and culpa in non faciendo.* — A distinction has been frequently taken between negligence in commission and negligence in omission; and this view has been advanced not only by Donell, a learned jurist, to whose acuteness we owe in other respects much, but by a contemporaneous English judge of much sagacity.[1] Under these circumstances it is proper to consider it somewhat in detail.

§ 80. *Under the Roman law.* — By the Aquilian law, as we have seen, a party whose property or person is injured by the negligence of another can, independently of contract, have redress, under certain limitations, from the party injured. But it is not necessary that under this law the aggression should consist of an act of positive commission. Undoubtedly the Roman law, resting, as we have seen, upon that theory of individual independence which was the pride of the jurists, held that no man could usually be made liable for a mere omission to act. Yet even under this law an omission created a liability when it was a breach of a positive duty. An interesting case to this effect is given in the Digest, in the discussion of the Aquilian law.[2] One servant lights a fire and leaves the care of it to another. The latter omits to check the fire, so that it spreads, and burns down a villa. Is there any one liable for the damages? The first servant is chargeable with no negligence, and the second chargeable only with an omission. Of course, if we follow the maxim that a mere omission cannot be the basis of a suit, there can be no redress. But Ulpian, who on another occasion insists strongly on this maxim as an essential principle of elementary law, casts it summarily aside when the attempt is to so use it as to confuse the bare omission of an act we are not bound to perform with the imperfect performance of an act to which we are bound. Against the *negligenter custodiens*, he decides, the *utilis Leg. Aq.* can be enforced; and there can be no question that he decides rightly, and in full accordance with his own views as to abstract non-liability for pure omissions. For it is clear that in the case before us, the non-action of the second servant is equivalent to

[1] Bramwell, J., in Southcote *v.* Stanley, 1 H. & N. 248; Gallagher *v.* Humphrey, 10 W. R. (Q. B.) 664.

[2] L. 27. § 9. D. ad L. Aquil. 2. See also Cleland *v.* Thornton, 43 Cal. 437.

action. He undertakes the charge of the fire, and in the imperfect performance of this charge he acts affirmatively and positively. So, also, is it in the well known case of a physician who undertakes the case of a patient.[1] A physician is not liable for not undertaking the case of a sick stranger. If, however, he undertakes the case, he is liable, though he has as yet given no advice. For, as Hasse well argues, it would be as absurd to require that some remedy should have been actually administered by him, in order to constitute liability on his part, as it would be to require, in order to make the person undertaking to watch a fire liable, that he should have stirred the coals with the tongs. Whoever, in other words, undertakes an office or duty, is as responsible for negative as he is for affirmative misconduct in the discharge of such office or duty. He is not liable, as a general rule, because he declines to accept the office or duty. But accepting it, he is bound to perform it well. *Voluntatis est suscipere mandatum, necessitatis est consummare.*[2]

§ 81. *Donell's limitations as to* culpa in non faciendo. — But to go into the question more in detail, *culpa in non faciendo* is considered by Donell in the following successive stages: —

(1) He who is invited to undertake a duty has the alternative of accepting or rejecting. If he enters on the discharge of the duty, and in discharging it injures instead of aiding, he becomes liable for the injury.

(2) But if he undertakes the duty and omits something in its performance, there are two conditions in which he is excusable:

a. He may have been ignorant that he was required to act positively.

b. While knowing he was required so to act, he may have doubted his capacity. To refuse to do that for which we feel ourselves incompetent is certainly not censurable. Of course to this is the qualification, *nisi alia res te ad diligentiam obliget.*

But, answers Hasse, the qualification *nisi alia res te ad diligentiam obliget* contains the principle at issue. For if I am not bound to certain duties to another, I cannot be compelled to perform such duties, no matter what may be the moral reasons calling on me to act. If, however, I undertake the performance of

[1] See L. 8. pr. D. ad L. Aq. 2; Hasse, p. 22. [2] See supra, § 12, 13; infra, § 442.

this duty, then I am obliged to perform it diligently. Under the Aquilian law, as has just been shown, omission is treated as equivalent to action, in cases where I begin a work and then drop it, wherever this withdrawal works injury to another; nor does it matter whether such withdrawal arises from malice, or ignorance, or timidity. With *obligationes* only such positive and negative action is required as form the subject matter of the *obligatio;* and he who undertakes the obligation cannot excuse himself on the ground that he was ignorant of the scope of the obligation, or that he wanted courage to undertake its complete discharge. If he was incapable he had no business to undertake the obligation; if he was ignorant of what it required, then his duty was to decline its acceptance.[1]

§ 82. *Omissions as such, when disconnected with a legal duty, not the subject of suit.* — As a general rule it may be affirmed that omissions, unless when involving the non-performance or malperformance of a positive duty, are not the subject of a suit. As has been elsewhere shown, this results from the nature of the civil compact; for if the law undertook to compel men to perform toward each other offices of mere charity, then the practical and beneficent duty of self-support would be lost in the visionary and illusory duty of supporting every one else.[2] It is scarcely necessary to point attention to the fact that if the maxim be generally true that he who injures another by his omissions is civilly liable, then the converse must also be true, that every one is obliged by law to be as useful to another as he can. To the Romans such an assumption was peculiarly offensive, — as to the Romans the independence of each family was a fundamental maxim of the law. If each man is compelled to feed his neighbor, then his neighbor will be compelled to feed him back; and where will this end? No doubt in degenerate periods the cry of the rabble was *panem et circenses;* but by the law as held by the great jurists, each family was a principality itself, which in its proud isolation depended on itself for its own support, excluding the aid of others as an intrusion upon personal rights, and rejecting such aid on principle as inconsistent with that spirit of personal independence which they held essential to a brave and free state. So far was this carried, that it was only by the Praetorian fiction of a stipulation being made to that effect, that the owner of a house that

[1] See supra, § 13.

[2] See 2 Wh. Cr. L. § 1011, 2529.

by its defective construction caused damage to the property of another, could be made to pay for such damage.[1] No doubt the Roman principle just stated, so far as it limits our legal duties to the discharge of the offices specifically assigned to us by law, is essential alike to high public spirit and to healthy economical progress. And no doubt that so far as concerns merely moral duties, the principle of the Roman law in this respect has been adopted by all modern civilized jurisprudences. No public enterprise (*e. g.* a railroad when in working order) can be carried on safely if every one who conceives something is wrong in it is required to rush in and rectify the supposed mistake. No man could courageously and consistently discharge his special office if all other persons were made both his coadjutors and overseers. Industry would cease if the consequences of idleness were averted by making almsgiving compulsory. Hence, unless the duty is legal, no liability is imputable for its neglect.

§ 83. *But otherwise when the omission is a defect in the discharge of a legal duty.* — For it is of the essence of negligence to omit to do something that ought to be done. "Suppose that there is, to my knowledge, a peculiar danger in the nature of a trap — *e. g.* a concealed pit — on the premises, of which I neglect to warn the person who I know is going there by my permission; it is obviously unimportant whether the pit was dug by my orders, or whether it was there when I myself came to the premises, and I have only neglected to have it fenced."[2]

A physician, to take another illustration, who undertakes to attend a patient and omits to give a necessary prescription, is guilty of a positive malfeasance; and so of the carpenter who omits properly to fasten a roof so that the tiles fall on the street; and of the engine-driver who omits to give notice to an approaching train, so that a collision ensues. An omission, therefore, may be a juridical cause; but it is so, not because it is a negation, but because it is a positive, though it may be a negligent wrong.[3]

[1] See Hasse, § 3.

[2] Cotton *v.* Wood, 8 C. B. (N. S.) 568. Saunders on Neg. § 50. Infra, § 345–53.

[3] "A un autre point de vue," says Demangeat (Cours. de Droit Romain, III. 445, Paris, 1866), "on distingue la faute *in omittendo* et la faute *in committendo*, c'est un fait dolosif ou une imprudence. Je ne réponds pas toujours, envers tout le monde, de la faute *in omittendo*. D'abord je n'en réponds point envers celui qui n'est pas déjà mon créancier. Ainsi, le feu vient de prendre à votre maison; je m'en aperçois, je pourrais facilement

§ 84. *Omissions in a municipal government to supply water, and the relation of such omission to a non-extinguished fire.* — On this point Sharswood, J.,[1] says: "It may be doubted whether it would be a case to which the maxim *causa proxima non remota spectatur* has any application. The purpose of the reservoir being to extinguish fires, and the fire having been shown not to have been extinguished in consequence of the non-performance of the duty imposed, it would be no answer, perhaps, to say that the proximate cause of the injury was the fire, and the want of water only the remote cause. If it were made the duty of a municipality to station a police officer at a particular corner, to protect the foot-passengers from being run over by passing vehicles, it may

l'eteindre et vous préserver ainsi d'une grande perte; mais je reste tranquille, je ne me donne pas même la peine d'appeler au secours; je ne vous dois point des dommages-intérêts, quoiqu'il ne n'ait manqué qu'un peu de bonne volonté pour conserver votre chose. Au contraire, la *culpa in committendo*, le fait dommageable, j'en réponds en général envers tout le monde.

"Du reste, pour m'en rendre responsable, tantôt on exige qu'il y ait eu dol de ma part, comme dans le cas de *furtum;* tantôt on se contente de la simple imprudence, de la *culpa levissima*, comme dans le cas de la loi Aquilia. En second lieu, même envers mon créancier, je ne réponds pas toujours de la *culpa in omittendo*. Si j'ai promis à Titius sur stipulation de lui donner l'esclave, Stichus, et que, dans un maladie dont l'esclave est ensuite atteint, je le laisse mourir faute de soins, le juriconsulte Paul décide que je ne suis pas tenu envers Titius. L. 91. pr. D., *De verbor. oblig.* (45. 1.) Voy. ci-dessus, p. 208. Mais, lorsqu'au lieu d'un stipulant il s'agit d'un créancier qui a contre moi une action *bonae fidei*, en général il peut me demander compte de ma faute *in omittendo:* en d'autres termes, je dois apporter de la diligence à l'exécution du contrat. C'est de ce cas que nous avons spécialement à nous occuper ici.

"Dans la faute *in omittendo*, il peut y avoir trois degrés, savoir: dol, faute considérée *in abstracto*, faute considérée *in concreto*. Nous savons quand il y a dol. La faute considérée *in abstracto* c'est l'omission des soins qu'apporte habituellement à ses affaires un *bonus paterfamiliâs;* dire qu'un certain débiteur répond de la faute *in abstracto*, c'est dire qu'il sera tenu s'il n'a pas fait ce qu'eût fait à sa place un homme soigneux en général. Au contraire, la faute considérée *in concreto*, c'est l'omission des soins que le débiteur lui-même apporte habituellement dans ses propres affaires: dire qu'un certain débiteur répond de la faute *in concreto*, c'est dire qu'il sera tenu s'il n'a pas apporté à l'accomplissement de son obligation les mêmes soins qu'il apporte habituellement quand il s'agit de ses propres affaires. Nous allons voir que, suivant la nature du contrat qui est intervenu, le débiteur répond seulement de son dol ou de la faute considérée *in concreto* ou enfin de la faute considéré *in abstracto*."

[1] Grant *v.* City of Erie, 69 Pa. St. 410.

be doubted whether it would be an answer to an action to say that the cause of the injury was the horse and wagon and not the absence of the officer. But if the municipality were vested with the authority to employ and keep on foot a sufficient police, no one can surely pretend that a foot-passenger run over by a wagon could sue the corporation for damages, even though he should be able to show that they had formerly kept an officer at that place for that purpose and had withdrawn him, or that he had been guilty of negligence in the performance of his duties. That would be a case precisely analogous to the one now before us." [1]

III. DISTINCTION BETWEEN CONDITIONS AND CAUSES.

§ 85. At this point emerges the distinction between conditions and causes, — a distinction the overlooking of which has led to much confusion in this branch of the law. What is the cause of a given phenomenon? The necessitarian philosophers who logically treat all the influences which lead to a particular result as of equal importance, and who deny the spontaneity of the human will, tell us that the cause is the sum of all the antecedents. Thus, for instance, a spark from the imperfectly guarded smoke-pipe of a locomotive sets fire to a hay-stack in a neighboring field. What is the cause of this fire? The sum of all the antecedents, answers Mr. Mill, the ablest exponent of the necessitarian philosophy. Apply this concretely, and it would be difficult to see how any antecedent event can be excluded from taking a place among the causes by which the fire in question is produced. Certainly we must say that either if the railroad in question had not been built (an event depending upon an almost infinite number of conditions precedent, among which we can mention the discovery of iron, of steam, and of coal), or the hay-stack in question had not been erected (to which there is also an almost infinite number of necessary antecedents, the failure of any one of which would have caused the failure of the hay-stack), no fire would have taken place. The Law, however, does not concern itself with refinements such as these. Its object is to promote right and redress wrong; and without undertaking to propound any theory of the human will, it contents itself with announcing as an indisputable fact that by making a human "antecedent" punishable for a wrongful act, such "antecedent," if not restrained from committing the

[1] See also remarks on this point, infra, § 251–260.

wrong, may be compelled to redress it. Whatever may be said of other "antecedents," the law, therefore, declares that a rational being can sometimes be made by fear or interest to change his purposes, and sometimes either to desist from a wrong or take measures to repair it; and acting on this assumption, the law, when any injury is done, betakes itself to consider whether there is any rational being who could, if he had chosen, have prevented it, but who either seeing the evil consequences, or refusing to see them, has put into motion, either negligently or intentionally, a series of mechanical forces by which the injury was produced. This is the basis of the distinction between conditions and causes.[1] No doubt all the antecedents of a particular event are conditions without which it could not exist. No doubt, in view of one or another physical science, conditions not involving the human will may be spoken of as causes. No doubt, for instance, in the eye of an engineer an imperfect spark-fender may be treated as the cause; or the use of inappropriate fuel, or the condition of the weather, which made the hay-stack peculiarly inflammable. But, except so far as these conditions are capable of being moulded by human agency, the law does not concern itself with them. Its object is to treat as causes only those conditions which it can reach, and it can reach these only by acting on a responsible human will. It knows no cause, therefore, except such a will; and the will, when thus responsible, and when acting on natural forces in such a way as through them to do a wrong, it treats as the cause of the wrong. As a legal proposition, therefore, we may consider it established, that the fact that the plaintiff's injury is

[1] "In whatever proportion our knowledge of physical causation is limited, and the number of unknown natural agents comparatively large, in the same proportion is the probability that some of those unknown causes, acting in some unknown manner, may have given rise to the alleged marvels. But this probability diminishes when each newly discovered agent, as its properties become known, is shown to be inadequate to the production of the supposed effects, and as the residue of unknown causes, which might produce them, becomes smaller and smaller. . . . . The appearance of a comet, or the fall of an aerolite, may be reduced by the advance of science from a supposed supernatural to a natural occurrence; and this reduction furnishes a reasonable presumption that other phenomena *of a like character* will in time meet with a like explanation. But the reverse is the case with respect to those phenomena which are narrated as having been produced by *personal agency*." H. L. Mansel: Essay on Miracles, § 11. See this further illustrated in Porter on the Human Intellect, § 639.

preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced from liability for such injury.[1]

§ 86. *Illustrations of the distinction between conditions and causes.* — Illustrations of the important distinction just stated will hereafter frequently appear. At present the following may be specifically noticed: —

Where an injury to a passenger on a highway is occasioned partly by ice with which the road is covered, and partly by a defect in the structure of the road, the parties responsible for the defectiveness of the road are liable, notwithstanding the fact that the ice contributed to the injury.[2] The ice was a *condition* of the injury; the negligent construction of the road its *cause*.[3]

So in a case where the evidence was that a sign hung over a street in a city, with due care as to its construction and fastenings, but in violation of a city ordinance which subjected its owner to a penalty for placing and keeping it there, was blown down by the wind in an extraordinary gale, and in its fall a bolt which was part of its fastenings struck and broke a window in a neighboring building. It was ruled that the owner of the sign was liable for the damage sustained by the window. The wind was a *condition* of the injury; the unlawful arrangement of the sign its juridical *cause*. "It is contended," said Chapman, C. J., in giving the opinion of the court, ... "that the act of the defendant was a remote, and not a proximate cause of the injury. But it cannot be regarded as less proximate than if the defendant had placed the sign there while the gale was blowing, for he kept it there till it was blown away. In this respect, it is like the case of Dickinson *v.* Boyle, 17 Pick. 78. The defendant had wrongfully placed a dam across a stream on the plaintiff's land, and allowed it to remain there, and a freshet came and swept it away; and the defendant was held liable for the consequential

[1] Palmer *v.* Andover, 2 Cush. 600; Hunt *v.* Pownall, 9 Vt. 411; Allen *v.* Hancock, 16 Vt. 230; Winship *v.* Enfield, 42 N. H. 197; City of Atchison *v.* King, 9 Kansas, 558; Marble *v.* Worcester, 4 Gray, 395; Murdock *v.* Warwick, 4 Gray, 178; Rowell *v.* Lowell, 7 Gray, 100; Morse *v.* Abbott, 32 Me. 46; Moulton *v.* Inhab. of Sanford, 51 Me. 127. See this doctrine applied to contributory negligence, infra, § 303.

[2] City of Atchison *v.* King, 9 Kansas, 550. Infra, § 980.

[3] Salisbury *v.* Herchenroder, 106 Mass. 458. Infra, § 980.

damage. It is also, in this respect, like the placing of a spout, by means of which the rain that subsequently falls is carried upon the plaintiff's land. The act of placing the spout does not alone cause the injury. The action of the water must intervene, and this may be a considerable time afterwards, yet the placing of the spout is regarded as the proximate cause. So the force of gravitation brings down a heavy substance, yet a person who carelessly places a heavy substance where this force will bring it upon another's head does the act which proximately causes the injury produced by it. The fact that a natural cause contributes to produce an injury, which could not have happened without the unlawful act of the defendant, does not make the act so remote as to excuse him. The case of Dickinson *v.* Boyle rests upon this principle." [1]

IV. RESPONSIBLE HUMAN AGENT.

§ 87. But a man, to be a juridical cause either through his acts or omissions, must be responsible. If he is irresponsible, he is no longer a cause, but he becomes a condition, — *i. e.* he is ranked among those necessitated forces, which like weapons of wood or stone, are incapable of moral choice, but act only as they are employed or impelled. The cause of the event to which any of these classes of forces is related as conditions must in every case be a responsible originator. The question, therefore, to be here practically considered is, who are irresponsible. And among such persons we may mention: —

§ 88. 1. *Persons incapable of reason.* — As to these there is no question. Neither an insane person, nor an infant, at least before seven, can be a juridical cause.[2] And the same reasoning applies to persons so young and inexperienced as to be unable to exercise intelligent choice as to the subject matter.[3]

[1] "See also Woodward *v.* Aborn, 35 Maine, 271, where the defendant wrongfully placed a deleterious substance near the plaintiff's well, and an extraordinary freshet caused it to spoil the water; also Barnard *v.* Poor, 21 Pick. 378, where the plaintiff's property was consumed by a fire carelessly set by the defendant on an adjoining lot; also Pittsburg City *v.* Grier, 22 Penn. State, 54; Scott *v.* Hunter, 46 Penn. State, 192; Polack *v.* Pioche, 35 Cal. 416, 423."

[2] Bartonshill Coal Co. *v.* Reid, 3 Macq. 266; Bartonshill Coal Co. *v.* McGuire, 3 Macq. 300; Grizzle *v.* Frost, 3 F. & F. 622; Coombs *v.* New Bedford Cord. Co. 102 Mass. 572; Chic. & Alt. R. R. 58 Ill. 226; and cases cited infra, § 306–7.

[3] See Coombs *v.* New Bed. Cord. Co. 102 Mass. 572; Grizzle *v.* Frost,

The Roman law, which is to the same effect, bases this doctrine on the necessity of *will* to *causation*. Whoever is incapable of *diligentia*, it declares, cannot be charged with *negligentia*. Hence neither *furiosus* nor *infans* could be held liable under the Aquilian law.[1] Liability of the infant, however, as is shown by Pernice,[2] comes with capacity; when he is *doli* or *culpae capax* he is liable. But this is not peculiar to the Aquilian law. In respect to the performance of contracts, he only is liable for *culpa* who is *culpae capax;* and the same principle extends to *dolus* and *culpa lata*. Thus: —

"An in pupillum, apud quem sine tutoris auctoritate depositum est, depositi actio detur quaeritur, sed probari oportet, *si apud doli mali capacem* deposueris, agi posse si dolum commisit."[3]

It is true a nuisance on the land of an infant or an insane person may be abated by indictment or by injunction. But no suit can be sustained for negligence, of which it is one of the postulates that a person destitute of reason, whether from infancy or insanity, is not guilty of neglecting that which he has no mental capacity to perceive or do.

§ 89. 2. *Persons under compulsion.* — So, also, a person under compulsion cannot be viewed as a juridical cause. What he does, he does purely as the mechanical agent of the person by whom he is directed; and he can no more be charged with the liabilities of juridical causation than could the stream by which a meadow is flooded, or the spark by which a hay-stack is kindled.[4] Such, also, is the rule where the plaintiff is put into a position by the defendant from which he (the plaintiff) cannot escape, and in which he without blame to himself sustains damage. This is illustrated by a Pennsylvania case, in which the defendant negligently blocked up the lock of a slackwater, keeping the plaintiff's boats in the open stream, where, on the rising of the stream, they were swept over the dam; upon which facts the defendant was held liable for the damages thus sustained.[5] And so also in the

3 F. & F. 622; Bartonshill Coal Co. *v.* McGuire, 3 Macq. 300; and cases cited infra, § 216, 308; Railroad Co. *v.* Gladman, 15 Wallace, 401. See, particularly, infra, § 309.

[1] L. 5. § 2. h. t.

[2] Op. cit. p. 53.

[3] L. 1. § 15. dep. 16. 3. See § 309.

[4] See Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 47; Snow *v.* Housatonic Co. 8 Allen, 441; Reed *v.* Northfield, 13 Pick. 98.

[5] Scott *v.* Hunter, 10 Wright Pa. St. 192; Johnson *v.* W. C. & P. R. R. 70 Pa. St. 357. Infra, § 304.

cases hereafter fully cited,[1] where a person paralyzed with fright chooses the most dangerous of two alternatives.

§ 90. 3. *Unconscious agents.*[2] *Sending explosive compound through carrier.* — An explosive compound, negligently packed, is put into the hands of a carrier to deliver, the carrier being ignorant of its contents. Who, in case of the package being left at the place of delivery, and there exploding, is liable for the injury produced by the explosion? Had the carrier known that the package was in this dangerous condition, then he would become liable, on the principle that he who negligently meddles with a dangerous agency is liable for the damage. But if he is ignorant of the contents of the package, he is no more liable than is the car by which they are carried.[3] No matter how numerous may be the agencies through which such a package is transmitted, the original forwarder, in case of the carriers' being ignorant and innocent, continues liable, while the carriers are free from liability. When, however, a vendee or agent knows the explosive character of a compound (*e. g.* gunpowder), and then negligently gives it to a third person, who is thereby injured, the causal connection between the first vendor's act and the injury is broken.[4]

§ 91. *Negligent sale of poison.* — So with regard to the negligent sale of poison. If B. negligently sells poison, under the guise of a beneficial drug, to A., he is liable for the injury done to A.; or, to those to whom A. innocently gives the poison. But suppose that A. has grounds to suspect that the drug is poisonous, and then, instead of testing it, sells it or gives it to C.? Now, in such a case there can be no question that A. is liable for the damage caused by his negligence; though if A. is unconscious of the mistake, and acts merely as the unconscious agent of B., then there is no causal connection between A.'s agency and the injury, and B. is directly liable to C.[5] Beyond this it is not safe to go. It is true that in a New York case,[6] the liability was pushed still further; but wherever an intelligent third party comes in, and negligently passes the poison to another, this breaks, as will hereafter be shown, the causal connection, and makes such intervening negligence the juridical cause. The same may be said with

[1] Infra § 93, 304.

[2] See, as to persons deprived of their senses, infra, § 307.

[3] See infra, § 854–5–6.

[4] Carter *v.* Towne, 103 Mass. 507.

[5] Norton *v.* Sewall, 106 Mass. 143.

[6] Thomas *v.* Winchester, 2 Selden, 397.

regard to the leaving, in an insecure state, the platforms of a place of public resort. A person visiting a private house may be expected to look about him before he takes a step. Those passing through a public avenue, on the other hand (*e. g.* a railway depot), have a right to move rapidly, trusting that the open way they are invited to tread is safe. It is natural for them under such circumstances to move boldly and confidently; and if through negligence in construction of a platform or step injury ensues, the negligent owner is liable for the injury.[1]

§ 92. *Giving of loaded gun to another.* — So, again, with regard to the giving of a loaded gun to another. If the gun be given by B. with due warning to A., a person experienced in the use of fire-arms, who so negligently handles the gun that it explodes and injures C., then A., and not B., is liable. But if the loaded gun be given to an unconscious child, and the child, not knowing what the gun is, handles it so that it explodes, and injures a third person, then the liability is not attached to the child, but is imputable to him who gives the child the gun.[2]

§ 93. *Injury encountered by the plaintiff when losing self-control through the defendant's negligence.* — Suppose the plaintiff, when on a coach, jumps off to avoid danger, acting unwisely in so doing, yet in confusion of mind produced by the defendant's reckless driving? Or suppose that the plaintiff, when legitimately on a railway track, loses his presence of mind through the unexpected and irregular course of a train which is negligently driven on the track; and suppose that when thus confused, he unwisely but unintentionally runs into instead of out of danger? Is the plaintiff, in either of these cases, the juridical cause of an injury thus produced, or is the negligent driver the cause? Certainly the latter; for the plaintiff, on the assumption that he is at the time incapable of responsibly judging, is not a responsible, independent agent, capable of breaking the causal connection between the defendant's negligence and the injury. It was the defendant's negligence that put the plaintiff in a position in which he was forced to make so perilous a choice; and the defendant is liable for the consequences.[3]

[1] See infra, § 821.

[2] Dixon *v.* Bell, 5 M. & S. 198.

[3] See infra, § 377; Coulter *v.* Am. Un. Exp. Co. 5 Lansing, 67; Buel *v.* N. Y. Cent. R. R. 31 N. Y. 314; Frink *v.* Potter, 17 Ill. 406; Adams *v.* Lancas. R. R. 17 W. R. 885; Sears *v.* Dennis, 105 Mass. 310; Stevens

§ 94. *Self-injury done in fright.* — Another case that falls under this head is that of injury a person may inflict on himself in fright. Suppose that by the negligence of A., B. is so frightened that he attempts to fly, and so doing injures himself; is A. liable? He certainly is, if B., in consequence of A.'s act, has lost his self-control so as to be irresponsible.[1] There can be no question that where one person pursues another with such violence that the latter, in seeking to escape, is drowned in a stream into which he is forced to precipitate himself, the former is guilty of homicide;[2] and there is no reason why the same principle should not be applied to actions for negligence. Hence, where the defendant chased with an axe a boy who in his fright ran unconsciously against a cask of wine and broke it, the defendant was held liable for the injury thus incidentally produced.[3] So a person thrown from a bridge into a rapid river may be able to swim, and if in full possession of his faculties to save himself; but if in the confusion and terror of the moment he loses his self-command and is drowned, the person throwing him in the water is liable.[4] So, if a person who has his clothes taken from him on a cold night is so numbed and enfeebled that he cannot seek refuge, and hence is frozen to death, the assailant is as liable for this death through freezing as he would be if the deceased had been tied to a stake in the open air in such a way that escape was impossible.[5]

§ 95. *Persons acting precipitately and under unusual excitement.* — More difficult questions arise when an injury is produced by persons acting precipitately and under excitement, which precipitation and excitement were caused by the negligent act of the defendant. In the leading case on this subject,[6] the evidence was that the defendant, on the evening of the fair day at Melbourne Port, October 28, 1770, "threw a lighted squib made of

v. Boxford, 10 Allen, 25; Babson *v.* Rockport, 101 Mass. 93; Lund *v.* Tyngsborough, 11 Cush. 563; Indianopolis R. R. *v.* Carr, 35 Ind. 510; Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 47; Snow *v.* Housatonic Co. 8 Allen, 441; Reed *v.* Northfield, 13 Pick. 98, and cases cited infra, § 304.

[1] See R. *v.* Pitts, C. & M. 284; Frink *v.* Potter, 17 Ill. 406; Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 47; Snow *v.* Housatonic R. R. 8 Allen, 441; R. *v.* Williamson, 1 Cox C. C. 97; and cases cited infra, § 218, 219, 304.

[2] Wh. C. L. § 941 *a*.

[3] Vanderburg *v.* Truax, 9 Denio, 467.

[4] L. 5. § 7. D. ad Leg. Aquil.

[5] L. 14. § 1. D. 19. 5.

[6] Scott *v.* Shepherd, 2 W. Blacks. 892; 1 Smith's Leading Cases, 549, 7th Am. ed. 755.

gunpowder, from the street into the market-house, which is a covered building supported by arches, and inclosed at one end, but open at the other, and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis, *instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib, from off the said standing, and threw it across the said market-house, where it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing struck the plaintiff, then in the said market-house, in the face therewith,* and the combustible matter then bursting, put out one of the plaintiff's eyes." That there was a causal connection between the defendant's act and the plaintiff's hurt was apparently conceded in the argument. The only question that arose was as to whether the proper remedy was trespass. The majority of the court held that trespass would lie. "It is like," said Nares, J., "the case of a mad ox turned loose in a crowd. The person who turns him loose is liable in trespass for whatever mischief he may do." Blackstone, J., argued that the damage was consequential, and therefore case was the remedy, if there was any. But he went beyond this. "The tortious act," he said, "was complete when the squib lay at rest upon Yates's stall. He, or any by-stander, had, I allow, a right to protect themselves by removing the squib, but *should have taken care to do it in such a manner as not to endanger others.* . . . . This differs from the cases of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. *It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still: yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower.* No doubt but Yates may maintain trespass against Shepherd, and according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act; nay, it may be extended *ad infinitum.* If a man tosses a foot-ball into the street, and after be-

ing kicked about by one hundred people, it at last breaks a tradesman's window, shall he have trespass against the man that first produced it? Surely only against the man that gave it that mischievous direction. But if it is said Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether *case* would lie against Shepherd for the *consequential* damage; though, as at present advised, I think upon the circumstances it would. But I think in strictness of law trespass would lie against Ryal the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act." Gould, J., and De Grey, C. J., agreed with Nares, J. De Grey, C. J., said: "I agree with my brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident, as in the case cited for cutting thorns, lopping off a tree, shooting at a mark, defending one's self by a stick which strikes another behind, &c. They may also not lie for the consequence even of illegal acts, as that of casting a log into the highway, &c. *But the true question is, whether the injury is the direct and immediate act of the defendant, and I am of opinion that in this case it is.* The throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it. . . . . And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter. Fost. 261. So too in 1 Ventr. 295; a person breaking a horse in Lincoln's Inn Fields hurt a man; held that trespass lay; in 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequently to the original throwing as a continuation of the first force and first act, which will continue

till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable. The blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95, *a*, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act needs not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation." It is clear, therefore, that the defendant was held liable on the ground that the intermediate parties by whom the squib was passed on acted without mischievous design, in sudden terror, the object being to rid themselves as quickly as possible of a dangerous missile which might the next moment explode.

But this exception was perilously extended in New York in a case[1] in which the evidence was that the defendant, who had gone up in a balloon, alighted in the plaintiff's garden. A number of persons hearing his cries, and seeing this remarkable descent, rushed into the garden and injured it. The defendant was held by the court to be liable for the injury done to the garden. Undoubtedly if negligence was imputable to the balloonist; and if it could be shown that on his descent he was in such extreme danger that, from instinctive humane impulse, persons passing by rushed in precipitately in order to save him, no opportunity being given to them for reflection, he might be viewed as the juridical cause of the damage inflicted by them on the garden, they being regarded as unconscious agents. But if they entered from curiosity, and trampled down fence, walks, and plants, simply to be in at a sight, not only were they themselves liable directly to the plaintiff for their inconsiderate and negligent act, but the balloonist's negligence, on principles presently to be vindicated, was not the juridical cause of the damage inflicted directly by these intruders.[2]

§ 96. Hence, rejecting the conclusion reached in New York in the case just mentioned, we must accept that of the supreme court of Pennsylvania, in a suit[3] where the evidence was that the

[1] Guille *v.* Swan, 19 Johns. 380.

[2] See infra, § 304.

[3] Fairbanks *v.* Kerr, 70 Penn. St. 86.

defendant mounted a pile of flag-stones in a street to make a public speech, and a crowd of hearers gathered about him, some of whom also got on the stones and broke them, and where it was ruled by the court that the speaker was not liable, as a matter of law, for the breaking of the stones by the by-standers.[1]

[1] "The court below," said Agnew, J., "held that if the persons, whose combined weight broke down the stones, were collected together by the act of the defendant in making the speech in the street, he would be responsible in an action on the case for the consequential damages. This instruction was not qualified. The court told the jury that a proximate cause is one which is a first and direct power producing the result, and a remote cause is one removed from the direct, and may be called the secondary cause; but said nothing upon the character of the act which caused the injury, and gave no instruction to ascertain whether this act was a natural or probable consequence of making the speech in the street, or one which might have been readily foreseen by the defendant. In effect, such an unqualified instruction would expose the defendant to all the consequences of his street speech, — the accidental and even the wilful acts of the by-standers gathered there by it, as well as the natural and probable consequences which he might have foreseen. Thus, if one of the crowd should by accident thrust his elbow through a window-pane, or inadvertently tread upon and break an article of show beside a door, or even if one had his pocket picked, the unfortunate speaker would be held liable for all these consequences of his speech. The court, therefore, really decided as a question of law, a matter of fact properly belonging to the jury, to wit: that the mounting of the pile of stones by the by-standers was the natural and probable consequence of the speech in the street, which the defendant ought to have, or might have, foreseen. This was an error: the question was a fact dependent on all the circumstances. For example, had the second pile been two hundred feet or a square away from the speaker, no one could say that by any fair reasoning he might have expected such an accident to happen. The maxim, *causa proxima non remota spectatur*, governs cases of this kind, and yet its application is not always easy. Many cases illustrate, but none define, what is an immediate or what is a remote cause. Indeed, such a cause seems to be incapable of any strict definition which will suit in every case. It was said in Morrison *v.* Davis & Co. 8 Harris, 171, the general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast, and not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature. Of the first branch of this proposition, Scott *v.* Hunter, 10 Wright, 192, is an illustration. Therefore a defendant who unnecessarily occupied the passage-way to the locks of one of the dams of the Monongahela slackwater, from the afternoon of one day till the afternoon of the following day, holding the boats of the plaintiff into the stream, while it was rising rapidly, until the flood carried them over the dam, was held to be liable for the injury. The court below thought the flood was the proxi-

V. ORDINARY NATURAL SEQUENCE.

§ 97. *Mechanical sequences.* — The injury must proceed in ordinary natural sequence from the neglect. As "natural sequences," we may regard, —

mate cause of the injury, and the occupancy of the access to the locks by the defendant was too remote; but this court reversed the judgment. The question, whether the defendant ought not to have apprehended the danger to the plaintiff's boats when the stream was rising rapidly, was not submitted to the jury; and hence, said Mr. Justice Strong, here, we think, the court erred in assuming to decide as a matter of law that the wreck of the boats was not the natural consequence of the wrongful act of the defendant in blocking up the locks and channel of the river, and holding the boats of the plaintiff so long exposed to the force of the current. It was a *natural* consequence, he says, *if it should have been foreseen*, or if it would have been guarded against by men of ordinary prudence, using their own rights with proper regards to those of others.

"On the other hand, Morrison *v.* Davis & Co. supra, is an illustration of the second branch of the proposition. There the accident happened in consequence of the boat being overtaken and sunk by an extraordinary flood at Piper's Dam, on the Juniata, but which the boat would have passed safely had it not been delayed by the defendants using a lame horse.

"This court held that the proximate cause destroying the boat and cargo was the flood, and that the use of the lame horse, which led to the unforeseen conjunction of the happening of the flood and of the boat's being at the dam at the same time, was too remote a cause to create a liability for the loss of the plaintiff's goods. Doubtless the delay produced by using the lame horse was a cause of the accident; but it was not a probable cause, for it could not be foreseen that it would unite with the flood at a place of danger to produce it.

"In McGrew *v.* Stone, 3 P. F. Smith, 441, it was said by myself, as the result of the cases, that the maxim, *causa proxima non remota spectatur*, means but this: We are not to link together, as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury; but we are not justly called to suffer for it, unless the other event was the effect of our act, or was within the probable range of ordinary circumspection, when engaged in the act. But when we are engaged in an act which the surrounding circumstances indicate may be dangerous to others or their interests, and when the event whose concurrence is necessary to make our act injurious is one we can readily see may occur under the circumstances, and unite with the act to inflict an injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury.

"This subject of near and remote consequences has been largely discussed by the present Chief Justice in

1. *Those sequences which are in conformity with well known material forces.* — Among these we may mention the following: The gate of a dam is negligently left open, and the water pours out during the night and floods a meadow. Here the flooding of the meadow is the result of the well known material law that water will descend from a higher to a lower level. A person who meddles with water under these circumstances is presumed to know this law, and is responsible for mischief accruing through his negligence.[1] The switch of a railroad is negligently left open in front of an approaching train. That the train, on reaching the switch, should be deflected by this check from its course, is also in obedience to a well known material law; and hence the negligent switch-tender, who ought to know this law, is liable for the consequences of his neglect.[2] A fire is kindled in a field in a strong

the recent case of Pennsylvania Railroad Co. *v.* Kerr, 12 P. F. Smith, 353. It is certain, he says, that in almost every considerable disaster, the result of human agency and dereliction of duty, a train of consequences generally ensues, and so ramify as more or less to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. In that case the railroad company was held not to be responsible for the ulterior consequences to other houses caused by the negligent burning of a warehouse on the line of their road from the sparks of one of their engines. In Fleming *v.* Beck, 12 Wright, 313, remarks pertinent to this subject may be found. Among other things it was there said, that in strict logic it may be said that he who is the cause of loss should be answerable for all losses which flow from his causation. But in the practical workings of society the law finds in this, as in a variety of other matters, that the rule of logic is impracticable and unjust. It is impossible to compensate for all losses, and the law, therefore, aims at a just discrimination which will impose upon the party causing them the proportion that a proper view of his acts and the attending circumstances would dictate.

"In view of these principles it would be difficult to decide, as a legal conclusion, that the defendant is liable for the breaking of the stones in question by the by-standers. It cannot be said with *judicial* certainty, that when he stopped to make his speech in the street he must have foreseen, as the natural and probable consequence of his act, the persons collecting together to listen to him would mount the pile of stones; and even, if some of them would, that so many would as by their collected weight might break some of the stones. The lowermost stones in the pile were already trusted by the plaintiff with the weight of the uppermost. Height of pile, strength of grain, distance from the speaker, number of by-standers, and perhaps other circumstances, all would enter into the question of the probability of the injury. The question was, therefore, one of fact for the jury, and not of law for the court."

[1] See Collins *v.* Middle Level Commis., L. R. 4 C. P. 279. Infra, § 934.

[2] Infra, § 802.

wind. The field is covered with thick dry grass which extends to a neighboring cottage. The fire thus kindled, no effort being made to check it, runs along the grass until the cottage is fired. He who negligently makes or negligently tends this fire is liable for the burning of the cottage, because it is a material law, of which he is presumed to be cognizant, that fire when applied to inflammable matter will spread.[1]

§ 98. It is unnecessary at this point to treat concretely propositions which will be examined in such full detail when we come to discuss the principle that no one is to use a material agency in such a way as to inflict an injury on another.[2] One or two specific illustrations, however, may be here not inappropriately introduced. The first is an interesting English case,[3] where the evidence showed that in an exceptionally dry season the employees of a railway company, in cutting grass and trimming the hedges bordering the track, placed the trimmings in heaps near the line and allowed them to remain there fourteen days, forming a sort of tinder. Sparks from a passing engine set fire to one of these heaps, and the fire was thence carried by a high wind across a stubble-field and a public road, and burned the goods of the plaintiff in a cottage about two hundred yards from the railway. It was held by two judges out of three in the common pleas (Bovill and Keating, JJ., against Brett, J.), that there was evidence to go to a jury of actionable negligence on the part of the company, and this judgment was affirmed by the exchequer chamber. Cases of this kind will hereafter be discussed at large.[4] It is enough to say, that where a heap of inflammable material is left without guard in a position in which, in the ordinary course of nature, it will be visited by a high wind, the person guilty of this negligence is liable for the damage thereby immediately produced. This is affirmed in a well known opinion of a great Roman jurist, elsewhere cited.[5] And this conclusion, philosophical and just in itself, is sustained by a long train of decisions in our Anglo-American courts.

§ 98 *a*. *Cutting off water which would extinguish a fire.* — So it is a natural tendency of fire to spread, and of water to put out

[1] Infra, § 865. See Cleland *v.* Thornton, 43 Cal. 439.

[2] See supra, § 12; infra, § 851.

[3] Smith *v.* London & S. W. Ry., L. R. 5 C. P. 98.

[4] Infra, § 868–878.

[5] See supra, § 12; infra, § 865.

fire; hence, he who intercepts a stream of water which is in the process of putting out a fire is liable for the spread of the fire.[1]

§ 99. *Collisions injuring carriages.* — So it is an ordinary law of mechanics that carriages should gradually, and yet imperceptibly become weakened, and that this weakness should first disclose itself upon striking a defect on a highway. Hence the road-maker must be held to contemplate such latent defects, and hence a town cannot relieve itself from liability for damage to a carriage from striking a defect which was negligently permitted, by showing that the carriage was itself defective, provided the defect was not known to the plaintiff, or caused by his negligence.[2]

§ 100. 2. *Natural and probable habits of animals.* — So we are bound to presume that animals will act in conformity with their natural and probable habits; and if I negligently do or omit something with regard to an animal, which, supposing him to follow his natural and probable habits, leads him either to hurt himself or others, I am liable for the hurt.

Letting loose dogs addicted to worrying. — Hence, in the ordinary case to be hereafter more fully considered, if I own a dog accustomed to worry sheep, and negligently let him loose in a place where he can reach sheep, I am liable for the injury done by him.[3]

§ 101. *Permitting cattle to stray.* — So of cattle whose tendency is to stray. If I negligently let down a fence by which cattle are confined, so that they wander at large, I am liable for the damage sustained by them or the damage they perpetrate. Of this a pointed illustration is found in an English case decided in 1873.[4] The plaintiff owned two cows which were inclosed in his field adjoining the defendant's woodland. The two fields

[1] Metallic Comp. Cast. Co. *v.* Fitchburg R. R. 109 Mass. 277; 1 Am. Law T. R. (N. S.) 135; infra, § 793. In Mott *v.* Hudson Riv. R. R. 1 Robertson (N. Y.), 585, it was held that the mere appearance of a fire consuming buildings in the vicinity of but some distance from a railway track, the display of a red light on the track, and requests by firemen to those in charge of a train to stop it, *without giving any reason for stopping*, do not make it the duty of the engineer to stop, so as to make the company liable for damages caused by the cutting of the hose.

[2] Palmer *v.* Andover, 2 Cush. 601; Russell *v.* Lowell, 7 Gray, 102; Fletcher *v.* Barnet, 43 Vt. 192; infra, § 987.

[3] See infra, § 908.

[4] Lawrence *v.* Jenkins, L. R. 8 Q. B. 274.

were separated by a fence which it was the defendant's duty to maintain. The defendant sold certain trees to a man named Higgins, who, in felling them, broke down the fence. The cows strayed through the aperture, and ate, on the defendant's ground, the foliage of a laurel tree which Higgins had cut down. It being the duty of the defendant to keep the fence in order, and it being the natural habit of cows to stray, he was held liable for any damage that accrued through their straying. The damage they sustained was a natural consequence of their straying; and the law, as will be seen, would have been the same if in straying they had collided with a railroad train.

§ 102. Nor does it alter the case that such collision does not follow immediately in point of time the straying of the animals. Thus, the fact that after escaping from its pasture, through defects in a fence a railroad was bound to keep in order, an ox wandered for some time before it passed upon the railroad track, does not relieve the railroad from liability on the ground that the wandering of the ox, and not the defect in the fence, was the proximate cause.[1]

§ 103. *Horses taking fright on a public road which has in it defects against which, in their fright, they strike.* — Suppose a road which the town authorities are bound to keep in repair has defects against which a frightened horse strikes, from which, if he were not frightened, he could have been safely guided by his driver; is the town liable for damages so caused? This may be a difficult question, for its decision depends upon whether the horse's fright was a natural and probable incident of travel, and whether the defect was outside of the beaten track to which a horse can be ordinarily confined. The town authorities are only bound to provide against defects which, according to the ordinary laws of travel, would naturally and probably produce injury to travellers. Is it in conformity with the laws of travel that horses should ordinarily take fright; or, in other words, should a horse which is ordinarily accustomed to take fright, be driven?[2] Here we encounter an alternative which, in either phase, precludes the plaintiff's recovery. Either the horse is accustomed to take fright when driven, or he is not. If he is accustomed so to take fright, then his owner

[1] Gilman *v.* Europ. & N. A. R. R. 60 Me. 235. See Vicars *v.* Wilcox, 8 East, 1.

[2] See infra, § 835, 983.

is precluded from recovering, on the ground that in driving on a public road an unruly horse, with whose character it is his duty to be acquainted, he is himself guilty of a contributory negligence. If, on the other hand, the horse is not accustomed to take fright, then we have a right to infer that his fright at the time of the accident is extraordinary and exceptional, and as such, is a *casus* against which the town authorities are not required to guard.[1]

§ 104. But this mode of reasoning is inapplicable if the evidence is that the horse, being driven with due care, simply shies to an extent common and probable among horses, and that when shying he deflects a few feet from the beaten track and then strikes against a defect and is hurt. In this case, as the shying is part of the natural and probable habits of horses, and does not, when only producing a slight change of course, make the horse unfit for use in a public road, the road-making authorities are liable for the consequences. They are bound to keep at least as much of the road in repair as is necessary to allow for slight deflections of this class.[2] A safe track must be made wide enough to enable such ordinary starts and consequent deviations to take place with safety; and if the track is not wide enough for this purpose, and a horse, in starting, strikes against a defect within what should be such limits, the town is liable.[3]

§ 105. On the other hand, when a horse becomes violently and extraordinarily unmanageable, so as to dash out of such beaten track on the edges of the road, this is one of those extraordinary incidents of travel not in the contemplation of the road-builder, and for the consequences of which the town is not responsible. The town is bound to keep a road fit to be travelled by horses according to the ordinary usage of travel, and wide enough for the ordinary shyings and frights of horses; but to require a road to be so built as to present no defects which would damage a runaway horse would throw on the town an intolerable burden, and revive the exploded[4] and absurd doctrine of *culpa levissima*.[5]

[1] See Davis *v.* Dudley, 4 Allen, 557; Murdock *v.* Warwick, 4 Gray, 478; Sneesby *v.* Lancashire & Y. R. R., L. R. 9 Q. B. 263; Hill *v.* New River Co. 2 Y. & J. 391; Lawrence *v.* Jenkins, L. R. 8 Q. B. 274; infra, § 983.

[2] Houfe *v.* Fulton, 29 Wisc. 296; Stone *v.* Hubbardstown, 100 Mass. 50; infra, § 983.

[3] Kelley *v.* Fond du Lac, 31 Wisc. 180. See infra, note 5, where this case is quoted at large.

[4] See supra, § 97.

[5] See Marble *v.* Worcester, 4 Gray, 397; Davis *v.* Dudley, 4 Allen, 557;

§ 106. *Horse switching his tail over the reins.* — It has been held in Massachusetts that the liability of a town for injuries resulting

Titus *v.* Northbridge, 97 Mass. 258. The authorities are so numerous, and discuss the question from such various standpoints, that I do not attempt to classify them. It may be generally said, that the results in New Hampshire and Vermont do not materially differ from those reached in the text. Winship *v.* Enfield, 2 N. H. 197; Clark *v.* Barrington, 41 N. H. 44; Tucker *v.* Henniker, 41 N. H. 317; Norris *v.* Litchfield, 35 N. H. 276; Hunt *v.* Pownal, 9 Vt. 411; Kelsey *v.* Glover, 15 Vt. 708; Allen *v.* Hancock, 16 Vt. 230. In Maine the decisions tend to establish a freedom from liability in cases where the defect in the road could have been avoided had the horse not taken fright. Moore *v.* Abbott, 32 Me. 46; Coombs *v.* Topsham, 38 Me. 204; Anderson *v.* Bath, 42 Me. 346; Moulton *v.* Sanford, 51 Me. 303.

In Pennsylvania the rule laid down in the text is unhesitatingly applied. Thus, in Lower Marion T. *v.* Merkhoffer, 71 Penn. St. 276, the court said: —

"It was not a defence to the township to show that by careful driving accident might have been avoided at the place in question. That would fall far short of what is the purpose of a public highway. It must be kept in such repair that even skittish animals may be employed without risk of danger on it, by reason of the condition of the road. The law provides the means for repairing the roads, and if it be not done, and injury ensue, it would be wrong that individuals should suffer for the default of the public officers."

In Houfe *v.* Fulton, 29 Wisc. 296, the cases are thus ably discussed by Dixon, C. J.: —

. . . . "In Massachusetts there seems to be some conflict of decision upon the point. In Palmer *v.* Andover, 2 Cush. 601, it was ruled, as in the cases last above cited, that a town is liable for an injury occasioned by a defect in the highway, where the primary cause of the injury is a pure accident; as, for example, the failure of some part of a carriage or harness; provided the accident occurred without the fault or negligence of the party injured, and be one which common prudence and sagacity could not have foreseen and guarded against; and provided, also, that the injury would not have been sustained but for the defect in the highway. The decision in that case has never, to our knowledge, been formally overruled by the court in which it was made, although it seems to have been considerably shaken by the language employed in some subsequent cases; whilst in others, still later, we find it referred to with apparent approbation and acquiescence. We regard it as still correctly expressing the rule of law in that state, in cases of the kind, though it has frequently been necessary to distinguish it. The language of Chief Justice Shaw in Murdock *v.* Warwick, 4 Gray, 180, and again in Marble *v.* Worcester, Ibid. 397, 401, 402, sounds very like overruling it; but afterwards, in Rowell *v.* Lowell, 7 Gray, 102, the decision was directly approved; and so, too, we understand the reference in Titus *v.* Northbridge, 97 Mass. 264, 265.

"The limitation put upon it in the last two cases, and which was indeed plainly implied from the case itself, was, that the contributing cause must be 'a pure accident;' by which is meant some unexpected occurrence or

from a defect in a highway is diverted by the fact that the defect could have been avoided had it not been that the plaintiff's horse,

event for which no person is responsible, or which cannot be attributed to any unlawful or negligent acts of omission or commission, either on the part of plaintiff or of any third party. Thus explained and applied, we understand Palmer *v.* Andover to be the law of Massachusetts at the present day; and, save only in cases where horses become unmanageable, though without any fault or negligence on the part of the plaintiff or the driver, unless such condition is caused by a defect in the highway, as when they become so by reason of fright not produced by something unlawfully or improperly left in the highway, or by reason of disease or viciousness, so that the driver cannot stop them, or direct their course, or exercise or regain control over their movements, and in that condition they come upon a defect in the highway, and an injury ensues; we understand, also, that the general principles laid down in the same case are still the governing ones in actions of the kind in that state. Those principles, it is said in the opinion, 'require nothing further of the plaintiff than to prove ordinary care and diligence on his part in all that appertains to himself and his manner of travelling, at the time of receiving the injury; that the road was defective and out of repair, so much so and for such a length of time as to show the town in legal fault as to such defect; and the further fact that the injury would not have been sustained, if the town had not so permitted their road to be out of repair.'

"The only exception to the principles thus laid down, as yet to be found in the reported cases, is that above noted, where horses become unmanageable in the manner and for the causes stated; and in such cases it has been frequently decided that there can be no recovery against the town, although the plaintiff or the driver was in no fault. Marble *v.* Worcester, supra; Davis *v.* Dudley, 4 Allen, 577; Titus *v.* Northbridge, 97 Mass. 258; Horton *v.* Taunton, Ibid. 266, note; Fogg *v.* Nahant, 98 Mass. 578. Some of these cases seem to go upon the principle, that the horses being actually uncontrollable, the plaintiff is unable to show the exercise of ordinary care, or of any care at the time of the injury, in order to avoid it. Others say that the flight or unmanageableness of the horses is the misfortune of the traveller, of which he must bear the loss. A better reason would seem to be, that it is not within the spirit or intent of the statute that the towns shall be bound to provide roads that shall be safe for frightened and runaway horses; that the remedy is presumed to have been given only to those who have their carriages and horses under their control at the time. But, whatever the true ground of such decisions may be, or whether they are sound or not, it is unnecessary to inquire here, since a recognized exception to them is, that a horse is not to be considered uncontrollable that merely shies, or starts, or is momentarily not controlled by his driver. Titus *v.* Northbridge. Such was the fact in the present case. The horse, if beyond the control of the driver, was so but for a moment. Instantly, upon stopping, the fall or plunge was made, and the plaintiff carried over and down upon the ice, the driver barely having had time to save himself by catching upon the edge of the bridge. The case does not fall within the rule of any of those last above

by throwing his tail over the reins, freed himself from his driver's control, and thus precipitated the carriage against the defect.[1]

decided, but is clearly within the exception." . . . .

In a subsequent case (Kelley *v.* Fond du Lac, 30 Wis. 180), it was ruled that, —

"If an accident, causing injury to a team, or vehicle, or person travelling therewith, results from the fact that such team is at the time in a state of fright, or not under the driver's control, the town will be liable if such condition of the team is itself caused by some defect in the highway; but not otherwise.

"Where a team, having broken away from the vehicle to which it had been attached, and from the driver's control, and being in a state of fright, dashed against trees standing in the highway, and one of the horses was killed, if it appears, in an action for such damage, that the fright and flight of the team were caused by a defect in the highway (the plaintiff not being in fault), the question whether the presence of such trees in the highway *was also a defect* is immaterial.

"Dixon, C. J. . . . . In the recent case of Houfe *v.* The Town of Fulton, 29 Wisc. 296, this court had occasion to examine the Massachusetts and other authorities upon which counsel rely in support of the first point, and also to consider the question whether the defect in the highway must be the *sole* cause of the injury. We there stated, as the result of our examination, that the fright or uncontrollableness of the team, to constitute a defence for the town, must be such as is not produced by a defect in the highway itself, or the presence of any object within it which the town, in the exercise of reasonable care and prudence, is bound to remove, on account of its natural tendency to frighten horses, and thus cause mischief and injury to travellers. We believe we were correct in this statement of the principle governing the Massachusetts decisions; but whether we were precisely so or not, we are certainly not disposed to go further in the application of it. If without negligence or with no want of ordinary care on the part of the driver, who is a safe and competent person to have the management of a team, it becomes frightened and unmanageable, or escapes from his control by reason of any defect in the highway, and, under the fright or impulse so caused or given, runs away and injures or destroys itself or the carriage or vehicle, or injures the person of the driver or other person travelling with him, in that case it is the opinion of this court that the town is liable, and must respond in damages for the injuries so caused and sustained. It was expressly so adjudged with respect to an object within the limits of the highway, but outside the travelled part, which was naturally calculated to frighten horses of ordinary gentleness, in the case of Foshay *v.* Glen Haven, 25 Wisc. 288, following the case of Morse *v.* Richmond, 41 Vt. 435, and authorities there cited. If fright and injury from such a defect be actionable against the town, it is scarcely necessary to remark that fright and injury from any other defect calculated to produce them, and which does produce them, if the jury shall so find, like the pitch-hole in

[1] Fogg *v.* Nahant, 98 Mass. 578; *S. P.* 106 Mass. 278. See Titus *v.* Northbridge, 97 Mass. 258; Davis *v.* Dudley, 4 Allen, 557.

But is the switching by a horse of his tail over the reins one of those extremely unlikely and abnormal acts which are called the acts of God, and which ordinary sagacity cannot foresee? The bites of flies, at certain periods of the year, are apt to produce this switching, even with the quietest horses; yet we can hardly view such bites as such unique casualties as to be outside of the ordinary incidents of travel. If within the ordinary range of travel, then they are contingencies for which the road-maker should provide.

Horse becoming lame. — So, also, a person is not charged with contributory negligence from his horse becoming lame, when this is an ordinary incident of travel.[1]

§ 107. *Frightening horses on public road.* — Certainly it will not be maintained that it is an unusual and unnatural thing for horses, when travelling on a road, to be frightened by extraordinary noises or sights. He, therefore, who, on a road travelled by horses, makes such noises or exhibits such spectacles, is liable for any damage caused by a horse taking fright.[2] This rule has been applied to protect the public using a road from the effect of a jet

the present case, will also be actionable.

"And as to the other point, that the trees standing in the highway were the remote cause of the injury complained of, enough has already been said to show, if they were so, that the town must still be held liable in case the jury shall find that the escape of the horses was caused by the defect in the highway at the place of such escape. In that case, such defect in the highway is to be regarded as the proximate and continuing cause of the injury, which was all one cause or event from the time the horses took fright and escaped until one of them was killed, with no new or other independent and sufficient cause intervening to which the injury could be attributed. In this view, the defect in the road at the place of escape, being found by the jury to have been the cause of the escape and consequent injury, is to be deemed the primary and only efficient cause, and the trees, whether negligently left standing within the limits of the highway or not, are not in any proper sense to be looked upon as a cause. Upon this subject the case of Hodge *v.* Bennington, 43 Vt. 451, will be found in point, that the descent into the pitch-hole, the hitting of the load of wood against the heels of the horses, their fright, jerking, and breaking away, and running and collision with the trees, whereby one was killed, though made up of parts and embracing many incidents, are nevertheless to be considered as essentially but one occurrence or transaction, constituting a single and individual cause of action." See infra. § 968.

As to fright of horses under such circumstances, see fully infra, § 983.

[1] Morrison *v.* Davis, 8 Harris (Pa.), 171.

[2] See fully infra, § 835.

of water likely to frighten horses coming along it, the jet of water being caused by the defendants, the New River Company, in the exercise of their statutory powers;[1] and to make a town liable for objects left on a road having a like tendency to frighten horses.[2]

§ 108. 3. *Natural and probable habits of men acting in masses.* — It is not natural or usual that at a particular moment in each day, and by a particular individual, a letter without address should be dropped in a post-office; but it is natural and usual that in a particular month, at a particular office, a number of unaddressed letters should be posted bearing a proportion generally constant to the whole amount of posted letters. It is not natural or usual that at a particular moment a particular person should pass at a particular point in a thoroughfare in which there is danger; but it is natural and usual that in the course of a week one or more persons should pass the particular point and be exposed to the particular danger. Men, moving in masses, act in obedience to general laws which can be predicted as to the mass, though not as to the individual member of the mass; and hence, wherever we may be able to say that men in masses will probably move in conformity with such laws, then, when as masses they so move, they do not interrupt causal connection.[3] If 1 negligently weaken, for instance, the foundations of a bridge over which a large population daily throngs, I cannot defend myself from an action for damages produced by my negligence on the ground that each particular individual should examine the bridge before stepping on it. If by a false alarm I cause the passengers of a crowded boat to rush over in a flock on one side, I cannot, if the boat is thus upset, excuse myself on the plea that the general alarm was foolish, and that each one should have inquired for himself. Or, to present the question in another aspect, when we inquire, in respect to negligence, what is that "regularity" and "naturalness" which are necessary incidents, as has been shown, of causal connection, we must apply the test, not to the particular indi-

[1] Hill *v.* New River Co., Q. B. 18 L. T. (N. S.) 555.

[2] Foshay *v.* Glen Haven, 25 Wisc. 288; Nourse *v.* Richmond, 41 Vt. 288. See infra, § 983. In Ohio & Miss. Ry. Co. *v.* Cole, 41 Ind. 331, it was, however, held, that to render a railroad company liable, under the statute, for animals killed or injured by its cars, locomotives, or other carriages, there must be actual collision of the cars, locomotives, or other carriages with such animals. This, however, as will be hereafter seen, is not good at common law.

[3] See infra, § 145.

vidual who may ultimately be injured, nor to the particular point of time in which the injury to him takes place, but to the adjacent population in the aggregate, and to the whole period of time over which the negligence immediately operates. If it is one of the incidents of society that a throng of people should pass a particular point, then I am liable if one person of this throng is injured by my placing a dangerous instrument at this point.[1]

§ 109. A man, for instance, to adopt a well known illustration from the Roman law, cuts off the bough of a tree that overhangs a public road in a populous neighborhood. Now, it is a law of society that in such a road there will be constant passing and repassing in proportion to the population; and he, therefore, who casts anything down on such road does so at his own risk; for he is either negligent in being ignorant of this law, or, when cognizant of it, he is negligent in letting the thing fall without giving notice. On the other hand, if the tree be in the centre of a large inclosed field, he has a right to assume, in accordance with an equally well known social law, that there will be no passing of travellers under the tree, even though he should be so covered up by the leaves that he cannot see what is going on underneath; and hence he will not be liable for damages sustained by the falling of a bough on a person of whose presence he is not conscious, but who is lounging under the tree. And so in an Arkansas case,[2] it was held that one who is hunting in a wilderness is not bound to anticipate the presence, within range of his shot, of another man, and that he is not liable for an injury caused unintentionally by him to a person of whose presence he is thus not to be expected to be aware.[3]

The general rule is thus stated: —

"Si putator ex arbore ramum cum dejiceret, vel machinarius hominem praetereuntem occidet, ita tenetur, si is in publicum decidat, nec ille proclamaverit, ut casus ejus evitari possit." [4]

Yet even here, if, in the most sequestered spot, there is a likelihood of some person being underneath the tree, who may be injured, he who is in the tree must take heed, and is liable if he acts in face of such probability.[5]

[1] See infra, § 145, 860.

[2] Bissell *v.* Booker, 16 Ark. 308.

[3] See also Driscoll *v.* The Newark & Rosendale Co. 37 N. Y. 637.

[4] L. 31. D. at Leg. Aquil. cited by Hasse, p. 68. See infra, § 145.

[5] See infra, § 112, 315, 344, 860.

"Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi: *culpam autem esse, cum quod a diligente provideri poterit non esse* provisum, aut tum denunciatum esset, cum periculum evitari non posset. Secundum quam rationem non multum refert, per publicum an per privatum iter fieret, cum plerumque per privata loca vulgo iter fiat. Quod si nullum iter erit, dolum duntaxet praestare debet, ne immittat in eum, quem viderit transeuntem, nam culpa ab eo exigenda non est, cum divinare non potuerit, an per eum locum aliquis transiturus sit."[1]

§ 110. So with regard to games. In games which are public exercises of strength, bodily hurt may be inflicted; but such hurt does not bring liability if the party inflicting it act in good faith according to the rules of the game. Thus it was *casus* when in the old Roman game of ball, a person was struck by the glancing of a ball thrown according to the ordinary usage of the game. Yet it was otherwise when the rules of the game were negligently transcended, so that injury was inflicted on those who were governing themselves by such rules.[2] So injuries *bonâ fide* inflicted in a public wrestling match were not the subject of suit, on the principle that no liability attaches to the regular and natural consequences of that which the law allows.[3] But if a new and dangerous game, whose character is unknown to third parties, is introduced, and as a consequence of this game injury is inflicted, the introducer of the game is liable for such injury, unless an independent disturbing will is interposed: "*Lusus quoque noxius in culpa est.*" It is a natural social consequence of such a game (*e. g.* a game involving the dangerous use of fire on a thoroughfare), that a crowd should collect, and that in this crowd some one should be hurt. Hence for this consequence the introducer of the game is liable.

So as to exercise in shooting.[4] If this be done by soldiers in a camp, where such shooting is customary, then there is no liability if a person passing in the neighborhood is accidentally hit. But a person who shoots at a thoroughfare, without notice, he not being required by official duty to shoot, is liable for the consequences arising if a person passing on the thoroughfare is hit.

[1] L. 31. D. Leg. Aquil. *ut sup.*

[2] See L. 52. § 4. D. ad leg. Aquil. 9. 2.

[3] L. 10. L. 7. § 4. D. eod.

[4] See People *v.* Fuller, 2 Parker C. R. 16; Spades *v.* Com. 3 Bush, 111; State *v.* Vance, 17 Iowa, 138; Barton's case, 1 Stra. 481. Supra, § 109.

"Si quis, dum jaculis ludit vel exercitatur, transeuntem servum tuum trajecerit, distinguitur. Nam si id a milite in campo, eoque ubi solitum est exercitari, admissum est, nulla culpa ejus intelligitur; si alius tale quid admisit, culpae reus est. Idem juris est de milite, si in alio loco, quam qui exercitandis militibus destinatus est, id admisit." [1]

§ 111. So as to shooting at a mark. If this is done in an open field at a target, near or behind which no one at the time of shooting is seen, there is no negligence. But it is otherwise when the target is placed on a fence behind which is a public road.

§ 112. So with regard to leaving a dangerous instrument on the highway.[2] It is negligence to leave such an instrument on a place of public access, where persons are expected to be constantly passing and repassing, and where such persons are not required to be on their guard, or where children are accustomed to play; [3] but it is not negligence to leave such an instrument in a private inclosure, which, from its very privacy, excludes the public, and puts on their guard all who enter. In other words, to sum up the principle which these cases illustrate, if it appears that viewing men in the aggregate, according to the laws which control them when so massed, it is regular and natural that within a certain time certain injuries will flow from a particular negligence, then such injuries are imputable to such negligence.

§ 113. So as to the leaving of horses without an attendant. A horse may be so left in an inclosed field without liability, for it is not usual or natural for a throng of persons to pass through such a field. It is otherwise, however, in a public thoroughfare through which persons of all ages and capacities are constantly jostling, without opportunity of always seeing their way before them, or of being careful as to what they touch. Hence causal connection between negligence and damage is held to continue where a horse, being left without control on the public streets, is led by one child over another child who is hurt thereby; [4] and where a horse so left by himself is frightened by a passenger casually hustling it on the streets, and then inflicts injury on per-

[1] § 4. I. de Leg. Aquil. 4. 3. See infra, § 315, 344, 860.

[2] See infra, § 315–16, 344, 851, 860.

[3] See R. R. v. Stout, 17 Wall. 657.

[4] Lynch v. Nurdin, 1 Ad. & E. (N. S.) 29. Infra, § 904, 915.

sons or property.[1] With this may be associated cases where the negligence of the defendant, a carrier, is such, that collisions with third parties are to be expected as a natural consequence of such negligence in a crowded thoroughfare.[2]

§ 114. *Extraordinary interruptions of natural laws.* — Accident, or *casus*, is sometimes defined to be an extraordinary interruption of a natural law; sometimes the interposition of a condition not under ordinary circumstances to be expected.[3] For the consequences of such accident or *casus* responsibility does not attach to the party whose discharge of duty is in this way interrupted.[4]

Casus or accident, when thus consisting of an extraordinary interruption of natural laws, producing an event which ordinary prudence would not foresee, is sometimes called the act of God. The act of God signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may, indeed, be considered to mean something in opposition to the act of man, as storms, tempests, and lightning.[5] The above maxim, may, therefore, be paraphrased and explained as follows: It would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there has been no laches.[6]

Casus has been held to exist where the accident arises from foggy weather, or the removal of accustomed landmarks;[7] where a rat made a hole in a box where water was collected in an upper room, so that the water trickled out, and flowed upon defendant's goods in a lower room;[8] where an act of parliament

[1] McCahill *v.* Kipp, 2 E. D. Smith, 413. Infra, § 915.

[2] Peck *v.* Neil, 3 McL. 22; Eaton *v.* Boston & L. R. R. 11 Allen, 505; Lockhart *v.* Lichtenthaler, 46 Penn. St. 158. See Illidge *v.* Goodwin, 5 C. & P. 190. Infra. § 798.

[3] Pollock, C. B., in Rigby *v.* Hewitt, 5 Exch. 21; cited by Byles, J., in Hoey *v.* Felton, 11 C. B. N. S. 113, and Greenland *v.* Chaplin, Ibid. 248.

[4] See Wakeman *v.* Robinson, 1 Bing. 215; Hall *v.* Fearnley, 3 Q. B. 913.

[5] Per Lord Mansfield, C. J. — Forward *v.* Pittard, 1 T. R. 33; Bell, Dict. & Dig. of Scotch Law, p. 11; Trent Navigation *v.* Wood, 3 Esp. 131; Oakley *v.* Portsmouth & Ryde Steam Packet Co. 11 Exch. 618; Blyth *v.* Birmingham Water Works Co. 11 Exch. 781.

[6] 1 Rep. 97; Broom's Legal Maxims, 5th ed. p. 230.

[7] Crofts *v.* Waterhouse, 3 Bing. 319, 321.

[8] Carstairs *v.* Taylor, Law Rep. 6 Exch. 217.

directed a water company to lay down pipes with plugs in them as safety valves to prevent the bursting of the pipes, and the plugs were properly made and of proper material, and a severe frost occurring, the plugs were prevented from acting, and the pipes accordingly burst and flooded the plaintiff's cellar;[1] where a fall of snow prevented a traveller from discovering a defect in a road.[2] So, where a horse took fright without any default in the driver, or any defect in the harness, or there being any known propensity in the animal, and did damage to the plaintiff;[3] where a horse, in travelling a highway, was suddenly unmanageable at the smell of blood;[4] where a horse not known to be vicious by the defendant, who was riding on the horse, became restive and ungovernable, and ran upon the foot pavement and knocked down and killed the plaintiff's husband;[5] and where the defendant's horse, being frightened by the sudden noise of a butcher's cart which was driven furiously along the street, became unmanageable, and plunged the shaft of a gig into the breast of the plaintiff's horse,[6] — it was held that the action could not be supported. The same rule is applied where a mill-dam built on a proper model, and with the care good engineers in such matters are accustomed to use, is swept down by a freshet of unprecedented fierceness and volume.[7] So an unusual water-flood, of a character not to be foreseen, and preventing safe transportation, is an act of God which will be a defence, if there be no want of diligence in the carrier;[8] but not so with the falling of the tide, causing a vessel to strand, for this could have been foreseen and provided against.[9]

§ 115. So, in a case put in the Digest, the builder of a house, in excavating the cellar, piled up a heap of earth against an adjacent house. A rain storm of extraordinary continuance, *assiduis pluviis*, set in, which so saturated the heap that it communicated such dampness to the adjoining wall that the latter fell

[1] Blyth *v.* The Birmingham Water Co. 11 Ex. 781.

[2] Street *v.* Holyoke, 105 Mass. 82; Day *v.* Mitford, 3 Allen, 98.

[3] Aston *v.* Heaven, 2 Esp. 533.

[4] Jackson *v.* Belleview, 30 Wisc. 257.

[5] Hammack *v.* White, 11 Com. B. N. S. 588; 31 L. T. C. P. 129.

[6] Wakeman *v.* Robinson, 1 Bing. 213; 8 Moore, 63.

[7] Livingston *v.* Adams, 8 Cow. 175.

[8] Wallace *v.* Clayton, 42 Geo. 443; Angell on Carriers, 153.

[9] Bohannon *v.* Hammond, 42 Cal. 227.

in. Labeo decided that, on the ground of the extraordinary character of the rain, to which, and not to the heaping of the earth (which was a usual incident of building), the damage was attributable, no liability attached to the builder; *quia non ipsa congestio, sed humor ex ea congestione postea damno fuerit.* The extraordinary and unprecedented character of the rain is spoken of as something *extrinsecus*, breaking the causal connection. . . . . And of this decision Javolenus approves.[1] That this is based on the *casus* of the rain coming with such unusual quantity and persistence is shown by another passage, in which it is declared that when, *through defective water pipes laid down by another*, water reaches and saps my wall, such other person is liable for the damage done. "Si fistulae, per quas aquam ducas, aedibus meis applicatae damnum mihi dent, in factum actio mihi competit."[2] In the first case there was no liability, because the damage was done by an extraordinary condition extrinsic to the defendant's action; in the second case there was liability because the bursting of the pipe was a natural consequence of its defectiveness.

§ 116. *Relations of responsibility to casus.* — Responsibility (*imputatio*) ceases where accident (*casus fortuitus*, or simply *casus*) intervenes. If there is nothing to be imputed to the defendant, there is nothing with which he is chargeable. "Ac ne is quidem hac lege tenetur, qui casu occidit (the action being, in this case, for damages under the Aquilian law), si modo culpa ejus nulla inveniatur."[3] "In hac actione, quae ex hoc capitulo oritur, dolus et culpa punitur. Ideoque si quis in stipulam suam, vel spinam, comburendae ejus causa, ignem immiserit, et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit, *requiramus, num imperitia ejus aut negligentia id accidit.* Nam si die ventoso id fecit, culpae reus est; nam et qui occasionem praestat, damnum fecisse videtur. In eodem crimine est, et qui non observavit, ne ignis longius est procederit. *At si omnia quae oportuit, observavit, vel subita vis venti longius ignem produxit, caret culpa.*"[4] Here, where the amount of care is not graduated by a special obligation, the term *quae oportuit* indicates that *casus* excuses only when every reasonable precaution has been taken.

[1] L. 57. D. loc. 19. 2. See infra, § 927, 930.

[2] L. 18. D. de serv. praed. urb. 8. 2. Bar, *ut sup.* p. 130.

[3] § 3. L. de Leg. Aq.

[4] L. 39. § 3. D. de Leg. Aq.; Paulus, lib. 22. ad Ediet.

§ 117. Where, however, according to the Roman Law, does *imputatio* cease and *casus* begin? On this point we may again, even though at the risk of repetition, recur to a leading passage of the Digest already cited: "Si putator ex arbore ramum cum dejicerit, vel machinarius hominem praetereuntem occidit, ita tenetur, si is in publicum decidat, nec ille proclamaverit, ut casus ejus evitari possit. Sed Mucius etiam dixit, si in privato idem accidisset, posse de culpa agi; *culpam autem esse, cum quod a diligente provideri poterit, non esset provisum*, aut tum denunciatem esset, cum periculum evitari non posset. Secundum quam rationem non multum refert, per publicum an per privatum, iter fieret, cum plerumque per privata loca vulgo iter fiat. Quod si nullum iter erit, dolum duntaxit praestare debet, ne immittat in eum, quem viderit transeuntem, nam culpa ab eo exigenda non est, cum divinare non potuerit, an per eum locum aliquis transiturus sit." [1]

§ 118. In other words, Sabinus, where the bough of a tree or any other heavy article is dropped, makes a distinction between the dropping on a public or on a private place. But Mucius, and after him Paulus, held that this distinction does not settle the question of liability. That question depends upon *culpa*, and *culpa* here depends upon diligence. Could the danger, by a diligent man, have been averted? But what is *diligence?* Hasse, in his authoritative treatise on *Culpa*, gives the following answer: *Diligence exists when there is applied a degree of carefulness which is competent for the average human capacity.* We cannot say of one who is simply not of extraordinary diligence that he is undiligent or negligent. Preëminent diligence is only attainable in three ways: —

1. By the application of rare talents.

2. Through extraordinary sensibility, which scents out dangers which an ordinary man would not prognosticate, and which therefore avoids dangers which another would encounter.

3. When for a particular transaction is invoked an amount of human strength beyond what could be continuously and usually maintained.

§ 119. Another case which has been the subject of criticism is the following: —

"Cum pila complures luderent, quidam ex his servulum, cum pilam praecipere conaretur, impulit, servus cecidit, et crus fregit.

[1] L. 31. D. ad Leg. Aquil.; Paulus lib. 10 ad Sabinum.

Quaerebatur, an dominus servuli Lege Aquilia cum eo, cujus impulsu ceciderat, agere posset. Respondi, non posse, *cum casu magis quam culpa videretur factum*." [1] No doubt misfortunes such as those mentioned in the last extract could have been avoided by the exercise of the highest possible degree of care. But who can always remain in such a condition of mental tension as to insure such avoidance? Who particularly can maintain this tension while playing a game? Or how can we require from all men the quickness and keenness in the observing and avoiding of risks which are given to but few? Hence where we have no right to expect such extraordinary vigilance and acuteness, the result is attributed to *casus* or accident.

§ 120. With the last case is to be mentioned the following: "Impetu quoque mularum, quas mulio propter imperitiam retinere non potuit, si servus tuus oppressus fuerit, culpae reus est mulio. Sed et si propter infirmitatem eas retinere non potuerit, *cum alius firmior retinere eas potuisset* aeque culpa tenetur." [2]

And again: "Sed et si canis, cum duceretur ab aliquo, asperitate sua evaserit, et alicui damnum dederit, *si contineri firmius ab alio potuit*, vel si per eum locum induci non debuit, haec actio cessabit, et tenebitur qui canem tenebat." [3] In both these cases the party injuring was held liable for the injury when it appeared that another person would have acted more effectively, — a test applied to the contract of Commodatum, where the highest degree of diligence is required. Yet this highest degree of diligence, as has been already fully shown,[4] is simply that diligence which diligent men usually apply. Hence the law requires, even from specialists, nothing further than such diligence as is usually exercised by specialists in the particular specialty. Whatever passes beyond the range of such diligence belongs to that of *casus fortuitus*.[5]

[1] L. 52. § 4. D. ad Leg. Aquil. Alfenus, Lib. 2. Digest.

[2] § 8. 1. eod.

[3] L. 1. § 5. D. si quadrupes pauperiem: Ulpianus lib. 18 ad edictum.

[4] See supra, § 32, 46.

[5] *Casus*, we are told by Wening-Ingenheim, in his thoughtful treatise on Schadenersatze, includes, in the original sense of the word, something more than the German word Zufall, or accident, — *casus* sometimes including occurrence (Fall) as well as accident (Zufall). For this he cites Horat. II. Od. 10. v. 10. Epist. I. 19. 18. L. 4. D. de vulg. et pupill. subst. (28. 6); L. 64. § 9. solut. matr. (24. 3.) But in its usual signification, *casus*, he declares, includes every event (*factum*) which is independent of us, whether

§ 121. *Act of public enemy. Vis major.* — So also it is a defence, in cases of bailment, that the goods were forcibly taken or destroyed by a public enemy. But this defence will not avail, if the defendant did not employ due diligence to escape or repel the attack.[1]

§ 122. *Casus and vis major no defence to an action to return specific things or their equivalents.* — *Casus* and *vis major* are necessarily no defence to an action on an obligation to return things or their equivalents; for the destruction of the particular thing is no reason why its equivalent should not be presented. *Genus perire non censetur.* Hence no casualty can be set up to bar an obligation to pay a particular sum of money.[2] Yet at the same time, on an alternative obligation, it is admissible to defend by showing that all the articles alternatively specified in the obligation are casually destroyed.[3]

§ 123. *Provoked casus no defence.* — *Casus* and *vis major* are no defence when they were induced through a defendant's fault. The Roman law is clear to this point.[4] Thus, if a ship collides with another in port through the violence of the storm, no negligence being imputable, this is *casus;* but if a rope by which she

this independence exists because the event was out of natural sequence, or because we were not capable of averting it. The latter condition is often spoken of by the Romans as *vis major, damnum, fatale, casus majores, fortuna.* L. 2. § 7. de adm. rer. ad civ. pert. (50. 8); and other citations given by Wening-Ingenheim, § 56. They frequently, when the latter restricted meaning is intended, add *fortunitus* to *casus.* Const. 4. Cod. de inst. et sub. (6. 25); Const. 5 Cod. de pign. act. (4. 24); L. 6. D. de adm. et per. tut. (26. 7.)

Periculum. — *Periculum,* in the narrow sense of the word, includes accidental disasters which befall a person or thing, and of the person to whom they occur it is said *periculam praestat.* In its widest sense, *periculum* includes all risk, whether advantageous or disadvantageous. Sometimes it is used to express the condition of him who is bound to *custodia,* or to the absolute return of goods. L. 29. pr. de petit. heredit. (5. 3); L. 13. § 1. de liber. caus. (40. 12); L. 14. § 1. de per et commod. rei vend. (18. 6); L. 14. § 16. de furtis (47. 2); cited by Wening-Ingenheim, § 56, p. 116.

Periculum is divided into *periculum deteriorationis,* when only the quality of the article is affected, and *periculum interitus,* when the article is in substance destroyed.

[1] Holloday *v.* Kennard, 12 Wall. U. S. 254, and other cases cited infra, § 561.

[2] L. 11. C. se cert. pet. 4. 2.

[3] See passages cited in Baron, § 238.

[4] L. 22. D. de neg. g. 3. 5; L. 5. § 4; L. 18. D. comm. 13. 16; L. 10. § 1. De de L. Rhod. 14. 2; Baron, § 238.

is attached to a quay is negligently cut, so that she is driven from her moorings, and thus exposed, then the storm is no defence in a suit against those by whose negligence she is thus cast adrift.[1] The same point has been repeatedly made in our own courts.[2] Thus where a ship, becoming unmanageable through the negligence of the captain and crew at a point about three quarters of a mile from a lee shore, drifted ashore, and damaged the plaintiffs' sea-wall, the negligence was held the cause of the *casus*, and therefore the owners of the ship were held liable.[3]

§ 124. So in a case cited by Mr. Broom, in his Legal Maxims,[4] a policy of insurance on bags of coffee on a voyage from Rio to New Orleans and thence to New York, contained the following exception: "Warranted free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and *free from all consequences of hostilities*," &c. The insured ship, while on her voyage ran ashore, and was eventually lost south of Cape Hatteras. It appeared in evidence that at Cape Hatteras, until the secession of the Southern States of America, a light had always been maintained, and that the light had for hostile purposes been extinguished by the Confederates whilst in possession of the adjacent country. If the light had been maintained the ship might have been saved. Whilst she was ashore near the land a portion of the coffee was saved by certain officers acting on behalf of the Federal Government, and a further portion thereof might in like manner have been got ashore but for the interference of the Confederate troops, in consequence of which the entire residue of the cargo was wholly lost. The question upon the above facts arose, Had the goods insured, or any, and if so, what portion of them, been lost by the perils of the sea, or by perils from which they were by the policy warranted free? The court unanimously held that the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being saved, — the proximate cause of the loss being a peril of the sea; but that as to so much of the coffee as was got ashore, and as to so much as would have been saved but for the interference of the troops, this was a loss by a consequence of

[1] L. 29. § 2. D. ad Leg. Aq.

[2] See Seigel *v.* Eisen, 41 Cal. 109; infra, § 559.

[3] Bailiffs of Romney Marsh *v.* Trinity House, L. R. 5 Ex. 208.

[4] 5th ed. 219.

hostilities within the warranty, so that in respect of it the insurers were not liable.[1]

"The maxim, *causa proximo non remota spectatur*," remarked Erle, C. J., in delivering his judgment in the above case, "is particularly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now the relation of cause and effect is matter which cannot always be actually [accurately?] ascertained; but if, in the ordinary course of events, a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established. Was the putting out the light at Cape Hatteras so immediately connected with the loss of this ship as to make the one the consequence of the other? Can it be said that the absence of the light would have been followed by the loss of the ship if the captain had not been out of his reckoning? It seems to me that these two events are too distinctly connected with each other to stand in the relation of cause and effect. I will put an instance of what I conceive to be a 'consequence of hostilities' within the meaning of this policy. Suppose there was a hostile attempt to seize the ship, and the master, in seeking to escape capture, ran ashore, and the ship was lost? There the loss would be a loss by the consequences of hostilities within the terms of this exception. Or, suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay, where there is neither harbor nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind, and lost; that again would be a loss resulting from an attempt at capture, and would be within the exception. But I will suppose a third case: the ship, chased into a bay where she is unable to anchor or to make any harbor, and putting out again on a change of wind, but, in pursuing her voyage encountering a storm, which, but for the delay, she would have escaped, and being overwhelmed and lost; there, although it may be said that the loss never would have occurred but for the hostile attempt at seizure, and that the consequence of the attempt at seizure was the cause without which the loss would not have happened, yet the proximate cause

[1] Ionides *v.* Universal Marine Insurance Co. 14 C. B. N. S. 259, cited per Willes, J.; Marsden *v.* City & County Ass. Co., L. R. 1 C. P. 240; Lloyd *v.* General Iron Screw Collier Co. 3 H. & C. 284; Sully *v.* Duranty, Ibid. 270; Dent *v.* Smith, L. R. 4 Q. B. 414, is important in reference to this topic.

of loss would be the perils of the sea and not the attempt at seizure. Take another instance: the warranty extends to loss from all the consequences of hostilities. Assume that the vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel, in ignorance of the fact, enters this channel, and his ship is blown up; in that case the proximate cause of the loss would clearly be the consequences of hostilities, and so within the exception. *But suppose the master, being aware of the danger presented in the one channel, and in order to avoid it attempts to make the port by the other, and by unskilful navigation runs aground and is lost,* — in my opinion that would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities, but a loss by a peril of the sea, and covered by the policy."

§ 125. It may be therefore said that a party cannot excuse himself upon the plea of *casus*, where by his own negligence he has placed himself in a position which renders a collision unavoidable. He must exercise care and foresight to prevent reaching a point from which he is unable to extricate himself; and omitting these, the greatest vigilance and skill on his part subsequently, when the danger arises, will not avail him.[1] Thus, where an action was brought against the defendants, as carriers by water, for damage done to the cargo by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost; the court held that the plaintiff was entitled to recover, because the damage resulted from the negligence of the captain in filling his boiler before the proper time had arrived for so doing; although it was urged in argument, that the above maxim applied, and that the immediate cause of the damage was the act of God.[2]

§ 126. *Necessary sacrifice of property in order to avoid superior calamity.* — *Casus* may also include acts of voluntary destruction necessary to avoid a more sweeping and irremediable injury, as where a cargo is sacrificed in order to avoid a shipwreck, or a house is blown up in order to stop a conflagration.[3] But, as will

[1] Austin *v.* N. Y. Steam Co. 43 N. Y. 75; infra, § 559.

[2] Piordet *v.* Hall, 4 Bing. 607.

[3] Russell *v.* Mayor, &c. 2 Denio, 461. As to when necessity will justify sacrifice or invasion of property, see British Plate Man. *v.* Meredith, 4 Term R. 796, where Buller, J., said:

presently be seen, actual necessity must be shown in order to justify such a sacrifice.

"There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say that the individuals who suffer have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema lex*." In The Mayor, &c. *v.* Lord, 18 Wend. 129, it is said by Chancellor Walworth, that "the rule appears to be well settled that in a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other public calamity, the private property of an individual may be lawfully taken or destroyed for the relief, protection, or safety of the many, without subjecting those whose duty it is to protect the public interests, by whom or under whose direction such private property was taken or destroyed, to personal liability for the damage which the owner has thereby sustained." See also, to the same general effect, Russell *v.* Mayor, &c. 2 Denio, 461; Hale *v.* Lawrence, 1 Zab. 714; American Print Works *v.* Lawrence, 1 Zab. 248; Lorocco *v.* Geary, 3 Cal. 69; Meeker *v.* Van Rensselaer, 15 Wend. 397; McDonald *v.* Redwing. 13 Minn. 38. The supreme judicial court of Massachusetts had also said, in Taylor *v.* Inhabitants of Plymouth, 8 Metc. 465, that "independently of the statute, the pulling down of a building in a city or compact town, in time of fire, is justified upon the great doctrine of public safety, when it is necessary."

So in Metallic Comp. Cast. Co. *v.* Fitchburg R. R. 109 Mass., Chapman, C. J., said: —

"The elaborate provisions which our statutes have made for the extinguishment of fires indicate the magnitude of the interest which the community has in preventing the spread of conflagrations, but these statutes do not supersede the common law. Their purpose is merely to enable the community to protect themselves more effectually than they could do otherwise. Thus, the organization of a fire department, with officers and implements, does not deprive the people of a neighborhood from obtaining an engine and hose and crossing the neighboring lands to obtain water for stopping a conflagration, without waiting for an organization, and individuals may climb upon neighboring roofs to carry buckets of water. It is a sufficient justification that the circumstances made such an invasion of private property reasonable and proper in helping to extinguish the fire. The objection of the defendants, that the officers of the fire department in Cambridge had no jurisdiction in Somerville, and could not act officially in that town, has no validity. They had a fire company organized, and an engine and hose, and were in the vicinity of the building, and they could not with propriety stand idly by and witness the spread of a fire which they might extinguish, merely because it was beyond the town line. They had a right, *as citizens*, to do what they reasonably could to prevent this public calamity, whether in their own city or a neighboring town." See this question discussed in Cent. Law J., Apr. 30, 1874, p. 212.

§ 127. *Casus no defence when its dangerous consequences could by prudence be avoided.* — Of this principle several illustrations have just been noticed. An interesting discussion of the question is to be found in a case in which the city of Philadelphia, holding under statute the control of the water power of the river Schuylkill, drew off, in a time of peculiar drought, so much water to supply the city, that the channel below the dam was left dry.[1] Was the drought a defence by which the city could justify its act? No doubt if the health of the city would have been imperilled by intermitting the supply, the city authorities would have been bound to continue the supply, even though navigation below the dam was sacrificed. But if it appeared that the water given to the city was wastefully supplied, then the defence of necessity would *pro tanto* fail; in other words, the drought would not be a defence if its consequences could have been avoided by due diligence on the part of the city authorities. And so was it held by the supreme court.[2]

[1] City of Phil. *v.* Gilmartin, 71 Pa. St. 140. See infra, § 571.

[2] "It now remains to consider," said Agnew, J., "the influence of an extraordinary drought upon the case. It is a clearly proved fact, and one fully established by the verdict, that the chief engineer of the water-works and his subordinates drew off the water of the pool, to supply the reservoirs of the city, below the top level of the dam, and kept it drawn off so far below, that, from the 9th of August till the 7th of September, 1869, the navigation of the pool was wholly impeded to the class of boats usually navigating the Schuylkill previous to that time. The plaintiff's boat was of this class, and drew, perhaps, half an inch less. Was this alleged wrong justified by an overruling necessity? Let it be conceded that an extraordinary drought, following the order of nature, is an act of God, the author of the laws of this order, and that in consequence some one must suffer without redress, upon the maxim *Actus Dei nemini facit injuriam;* and let it be admitted that, for the necessary use of man and his dependent creatures, the right to this element, as indispensable to life and health, is superior to the right of the navigator; yet the inquiry remains, was there such a necessity in this instance, to take from the navigator his superior right to use the stream.

"The injury, as shown by the evidence and established by the verdict, arose from the use of the Schuylkill by the city for water-*power*, and not merely for *consumption*. For every gallon of water supplied to the reservoirs thirteen and a half gallons were expended through the turbine wheels, for driving and lifting power; and when common water-wheels were used, the expenditure was twenty-seven gallons for power to every gallon pumped into the reservoirs for consumption. It is also in evidence, and an undoubted fact, that from time to time and for years the councils of the city have been warned by the chief engi-

§ 128. *Casus or vis major, burden of proof in.* — The *onus* of establishing *casus* or *vis major* is on the defendant, when he seeks to avoid a *primâ facie* liability by setting up such defence.[1]

§ 129. On the other hand, if the injury is shown to have resulted from a condition which is extraordinary and not to be expected, it is not enough simply to prove an injury to the plaintiff. Something that the defendants did, or that they omitted to do, must be proved to have been the cause of the injury.[2]

neer, in his reports, to take steps to protect the city in time of drought, by the use of steam-power, so as to economize the water of the Schuylkill for city use. This had not been effectually done, though steps had been taken in that direction; and in consequence of this negligence, the city has continued to use the water for power beyond the necessity of consumption, thus violating her duty in regard to the navigation by drawing unnecessarily upon the stream. The injury to the navigator is therefore the result of negligence on the part of the city, concurring, if you choose, with the providential act. But, in deciding upon the question of illegality in drawing off the water from the navigation, we are carried beyond its use for *power*, to inquire into the character of the *consumption* claimed as an overruling necessity.

"We have already seen that the city is a large vendor of water, from which she is deriving revenue, for all the purposes of the arts, manufacturing, business, and pleasure. The uses are not domestic, that is, such as are for the preservation of the life and health of the population and their creatures, but are simply utilitarian or business uses, and far exceed those needed for domestic purposes. And even as to those termed domestic, a distinction must be noted between the use proper and that which is lavishly expended in pavement washing, baths, &c. It is perfectly obvious, therefore, that the city drew off the water not only for driving and lifting power, but for a consumption far beyond any imperious necessity, and for purposes wholly subordinate to the right of navigation. She chose to prefer the pecuniary interest of her citizens, and doing an injury thereby, she must make compensation to the injured parties. I mean not by these remarks to draw any comparison between the importance of the use of the water for the great purposes of industry, wealth, and cleanliness of a city so populous as Philadelphia, and the use of it for navigation during a few days of drought. The question for us is that of legal right, not comparative weight. Such important interests as those of the city are likely to lead to the substitution of might for right, yet they are not of that imperious necessity which justifies might, and changes wrong into right. As administrators of the law, we cannot bend or break the law before a large interest, more than we can before one that is small. The doctrine of imperious necessity is not in this case."

[1] Byrne *v.* Boadle, 2 H. & C. 722; Vaughan *v.* Taff Vale R. C. 5 H. & N. 679; Skinner *v.* London, Brighton & S. C. R. C. 5 Exch. 787–9; Freemantle *v.* London & N. W. R. C. 10 C. B. N. S. 89; Great West. R. C. of Canada *v.* Braid, 1 Moo. P. C. N. S. 101.

[2] Cotton *v.* Wood, 8 C. B. (N. S.)

VI. INDISCRETION OR CONCURRENCE OF PARTY INJURED.

§ 130. "Contributory Negligence," as it is called in our own law, is discussed at such length in a future chapter,[1] that it is not

569; Toomey *v.* Brighton Ry. Co. 3 C. B. (N. S.) 146; Hammack *v.* White, 11 C. B. (N. S.) 588; Welfare *v.* Brighton R. R. 4 Q. B. 693. In Livezey *v.* Philadelphia, 64 Pa. St. 106, the evidence was, that, in an extraordinary flood, a bridge was carried away and thrown upon land of a lower owner, and damaged it. It was held, that without more, a presumption that it was negligently constructed did not arise. It was further ruled, that when a bridge was washed by a flood on a non-navigable river, upon the land of a lower owner, that it was not the duty of the owner of *the bridge* to remove it.

Sharswood, J.: . . . . "As to the ground of negligence, it may be dismissed with the remark that there was no evidence whatever of any insufficiency in the construction or fastenings of the bridge. Had it been carried away by an ordinary freshet, a presumption to that effect might perhaps have arisen. But it was a clearly proved and uncontradicted fact, that the freshet in which the disaster occurred was a most unusual and extraordinary one, — greater and more destructive than was ever known to happen before or since; that the water in the stream rose ten feet above its ordinary level. The accident took place in the night-time, and no one appears to have seen it; but the great probability seemed to be, in the opinion of the witnesses examined, that it would have stood had it not been butted against by a wooden bridge carried down by the flood from higher up the creek.

"For this accident, therefore, and all damages resulting from it, direct or consequential, the defendants ought not to be held liable. *Actus Dei nemini facit injuria.* The concurrence of negligence with the act of Providence, where the mischief is done by flood or storm, is necessary to fix the defendants with liability. 'When a loss,' says C. J. Gibson, 'happens exclusively from an act of Providence, it will not be pretended that it ought to be borne by him whose superstructure was made the immediate instrument of it.' Lehigh Bridge Co. *v.* Lehigh Coal & Navigation Co. 4 Rawle, 24.

"The bridge, in this instance, lodged in the bed of the creek, which is not a navigable stream, and has never been declared a public highway, and the place where it lodged was the plaintiff's own soil. The injury alleged to have been suffered was from the diversion of the water caused by this obstruction, and the contention on the part of the plaintiff now is, that it was the duty of the defendants after reasonable notice, which was proved to have been given, to have removed it, and that having failed to do so, they are responsible for the consequences. But the *ratio decidendi* in Forster *v.* Juniata Bridge Co. 4 Harris, 393, which seems not only founded on sound principles but to be a logical deduction from the Lehigh Bridge Co. *v.* The Lehigh Coal & Navigation Co. 4 Rawle, 24, does not support this contention. It was there

[1] Infra, § 300.

necessary at present to do more than to state in what it consists, and on what it rests. A person who by his own negligence, such is the general rule, causes damage to himself, cannot recover compensation from another person on the ground that if it had not been for the negligence of the latter the damage would not have occurred. But, to defeat such recovery, the negligence of the party injured must have been in itself of such a character as to have drawn on him the hurt, and he must have been an independent moral agent, he not acting compulsorily or without opportunity of reflection.

Roman law. — The Roman law is explicit to this effect. First comes the cardinal maxim, *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*[1] In other words, the harm which my negligence brings to me I am to be considered as not having received. So far as my relations to others are concerned, the harm is uncaused. The law is thus given by Paulus in the concrete: "Ei qui irritatu suo feram bestiam vel quamcunque aliam quadrupedem in se proritaverit, eaque damnum dederit, neque in ejus dominum neque in custodem actio datur."[2]

So, also, in a well known opinion of Ulpian: —

"Quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere."

§ 131. But it must be remembered that this doctrine of contributory negligence ceases when the person primarily inflicting the injury was either *in dolo*, or guilty of gross *culpa* which may

said that in such a case, where there is no negligence in the first instance, the sufferer must get rid of the instrument and the injury as he may. 'The company were not bound,' said Gibson, C. J., 'to follow the wreck of their bridge. They might abandon it without incurring responsibility for it; and the defendant, after notice given, might have disincumbered his land of it by casting it back into the river; but he could not appropriate it to his own use. He certainly might have removed it at his own expense, but the refusal of the company to remove it did not divest their property in it or bar their entry to reclaim it. It was held in Etter *v.* Edwards, 4 Watts, 65, that a riparian owner has neither lien nor claim for preserving a raft cast on his land; and this on the authority of Doctor & Student, c. 51, in which it is said that a man who has abandoned his property may at any time resume the ownership of it.' The facts that after notice from the plaintiffs, the city made an effort to remove the obstruction, or failing in this that they sold it to another, who made a second unsuccessful attempt, are circumstances which in no way vary the case."

[1] L. 20. de R. 3. 50. 17.

[2] R. S. I. 15. § 3.

be assimilated to *dolus*. The consequences of negligence can only be imputed to me, it has been already seen, when they are the regular and natural consequences of my negligent act; nor does it vary the case if we accept, as is sometimes done, instead of the latter qualification, the proviso, that such consequences could have been reasonably foreseen. It is not a regular sequence of my negligence that another person, acting according to his own lights, should be independently negligent; nor is such independent negligence something which I could reasonably foresee. But if I *do* foresee it; or if I design to injure a person who negligently comes in my way; or if I am grossly careless in the use of dangerous agencies, so that mere trespassers who wander within the range of these agencies are hurt, — then the prior negligence of the party hurt by me cannot be set up by me as a defence.[1]

§ 132. *Doctrine of "contributory negligence" not to be based on maxim volenti non fit injuria.* — The principle that causal connection is broken by the independent negligence of the party injured is sometimes based on the maxim *volenti non fit injuria;* it being argued that, because the injured person consents to be injured, he cannot recover damages for the injury. But this reasoning rests on the mistaken assumption that consent is in such case given, which is incompatible with the supposition that, as is essential to negligence, there is no consent at all. Negligence, to state this in other words, necessarily excludes a condition of mind which is capable either of designing an injury to another or of agreeing that an injury should be received from another. To contributory negligence, therefore, the maxim *volenti non fit injuria* does not apply, because a negligent person exercises no will at all. The moment he *wills* to do the injury, then he ceases to be negligent, and the case becomes one of malice or fraud. The Roman law has been quoted to sustain the idea that such negligence by the party injured may be a bar, on the ground that *volenti non fit injuria;* but the Roman law, as Pernice[2] shows by a copious criticism of the authorities, holds no such thing. Nor is this the only reason for refusing in such case to acknowledge the applicability of the maxim *volenti non fit injuria*. No agreement, it has frequently been held, to relieve negligence from its liabilities, will be sanctioned by the courts; and if so, we cannot hold that a person by merely consenting that

[1] See infra, § 300, 345.

[2] Op. cit. p. 61.

another shall negligently injure him can shut himself off from recovering damages if such negligent injury be actually inflicted.

§ 133. *"Contributory negligence" is a bar, because the plaintiff, by intervening, breaks the causal connection between the injury received by himself and the defendant's negligence.* — This rule, as will presently be seen, applies to all intervention of independent and responsible persons. If so, it applies to the intervention of the plaintiff himself, with the additional force derived from the principle that no man is to be permitted to have a compensation for his own wrong.[1]

VII. INTERPOSITION OF INDEPENDENT RESPONSIBLE HUMAN AGENCY.

§ 134. *Causal connection is broken by interposition of such agency.* — Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative.

§ 135. This principle, of leading importance in the law of negligence, will now be illustrated in detail: —

Roman law. — Causal connection may be interrupted, says Baron, a distinguished contemporaneous commentator, by the intervention of an independent agency, though the act whose operation was thus anticipated was of itself calculated to produce the particular evil. Hence it has been ruled that a person who mortally wounded a slave could not be held liable for the latter's death, when, before death ensued from such wounding, a third person came in and gave the slave another wound of which

[1] See infra, § 300.

he immediately died.[1] The same ruling has been made in our own country, on an indictment under similar circumstances for homicide.[2] But the causal connection is not broken when, *after* the injury has been inflicted, an event occurs which would have brought about the same injury, if it had not already occurred: *neque enim ex post facto decrescit obligatio*.[3] Thus, in the case of two woundings, above mentioned, the person inflicting the first wound would be liable for such *wound*, because that was inflicted before the attack of the second assailant; though not for the *death*, because that occurred after the second assailant inflicted his wound. So a person who injures another's property cannot defend himself in a suit for the *injury*, on the ground that immediately after the injury the property was destroyed in a general conflagration.[4]

§ 136. *Anglo-American law.* — With us, it is true, the principle, in the terms in which it is here expressed, has not received the prominent recognition assigned to it in the Roman law; though not unfrequently has it been accepted almost in the language in which it has been just stated.[5]

[1] L. 11. § 3; L. 15. § 1; L. 52. pr. D. ad L. Aquil. 9. 2; L. 4. de imp. 25. 1.

[2] Wh. Cr. L. 7th ed. § 941.

[3] See passages to this point cited by Baron, § 243.

[4] L. 7. § 4. i. f. quod vi. D. 43. 24; L. 37. D. mand. — 17. 1; and other passages cited by Baron, § 243.

[5] See Crain *v.* Petrie, 6 Hill, N. Y. 522; Stevens *v.* Hartwell, 11 Metc. 542; Saxton *v.* Bacon, 31 Vt. 540; Bk. of Ireland *v.* Evans, 5 H. of L. Cas. 389; Mangan *v.* Atterton, Law Rep. 1 Exch. 239; Ashley *v.* Harrison, 1 Esp. 48; Fitzsimmons *v.* Inglis, 5 Taunt. 534; Hoey *v.* Felton, 11 C. B. N. S. 142; Walker *v.* Goe, 4 H. & N. 350; Toomey *v.* R. R. 3 C. B. N. S. 145; Welfare *v.* Brighton R. R. Co. 4 Q. B. 693; Pensac. & G. R. R. *v.* Nash, 12 Florida, 497; Shepherd *v.* Chelsea, 4 Allen, 113; Richards *v.* Enfield, 13 Gray, 344. And see particularly cases cited infra, § 439 *et seq.*, 934. In Cuff *v.* Newark & N. Y. R. R. 35 N. J. 17, the question was discussed with an ability and judiciousness which require special notice.

In this case it appeared that the Newark and New York Railroad Company contracted with F. & Co. for the graduation of their road-bed. With the consent of the company, F. & Co. sub-contracted rock excavation with one S. Before the subcontract was made, it was understood by the contractors and by the officers of the company that the rock would be removed by S., by blasting with nitro-glycerine; a magazine for storing the nitro-glycerine was located on the company's land, under the direction of their engineer. By the contract, the contractors were forbidden to sublet without the company's consent, and were required to discharge incompetent and disorderly workmen, when required so to do by the company's engineer. S., without the knowledge of the company, stored in the magazine certain cans of glycerine

§ 137. For several reasons we must maintain that in our own jurisprudence, as well as in that of Rome, causal connection is

which belonged to the United States Blasting Company, and which he kept there for sale on the orders of the Blasting Company. An order for glycerine being sent to S. by the Blasting Company, his foreman directed B., one of his employees, to fill the order. B., in doing so, removed one of the Blasting Company's cans from the magazine a distance of one hundred and fifty yards, but not off the company's lands, and there, by his negligence, an explosion occurred, by which the deceased was killed. B. was employed by S. specially to take charge of the nitro-glycerine in the magazine, and was an incompetent person for that business. In an action against the railroad company and F. & Co., the contractors, by the administratrix of the deceased, to recover damages for his death, it was held by the supreme court: That the stipulations in the contract between the railroad company and the contractors, as to sub-contracting, and the removal of incompetent employees, did not create the relation of master and servant between the railroad company, or F. & Co., and the servants of the sub-contractor; nor raise a duty for the non-performance of which an action could be maintained by third persons against the railroad company, or F. & Co., for injuries resulting from the negligence of an employee of the sub-contractor. It was further held: That the permission of the company that S. might use their lands for a magazine in which to store oil necessary for the operations of blasting on the work, did not authorize him to use them for the purpose of engaging in a traffic in oil which belonged to others. And it was finally ruled: That the company were not answerable for injuries to third persons, which happened through the negligence of a servant of S. in the management of nitro-glycerine, which belonged to another company engaged in the manufacture of that article, and which had been clandestinely stored in the magazine by S., and was kept by him for sale on the orders of its owners, without the knowledge of the company.

The following is extracted from the opinion of Depue, J.: —

"In other cases the intervention of the independent act of a third person between the wrong complained of and the injury sustained, which was the immediate cause of the injury, is made a test of that remoteness of damage which forbids its recovery. Ashley *v.* Harrison, 1 Esp. 48; Mylne *v.* Smith, 2 Dow's Parl. Rep. 390; Fitzsimmons *v.* Inglis, 5 Taunt. 534; Hoey *v.* Felton, 11 C. B. N. S. 142; Daniels *v.* Potter, 4 C. & P. 262; Haddan *v.* Lott, 15 C. B. 411; Walker *v.* Goe, 4 H. & N. 350; Parkins *v.* Scott, 1 H. & C. 152; Crain *v.* Petrie, 6 Hill, 522; Stevens *v.* Hartwell, 11 Met. 542; Toomey *v.* Railway Co. 3 C. B. N. S. 145; Williams *v.* Jones, 3 H. & C. 256; Mangan *v.* Atterton, Law Rep. 1 Exch. 239; Bank of Ireland *v.* Evans, 5 H. of L. Cases 389, 397.

"Tested by the principle above stated, it is obvious that the injury received by the deceased, from which death resulted, is too far removed from the act of the company to impose a liability for it upon them. It did not result naturally or proximately from the nuisance they permitted on their lands, but was caused directly by the unauthorized and independent act of a third person intervening between

broken by the interposition of independent negligence. These reasons are as follows: —

the nuisance they consented to and the injury.

"Shaffner had clandestinely applied the magazine to an use for which he had not the permission of the company, and engaged in a business which was not connected with his contract. Permission to use their lands for the limited purpose of storing materials for the execution of the work, did not authorize him to use them for the purpose of engaging in a dangerous traffic, in the prosecution of which the injury resulted. It cannot be insisted, therefore, that the liability of the defendants flows from their consent to the use of their lands for the business in which Burns was employed when the accident happened. The nuisance relied on to fix the defendants, is the storage of nitro-glycerine in the magazine, by their consent. The injury was not caused by an explosion in the magazine. Burns had removed the can from the magazine a distance of one hundred and fifty yards. If he had taken it on the work, to use it in blasting, and, there, persons had been injured by his negligence, the company could not be held for the injuries, notwithstanding their consent to the use and storage of nitro-glycerine on their premises for the prosecution of the work, unless its use in blasting was a nuisance. The disconnection of his act from the nuisance of the storage of the oil, to which the company had consented, is the more apparent when it is considered that the oil, in the management of which the explosion occurred, was kept in the magazine without the knowledge of the company, and that the disaster happened in a business which Shaffner was not authorized to engage in on the company's land. Between his act and their illegal act there was no such connection that the latter can be said to have been the cause of the former.

"A. places a log in the highway, which B. casts into an adjoining close — or puts an obstruction upon the sidewalk, which passers-by throw into the roadway of the street, and a traveller is injured by coming in contact with it. A. cannot be held for the trespass in the one case, nor for the injury in the other. Or, to take an illustration more nearly connected with the facts of the case, suppose Burns, by command of Shaffner, had carried the can to Jersey City, and there, by his negligence, it had exploded and injury had resulted, could an action be maintained against the company for such injuries, based upon an allegation of liability, arising from a nuisance which consisted in the storing of the explosive on their lands at Bergen? If not, it is manifest that the action in this case cannot be supported. That the injury happened on their lands can make no difference, if the business in the prosecution of which it resulted was transacted there by Shaffner, without the authority of the company. If the case had shown that they had consented to the use of their land for the traffic in which Shaffner had engaged, they might have been held for any injuries that resulted immediately in connection with the transaction of that business. No such case was made at the trial. The injury was not caused by the nuisance which had the approbation and consent of the company. Their consent was to the erection of a magazine to be used for the limited purpose of storing materials for the necessary operations of their works,

§ 138. *To attach to an antecedent negligence the consequences arising from a subsequent negligence is inconsistent with the legal doctrine of causation.* — It has already been seen that there are two views of causation, so far as concerns liability for negligence. The first view is that a person is liable for all the consequences which flow in ordinary natural sequence from his negligence; the second that he is liable for all the consequences that could be foreseen as likely to occur. Can we regard the independent action of intelligent strangers as something that is in conformity with ordinary natural law, or as something that can be foreseen or preascertained? Of course, as a matter of theory, this opens interesting metaphysical and psychological questions which it would be inappropriate here to discuss. But as a matter of practice, can there be any question that, whatever may be the case in reference to an Omniscient eye, the actions of other persons, so far as we are concerned, viewing them as individuals, are not the subjects either of accurate precalculation or of foreknowledge? Is this not eminently so with regard to the *negligences* of others? We may to some extent assume that a malicious man may, under certain circumstances, do malicious things. But while we know that the best business men are sometimes negligent, it is impossible for us to come in advance to any conclusion as to the points to which such negligence will apply. To require us to act in such a way that no negligences on our part may be the conditions of negligences on the part of strangers, would be to require us to cease to be. If we do nothing, we negligently omit to do something that we ought to do. If we do something, owing to the imperfection of all things human, there will be some taint, no matter how slight, of imperfection in the thing we do. Yet, whether in doing or omitting, we touch more or less closely multitudes of persons each with a free will of his own, each with idiosyncrasies with which we have no acquaintance, each of whom may by some negligence cross

in the handling and management of which Burns would have been continually under the observation of others engaged on the works, who would have detected any unfitness for his business arising from intoxication. At most, consent to the erection of the magazine for that purpose can only be said to have afforded an opportunity for the unauthorized act of Shaffner in appropriating it to another use, and the negligent act of Burns, who, in law, is a stranger to the defendants, and for whose acts Shaffner alone is responsible."

our path, and make action on our part which is innocuous in itself, injurious. Reserving for another point the consideration of the consequences resulting from this indefinite extension of vicarious liability, we may now ask whether, on elementary principles, the action of an independent free agent, taking hold unasked of an impulse started by us, and giving it a new course productive of injury to others, does not make him the juridical starting-point of the force so applied by him, so far as concerns the persons so injured? For the spontaneous action of an independent will is neither the subject of regular natural sequence, nor of accurate precalculation by us; and if not, it cannot be said to have been caused by us. In other words, so far as concerns my fellow-beings, their acts cannot be said to have been *caused* by me, unless they are imbecile, or act under compulsion, or under circumstances produced by me which give them no opportunity for volition. This distinction is brought out as fundamental by De Grey, C. J., in a remarkable case which has been already fully cited.[1] That case, it will be recollected, was that of a squib, which, when tossed by the defendant on a table in a market-place, was thrown by the person guarding this table at B., and by B. at C., who was struck on the eye and injured by the exploding of the squib. Did the intermediate parties act merely mechanically in sudden convulsive action, to avoid the squib exploding on themselves, or did they act either mischievously or inadvertently, having opportunity to consider the risk, but not using such opportunity? "It has been urged," says this learned chief justice, "that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal (the intermediate parties) as free agents in the present case, but acting under a compulsory necessity for their own safety and self-preservation." He concedes, therefore, that if Willis and Ryal had been "free agents," the defendant would not have been liable. In other words, the intervention of a "free agent" breaks causal connection.[2]

§ 139. *Mischievous consequences of making one man liable for*

[1] Scott *v.* Shepherd, supra, § 95.

[2] "One of the most valuable of the *criteria* furnished us by the authorities is to ascertain *whether any new cause has intervened between the fact accomplished and the alleged cause. If a new* force or power has intervened of itself, sufficient to stand as the cause of the mischief, the other must be considered too remote." Ins. Co. *v.* Tweed, 7 Wallace, 44.

another's negligence. — Where would such vicarious liability end? We none of us can do any act perfectly; and these imperfections necessarily multiply when we deal in large business concerns, such as mills, banks, shipping, and railroads. It is very important that when we negligently set natural forces in action we should be liable for the damage these misdirected forces produce. But if another person comes in, and of his own free will takes a new departure, how can we be made liable without extending our liability indefinitely? Waiving the point just noticed, that as we did not force him to do the thing, we cannot be called its cause, there is no reason which will render us liable for the negligence of such second person supervening on our negligence, that would not bind us for the negligence of a third person supervening upon that of the second intruder. "Three actions for a single act," exclaims Blackstone, J., when commenting on this extension of liability in the case just cited, where, however, the extension was only defended on the ground that the intermediate parties were not free agents, "nay, it may be extended *in infinitum.*" For, to adopt Chief Justice De Grey's statement, "the immediate act needs not be instantaneous, *but a chain of effects connected together will be sufficient.*" If, for instance, a ball is negligently left by A. on a road, and B. negligently throws it at C., and C. negligently throws it at D., and D. neglects to put it out of the way, and E. stumbles on it and is hurt, then A. is liable for E.'s negligence, and so on without limit as to time. The consequence of this would be that capital would be obliged to bear the burden, not merely of its own want of caution, but of the want of caution of everybody else. If an injury occurred through negligence, the "chain of effects" (assuming on this hypothesis that one person's free action is the "effect" of another person's causation), will be traced back until a capitalist is reached, and he, being thus made the cause, would be made liable for all the subsequent negligences of others on the same subject matter. If this law be true, no man of means could build a steam-engine, or even a house. For there is no steam-engine so constructed but that some precaution is omitted which could have protected it from negligence of an incompetent intruder; no house is built which could not have been so constructed that no meddler could negligently cause it to become in some way an inconvenience to others.

§ 140. *This extension of vicarious liability inconsistent with the*

express limitations of the law. — We certainly know something about vicarious liability, for on this principle rest the noxal actions of the Roman law, and that portion of our own law which makes a master liable for his servant's negligence when in the scope of his service. But the limitations with which both the Roman law and our own guard this liability show how perilous the principle is considered to be, and how exclusively it is made to rest, not upon a general doctrine of causation, but upon a mere special policy based on the relation of master and servant. For neither the Roman law nor our own says that the master is liable for the servant because the master *causes* the servant's action, but simply because the master, having the function of employing and discharging the servant, is liable for negligence in such defective exercise of this power as works injury to others; and because what the servant does within the scope of his office is presumed to be done under the master's orders. Nor even though the relationship of master and servant exist, does this liability apply to anything to which the relationship of master and servant does not touch. In other words, as will be hereafter seen at large,[1] vicarious liability only exists in cases where one man agrees to be liable for another's conduct, or where such agreement is to be presumed, as to a particular subject matter, from the relation of master and servant. This view disposes of the whole question of vicarious liability for strangers unless such strangers are, either from imbecility, unconsciousness, or compulsion, subject to the laws of material causation.

§ 141. *Illustrations of doctrine that succeeding negligence of third person breaks causal connection.* — The illustrations of this doctrine are numerous and of various degrees of intensity. Among these may be noticed the following:[2] —

§ 142. In a Massachusetts case[3] the evidence was that a boy bought some gunpowder, and, in the absence of his parents, put it in a cupboard in his father's house with the knowledge of his aunt, who had charge of him and of the house while his parents were away. A week afterwards his mother gave him some of the powder and he fired it off with her knowledge; and some days later he took, with her knowledge, more of the powder out of the

[1] See infra, § 156–7.

[2] Crain *v.* Petrie, 6 Hill N. Y. 522; Vicars *v.* Wilcocks, 8 East, 1. See Cate *v.* Cate, 50 N. H. 145.

[3] Carter *v.* Towne, 103 Mass. 507.

cupboard, fired it off, and was injured by the explosion. It was held that the causal connection between the injury and the original negligent sale was broken, and that the seller was therefore not liable to the child for the injury. "The testimony," said Gray, J., "introduced for the plaintiff at the trial, discloses quite a different case from that alleged in the declaration, which was held sufficient when the case was before us on demurrer; and shows that the gunpowder sold by the defendants to the plaintiff had been in the legal custody and control of the plaintiff's parents, or, in their absence, of his aunt, for more than a week before the use of the gunpowder by which he was injured. Under these circumstances, that injury was not the direct or proximate, the natural or probable, consequence of the defendant's act; and the jury should have been instructed, in accordance with the defendant's request, that there was no legal and sufficient evidence to authorize them to return a verdict for the plaintiff." And the same rule applies to other intervening negligences.[1]

§ 143. So where A. makes a fire negligently, but no mischief would result were it not from the negligence of B., who by tampering with the fire causes it to spread to C.'s field. Here C. has no claim against A. supposing that B. is a free and rational agent. It would be otherwise, however, if A. built the fire negligently in a field where children were accustomed to play. Here it would be natural that the children should play with the fire; that they should do so is what the defendant should have foreseen; they are in some sense from their infancy irresponsible. Hence their acts are within the probable consequences of the defendant's negligence; and, not constituting an independent liability, do not break the causal connection between the defendant's negligence and the injury.[2]

§ 144. *At the same time, the fact that another person contributed either before the defendant's interposition or concurrently with such interposition in producing the damage is no defence.* — Indeed this proposition, instead of conflicting with the last, goes to sustain it. A. negligently leaves certain articles in a particular place. B. negligently meddles with them. Supposing B.'s negligence to be made out, and he be a responsible person under the limitations above expressed, he cannot set up A.'s prior negli-

[1] Supra, § 90, 91.

[2] See this illustrated in cases where a horse is negligently left in a street, supra, § 100–7; infra, § 147.

gence as a defence. *A fortiori*, he cannot set up the concurrent negligence of D., a third person, who may simultaneously join him in the final negligent act. It is in this sense we must construe the language of Colt, J., in a Massachusetts case.[1] "It is no answer," he said, "to an action by a passenger against a carrier, that the negligence or trespass of a third person contributed to the injury. These propositions would be more manifest if this action had been brought in form upon the implied undertaking of the defendants, but the plaintiff may elect to sue in tort or contract, and the rule of duty is the same in either form of action.[2] Even if no privity of contract existed, and the injury was the result of the joint acts of defendants and the owner of the load of hay and the Eastern R. R. Co., it would furnish no defence to this action; for in actions of this description nonjoinder of the defendants cannot be availed of in bar. And this is true, although the party contributing by his negligence was acting without concert with and entirely independent of the defendants." [3]

§ 145. *Nor when a negligence subsequent to that of the defendant is the agent by which the defendant's negligence proves injurious can the subsequent negligence be a bar to the plaintiff's recovery if such subsequent negligence was likely, in the usual and natural order of things, to follow from the defendant's negligence.* — This proposition has been already adequately illustrated.[4] A case which sustains it in result though not in the reasoning of the court, may be here specifically noticed.[5] The defendants, a gas company, having contracted to supply the plaintiff with a service-pipe from their main to the meter on his premises, laid down a defective pipe from which the gas escaped. A servant of a gas-fitter, engaged by the plaintiff to lay down the pipes leading from the meter over the premises, took, and without the exercise, it was assumed, of due caution, a lighted candle for the purpose of finding out whence the escape proceeded. An explosion then took place, whereby damage was occasioned to the plaintiff's premises, to recover compensation for which the plaintiff brought

[1] Eaton *v.* Boston & L. R. R. 11 Allen, 505.

[2] Warren *v.* Fitchburg R. R. 8 Allen, 227; Ingall *v.* Bills, 9 Met. 1; McElroy *v.* Nashua & Lowell R. R. 4 Cush. 400; Sullivan *v.* Philadelphia, &c. R. R. 30 Penn. State R. 234.

[3] Illidge *v.* Goodwin, 5 C. & P. 190.

[4] See supra, § 108.

[5] Burrows *v.* The March Gas & Coke Co., L. R. 5 Exch. 67 (affirmed L. R. 7 Exch. 96).

his action against the defendants. It was correctly ruled, that the causal connection between the defendant's negligence and the damage was not broken by the intervention of the gas-fitter's servant. "The defendants," said Kelly, C. B., "having been guilty of negligence by which the accident was caused, the plaintiff is entitled to maintain his action to recover compensation from the defendants for the damage occasioned to his property." "It was argued for the defendants," said Pigott, B., "that the damage was too remote. Now, the mere fact that there is another cause brought in without which the damage would not have occurred does not, in my view, make the first and main cause a remote cause of the damage; it can only disentitle the plaintiff to recover in cases where the ground may be taken that he has contributed that without which the damage would not have occurred. It seems to me that the escape of the gas was plainly the proximate cause of the damage of which the plaintiff complains. If that be so, though there is another cause without which the explosion would not have happened, yet that does not disentitle the plaintiff from recovery, unless he can be affected by the negligent conduct of Sharratt" (the workman), "and so must be taken to have contributed to the damage. I do not think that the plaintiff is responsible, &c. As my lord has put it, there were two independent contractors employed by the plaintiff to do work upon the premises. Both are guilty of negligence, by which the plaintiff sustains considerable damage. Is the plaintiff disentitled to complain of the negligence of one because the other contributed to the damage? It seems to me he ought to be entitled to complain of both, and to be able to recover against both. The fact that he is entitled to recover against one cannot deprive him of his right to recover against the other."

The true reason is, that he who so negligently constructs gas-pipes that gas escapes from them and fills a room is liable for all the regular and natural consequences of such negligence; among which consequences it is impossible to exclude the possibility of a person coming with a light into the room where the gas is collected.

§ 146. The same distinction may be illustrated by a New York case in which it appeared that A. negligently caused a leak in a gas-pipe in the cellar of an occupied house. The cellar filled with gas, and on a match being lighted by B., an explosion took place.

If B. is ignorant of the gas being in the cellar, and if such ignorance is not properly chargeable to him as negligence, then A. is liable for the consequences of the explosion. But if B. has notice, or is bound to take notice, of the leakage, then B., in lighting the match in the cellar, is guilty of negligence, which breaks the causal connection between A.'s negligence in causing the leak and the explosion.[1]

§ 147. Other cases resting on this distinction may be noticed. Thus where, in a case already cited, the defendant left his horse and cart standing in the street without any person to watch them, and a stranger by striking the horse caused it to back upon a shop window, it was held in England that the defendant was liable for the damages.[2] So the same result was obtained where some children played with and were hurt by a horse and cart negligently left in a thoroughfare.[3] If the mischief in these cases was caused by simply that casual and irresponsible contact which is an ordinary incident of thronged streets, then the decisions reached are sustainable on the principle that a negligent person is liable for all the ordinary and natural consequences of his negligence.[4] This is all that they actually decide; and it is substantially on this ground that the decision in the last case is put by Lord Denman. To extend them so far as to sustain the position that a person who leaves a horse on a street is liable for whatever a stranger may do with the horse, would extend the doctrine of vicarious liability to an extent inconsistent with both reason and authority.[5] That liability, as is elsewhere shown, is confined mainly to the relation of master and servant; and even in that relation is limited to the servant's acts when in the sphere of his employment. If my vicarious liability for another's negligence is established by the mere fact of my prior negligence, then I am not only liable for the conduct of strangers, as to whom (as is the case with master and servant) I exercise neither selection nor control, but I am liable for all future negligences, in endless series, of which these negligences may be antecedents.

[1] Lannen *v.* Albany Gas Co. 44 N. Y. 459.

[2] Illidge *v.* Goodwin, 5 C. & P. 192; supra, § 112–3.

[3] Lynch *v.* Nurdin, 1 Q. B. 36; supra, § 112, 113.

[4] See supra, § 73.

[5] See infra, § 156.

VIII. INTERPOSITION OF INTERMEDIATE OBJECT, WHICH, IF DUE CARE HAD BEEN TAKEN, WOULD HAVE AVERTED DISASTER.

§ 148. *Intermediate dams or water-courses in cases of freshets.* — Of course if "a head of water," to adopt Ch. J. De Grey's illustration, "is cut down," and another's pond is overflowed, then, though the water may be swollen by several subsidiary streams, the party negligently letting the water loose is liable for the injury, supposing the stream flows directly from his field to that of the plaintiff. But supposing the stream flows into another pond, and the owner of that pond, neglecting to properly guard it, permits it to overflow, so that a series of ponds and then of meadows are in this way flooded, can the person last flooded recover damages from the person first "cutting down the head of water?" Could the owner of a river bank recover in this way from the person who many miles away opened a water-course that flooded a pond, that then flooded another pond, and then, after a series of accessions and diversions, when there was abundant opportunity on the part of others to have diverted this mischief, did something towards raising the volume of the river? Could the owner of a sea-wall recover on the ground that the ocean had been thus unduly flooded? Of course when the question is so presented we say no; but if not, when does the liability stop? At what point, in this series of overflowings, does the causal connection of the first negligence with the last injury cease?

§ 149. *Intermediate buildings in cases of fire.* — A similar question arises as to fires. A house is negligently permitted to take fire; another house, some distance off, being built negligently of material easily ignited, catches fire from the first, and then communicates the fire to a third, which, if properly built and guarded, would not have thus caught. The third house then communicates the fire to a fourth, and then, through the negligence of the fire department, to a fifth, and then, through an explosion of inflammable oils, to a sixth. Is the person to whose negligence the first fire was due to be chargeable with the sixth? Of course we will all hold that in such case the liability must stop somewhere. The question is as to where this point is to be.

§ 150. The only rule to which we can resort is that just noticed, that causal connection ceases when there is interposed

between the negligence and the damage an object which, if due care had been taken, would have prevented the damage. If a stream passing through a series of fields is properly guarded in each field, a flooding of lower fields may be checked. If a house is properly built, if it is properly watched, if a proper fire apparatus is in operation, it can be prevented, when a fire approaches from a neighboring detached house, from catching the fire. This view has been adopted in Pennsylvania in a case[1] where an engine on a railroad negligently set fire to a warehouse belonging to the plaintiffs, and the fire from the house communicated to other buildings of the plaintiff, one thirty-nine feet from the warehouse, and the other eighty from it. It was held by the supreme court, that the railroad company were not liable for damages to the last building and its contents. And the same view has been taken in New York.[2]

[1] Penn. R. R. Co. *v.* Kerr, 62 Pa. St. 353.

[2] Ryan *v.* N. Y. Cent. R. R. 35 N. Y. 210.

"It has always," said Thompson, C. J., in Penn. R. R. *v.* Kerr, "been a matter of difficulty to determine judicially the precise point at which pecuniary accountability for the consequences of wrongful or injurious acts is to cease. No rule has been sufficiently defined and general as to control in all cases. Yet there is a principle applicable to most cases of injury which amounts to a limitation. It is embodied in the common law maxim, *causa proxima non remota spectatur*, — the immediate and not the remote cause is to be considered. Pars. on Cont. vol. 3, p. 198, illustrates the rule aptly by the supposititious case of debtor and creditor, as follows: 'A creditor's debtor has failed to meet his engagements to pay him a sum of money, by reason of which the creditor has failed to meet *his* engagement, and the latter is thrown into bankruptcy and ruined. The result is plainly traceable to the failure of the former to pay as he agreed. Yet the law only requires him to pay his debt with interest. He is not held for consequences which he had no direct hand in producing and no reason to expect. The immediate cause of the creditor's bankruptcy was his failure to pay his own debt. The cause of that cause was the failure of the debtor to pay him; but this was a remote cause, being thrown back by the interposition of the proximate cause, the non-payment by the creditor of his own debt.' This I regard as a fair illustration of what is meant in the maxim by the words '*proxima*' and '*remota*.' See also notes, same volume, p. 180.

"In Harrison *v.* Berkley, 1 Strobh. (S. C. Rep.) 548, Wardlaw, J., indulges in some reflections on this point worth referring to in this connection. 'Every incident,' says he, 'will, when carefully examined, be found to be the result of combined causes; to be itself one of various causes, which produces other events. Accident or design may disturb the ordinary action of causes. It is easy to imagine some acts of trivial misconduct or slight negligence, which shall do no direct harm, but sets in

§ 151. In 1872 it was attempted to push the principle still further in a case that was ultimately determined by the New York

motion some second agent that shall move a third, and so on until the most disastrous consequences shall ensue. The first wrongdoer, unfortunate, rather than seriously blamable, cannot be made answerable for all these consequences.'

"It is certain, that in almost every considerable disaster the result of human agency and dereliction of duty, a train of consequences generally ensue, and so ramify, as more or less to affect the whole community. Indemnity cannot reach all these results, although parties suffer who are innocent of blame. This is one of the vicissitudes of organized society. Every one in it takes the risk of these vicissitudes. Wilfulness itself cannot be reached by the civil arm of the law, for all the consequences of consequences, and some sufferers necessarily remain without compensation. The case of Scott *v.* Shepherd, 2 Wm. Blac. R. 893, the case of the squib, is sometimes cited as extending the principle of the maxim, but it is not so. The doctrine of proximate and remote causes was really not discussed in that case. One threw a squib in a market-place amongst the crowd. It fell on the stall of one who immediately cast it off to prevent it exploding there, and it struck a third person and exploded, putting out his eye. The question was, whether the defendant could be made answerable in the form of action adopted, which was trespass. De Grey, C. J., held, that the first thrower, the defendant, was answerable, for that in fact the squib did the injury by the first impulse. In this way the action of trespass was sustained. It is no authority against the principle suggested. There must be a limit somewhere. Greenl. in vol. 2, § 256, touches the question thus: 'The damages to be recovered must be the natural and proximate consequence of the act complained of.' This is undoubtedly the rule. The difficulty is in distinguishing what is proximate and what is remote. I regard the illustration from Parsons already given, although the wrong supposed arises *ex contractu*, as clear as any that can be suggested.

"It is an occurrence undoubtedly frequent, that by the careless use of matches houses are set on fire. One adjoining is fired by the first, a third is by the second, and so on, it might be, for the length of a square or more. It is not in our experience that the first owner is liable to answer for all these consequences, and there is a good reason for it. The second and third houses, in the case supposed, were not burned by the direct action of the match, and who knows how many agencies might have contributed to produce the result. Therefore, it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done. The text-books, and, I think, the authorities agree, that such circumstances define the word '*remota*' removed, and not the immediate cause. This is also Webster's third definition of the word 'remote.' The question which gives force to the objection that the second or third result of the first cause is remote, is put by Parsons, vol. 2, 180, "Did the cause alleged produce its effects without another cause intervening, or was it made to operate only through or by means of this intervening cause?' There might possibly be cases in which the causes of disaster, although seemingly removed from the original

court of appeals.[1] The defendant, a railroad company, in time of great drought, negligently dropped from one of its locomotives

cause, are still incapable of distinct separation from it, and the rule suggested might be inapplicable; but of these when they occur. The maxim, however, is not to be controlled by time or distance, but by the succession of events. . . . .

"To hold that the act of negligence which destroyed the warehouse destroyed the hotel, is to disregard the order of sequences entirely, and would hold good if a row of buildings a mile long had been destroyed. The cause of destruction of the last, in that case, would be no more remote, within the meaning of the maxim, than that of the first, and yet how many concurring elements of destruction there might be in all of these houses, and no doubt would be, no one can tell. So to hold, would confound all legitimate ideas of cause and effect, and really expunge from the law the maxim quoted, that teaches accountability for the natural and necessary consequences of a wrongful act, and which should, in reason, be only such that the wrong-doer may be presumed to have known would flow from his act. According to the principle asserted, a spark from a steamboat on the Delaware might occasion the destruction of a whole square, although it touched but a single separate structure. No one would be likely to have the least idea of such accountability, so as to govern and control his acts accordingly. A railroad terminating in a city might, by the slightest omission on the part of one of its numerous servants, be made to account for squares burned, the consequence of a spark communicating to a single building. Were this the understanding of the extent of liability under such circumstances, it seems to me that there might be more desirable objects to invest capital in than in the stock of such a railroad. But it never has been so understood or adjudged. Lowrie, J., in Morrison *v.* Davis & Co. 8 Harris, 171, illustrates the argument against such liability most strikingly by reference to a well known fact. In the case he was treating, a horse in a canal-boat team was lame, in consequence of which the boat was behind time in reaching the Juniata River, and in consequence of that was overtaken by a flood in the river, which destroyed the boat with its freight. The carrier, the owner of the boat, was charged with being negligent in using a lame horse, the occasion of the delay. In treating of this as only the remote cause of the disaster, the learned judge said: 'There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and by an extraordinary concurrence of very dry weather and high winds, with this little fault, one third of a city (Pittsburg) was destroyed; would it be right that this small act of carelessness should be charged with the whole value of the property consumed?' The answer would and ought to be, No; it was but the remote cause of it. Innumerable occasions must have occurred in this Commonwealth for asserting liability to the extent and upon the principle claimed here, yet we have not a solitary precedent of the kind in our books. This is worth something, as

[1] Webb *v.* Rome, &c. R. R. Co. 49 N. Y. 421; S. C. 3 Lans. 453.

live coals on a track, which coals set fire to a tie on the track. From this tie the fire was communicated to an old tie at the side

proof against the alleged principle. It was Littleton's maxim, 'that what never was, never ought to be.' 1 Vern. 385.

"The question in hand has not been adjudicated in this State, and but seldom discussed in any of the other states; yet we have a case decided in the court of appeals of the State of New York, in 1866, which is directly in point in support of the doctrine we have been endeavoring to advance above. It is the case of Ryan *v.* The New York Central Railroad Co. (8 Tiffany) 35 N. Y. 210. The facts in that case briefly were, that the defendant, by the carelessness of its servants, or through the insufficient condition of one of its locomotive engines, set fire to its own woodshed with a large quantity of wood therein. The plaintiff's house, situated some one hundred and thirty feet from the shed, took fire from the heat and sparks of the burning shed and wood, and was entirely consumed. A number of other houses and buildings were destroyed by the spreading of the fire. The plaintiff brought suit against the company for his loss. On the presentation of these facts at the trial, the circuit judge nonsuited the plaintiff, and at the general term of the supreme court of the Fifth District the judgment was affirmed. The case was then removed to the court of appeals, where the judgment was unanimously affirmed, in an elaborate and exhaustive opinion by Hunt, J. Every position taken by the counsel for the defendant in error here was taken there, and examined and fully answered in the opinion. All the English and American cases supposed to have any bearing on the point in dispute there on the same question we have here, are noticed by him, and the doctrine clearly deduced, that the railroad company was not answerable to the plaintiff for the loss of his house being burned by fire communicated by the burning shed. That case is not distinguishable in principle, or in the manner of destruction, from this. It is on all fours with this case.

"But it seems to have been thought that The Insurance Co. *v.* Tweed, 7 Wal. U. S. Rep. 45, conflicts with the above case. I do not think it does, when understood. It was an action on a policy of insurance against fire, in which there was an exception of several matters, viz., invasion, insurrection, military and usurped power, *explosion*, earthquakes, &c. An explosion took place in a warehouse on the opposite side of the street from the insured property, and scattered fire and burning fragments upon the insured property and destroyed it. The decision of the supreme court was, that the loss was within the exception of loss by fire occasioned by explosion. To me it seems that it would have been rather more rational to have held that the destruction was by fire, *per se*. But the court interpreted the terms of the contract of the parties in this way. We must remember that there may be a difference between interpreting the obligation of a contract, and defining liability under the law of social duty. Certain it is, the laws are not the same. One does not necessarily rule the other. I may say further, that there is no evidence, in the opinion of Mr. Justice Miller, that he had specially in view the same question, so ably discussed by Mr. Justice Hunt, or if he had, that his investigations extended so far as did those of the last named

of the track, and from thence to a mass of dry weeds and grass which had been there permitted by the defendant to accumulate. From this material, which had become very inflammable, the fire was communicated directly to the plaintiff's land, burning the trees and soil, which was the damage complained of. It was argued for the defendant that the damage was too remote, and Penn. R. R. *v.* Kerr, and Ryan *v.* N. Y. C. R. R. were relied on. But Folger, J., in giving the opinion of the court of appeals, held these cases to be inapplicable. "In Ryan's case," he said, "the opinion of the court was that the action could not be sustained, for the reason that the damage incurred by the plaintiff

judge. He does not even refer to the New York case at all.

"The question here involved does not seem to have been definitely determined in England; why, I am at a loss to know. There have been decisions, it is true, imposing liability against the reasons we have expressed above, but in none of them is the question of proximate and remote cause of the injury discussed at all. Such is the case in Piggot *v.* The Eastern Counties Railroad Co. 54 E. C. L. R. 229, cited by the counsel for the defendant in error; and such is the recent case of Smith *v.* The London & Southwestern Railway Co. Law Rep. March, 1870, p. 98. In this case Bovill, C. J., and Keating, J., affirmed the recovery. Brett, J., dissented. Both these cases were in the court of common pleas. I find no review of the question in the exchequer chamber. I regard these cases as passing over the question that was decided in the court of appeals in New York, and which is before us now, *sub silentio*. Hunt, J., expresses, to some extent, my experience, when he says, 'I have examined the authorities cited from the Year Books, and have not overlooked the English statutes on the subject, on the English decisions, extending back for many years. It will not be useful further to refer to the authorities, for it will be impossible to reconcile some of them with the views I have taken.' I entirely agree, that if they shed any light, it is too uncertain and dim to be followed with safety; while on the other hand, the concurrence of principle, with a just measure of responsibility, we think, is best subserved by the rule we suggest. With every desire to compensate for loss when the loser is not to blame, we know this cannot always be, without transcending the boundaries of reason, and, of course, of law. This we cannot do, and we fear we would be doing it, if we affirmed the judgment in this case. The limit of responsibility must lie somewhere, and we think we find it in the principle stated. If not found there, it exists nowhere. We have not been referred to any case, in any of the state courts, excepting those noticed, and I have not myself discovered any, which, in the least, militates against the foregoing views; we are therefore constrained to follow the result of our conclusions, and reverse the judgment in this case. At present we will not order a *venire de novo*, but if the plaintiff below and defendant in error desire, we will order it on the grounds shown for it, if made in a reasonable time."

was not the immediate but the remote result of the negligence of the defendant. . . . . The facts in the Ryan case are familiar, but they can be repeated briefly. The defendant by its negligence in not keeping in sufficient good order its engine, or in not properly managing it, set fire to its own wood-shed, and the contents thereof. *The fire from this was communicated through an intervening vacant space of one hundred and thirty feet*, to the buildings of the plaintiff standing on his premises, which were not in contiguity with those of the defendant, until it was destroyed; and the pith of the decision was *that this was a result which was not necessarily to be anticipated from the firing of the wood-shed and its contents; that it was not an ordinary, natural, and usual result from such a cause;* but one dependent upon the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind, which are said to be circumstances accidental and varying. The principle applied was the converse of that enforced in Vanderburgh *v.* Truax, 4 Denio, 464, *which was that the consequence complained of was the natural and direct result of the act of the defendant.*" But in the present case, the fire negligently kindled by the defendant communicated directly to the plaintiff's land, in a way that was natural and direct; and hence the defendant was held liable.[1]

§ 152. In Massachusetts, where there is a special statute which will be presently noticed, the question was discussed in 1868 in a case where the evidence was that the fire which destroyed the plaintiff's property proceeded from the defendant's locomotive, and came in a direct line and without any break, to the plaintiff's property. But in reaching the plaintiff's land it went across the land of three or four different parties which lay between the plaintiff's land and the railroad track, and the distance to the plaintiff's land was about half a mile. It was fed on its way by grass, stubble, and woodland.[2] "The liability of the railroad," said Chapman, J., "*is not at common law, nor dependent on the defendant's want of care; but is under a statute very general in its terms, making a railroad corporation responsible in damages to any person whose building or other property may be injured by*

[1] To the same effect is Vaughan *v.* Taff R. R. 3 H. & N. 742; McGraw *v.* Stone, 53 Penn. St. 441, and cases hereafter cited.

[2] Perley *v.* East. R. R. 98 Mass. 414.

fire communicated by its locomotive engines, and giving the corporation an insurable interest in the property upon its route, for which it may be held responsible, with authority to procure insurance thereon in its own behalf. . . . . The terms of the statute do not restrict the liability so as to exclude any cases where the fire is communicated from the engine, nor limit the insurable interest to any specific distance from the track." It is true that the opinion goes on to cite Ryan *v.* N. Y. Cent. R. R., and to express a dissent from the result there reached on common law grounds; but the case is made to rest mainly on the language of the local statute. Prior decisions of the same court,[1] can be sustained at common law, on the ground that the burning of the plaintiff's property was caused by an irresistible sheet of flame kindled directly by the defendant's engine.

§ 153. In sharper opposition, however, to the result in Pennsylvania and New York is a decision in Illinois,[2] in a case where a locomotive, when passing through a village, set fire to a warehouse and a lumber yard. The weather "was very dry and the wind blowing freely to the south." From the warehouse first ignited the flames "speedily set on fire the building of plaintiffs, situated about two hundred feet from the warehouse." The defendant demurred to the evidence, and the court trying the case sustained the demurrer. This was reversed by the supreme court, and rightfully, for there was no evidence that could lead to the presumption that the fire in the intermediate buildings could by due diligence have been extinguished, or that by due diligence the plaintiffs' building could have been protected from the fire: and the demurrer, by admitting the truth of the plaintiffs' evidence with all its intendments, admitted that the fire in the plaintiffs' building was naturally and in unbroken sequence communicated from the defendant's engine. The court, however (Lawrence, C. J.), went beyond this necessary consequence of the pleadings, and advanced positions which, if accurate, would make the first starter of a fire liable for all other fires which might be kindled from the flames he thus originated. Yet if so, why is he to be considered the primary cause? For, if we must go back through all intermediate negligences to the first act of negligence,

[1] Hart *v.* W. R. R. 13 Metc. 99; and Ingersoll *v.* S. & P. R. R. 8 Allen, 438.

[2] Feut *v.* Toledo, P. & W. R. R. 59 Ill. 351; 1 Redfield R. R. Cases, 350.

there is no reason for stopping with the railway company. Either the road was anterior or posterior to the buildings which were thus ignited. If anterior, then, in view of the contingencies of railroad fires, it was negligence to erect such buildings under the very eaves of its smoke-pipes. If posterior, then it was negligence in the legislature to authorize the road to run its track close to buildings so combustible; and it was negligence in the village authorities not to require these buildings to be removed. Nor, if we trace the train of causation, as thus defined, at its other end, can we see, on the reasoning of the court, where this liability can be stopped. "A natural consequence, which any reasonable person could have anticipated," is the test given by Chief Justice Lawrence. But "anticipatedness," as we have already seen,[1] is not an adequate test; for it is reasonable for me to anticipate that other people will be negligent, yet this does not make me liable for the negligences I thus anticipate; and "naturalness, without the limitations heretofore given,[2] is by itself insufficient, in cases where intervening negligences are set up.

§ 154. A distinct state of facts is exhibited in another interesting case, where the same question was mooted before Miller and Dillon, JJ. at a circuit court of the United States in May term, 1874.[3] The defendant's steamboat negligently set fire, by means of a smoke-pipe without a spark-arrester, to an elevator *owned by the defendant*, from which the fire passed to the plaintiff's saw-mill and lumber, distant 388 feet from the elevator. "There was at the time an unusually high wind blowing from the elevator in the direction of the plaintiff's lumber and mill. The evidence tended to show that sparks and burning brands were carried directly from the elevator to the lumber and mill; and that the trees upon the bluffs, 600 feet distant from the elevator, were scorched and killed by the flames and heat from the elevator." Here, therefore, there was no question as to the intermediate negligence of a third party, or of contributory negligence by the plaintiff, while the defendant's negligence was indisputable. The intermediate building (the elevator) belonged to the defendant; so that if there was any negligence in not stopping the flames at the elevator, that negligence was the defendant's. The plaintiff, in such a fierce blast of fire as that which the evi-

[1] Supra, § 16, 77.

[2] See supra, § 73.

[3] Kellogg *v.* Milwaukee & St. P. R. R., Central Law J. for June 4, 1874.

dence depicted, could not have saved a structure offering so expanded and combustible a surface as do a saw-mill and lumber yard. The distance of the plaintiff's property to the steamboat depot was not such, supposing the plaintiff to have been the second comer, to charge him in any sense with imprudence in selecting his site. The defendant was clearly guilty of negligence in not having spark-arresters to his smoke-pipe. The case was therefore one in which the plaintiff was entitled to recovery, and so found the jury, after a charge from Miller, J., in which this particular question was left to the jury as follows: "Now in the case before us, it is said that while the burning of the elevator was the direct consequence of the sparks from *The Jennie Brown*, the burning of the mill and lumber was the remote consequence of the negligence of the defendant. I am not prepared to say this. I do not believe it is the duty of the court to take that question away from the jury, and I leave it with you, as was done at the former trial, to determine whether under all the circumstances of the case, — with the wind blowing, the inflammable character of the elevator, the combustible material of which it was composed; and on the other hand, the distance between the elevator and the mill and lumber, and from all the evidence and circumstances before you, — whether the burning of the mill and lumber by the fire from the elevator was a consequence usually and naturally to be expected; *whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator, and whether the burning of the elevator was the result of the sparks from The Jennie Brown.*" In this case, also, the question of the interposition either of the plaintiff's negligence, or of that of a third person, did not arise. Had such an interposition been claimed, then an issue would have been presented which would have made it proper for the jury to have been told that the plaintiff could not recover if his negligence was the proximate cause of the disaster, or if the fire was communicated to the plaintiff's property by means of a fire in the property of a third person, which intermediate fire could have been arrested had there been due diligence either on the part of such third person, or of the public authorities assuming the duty of the local extinguishing of fires.

§ 155. To show the necessity of instructions such as those just stated, a single illustration, in addition to those already pre-

sented,[1] may be here given. A., B., C., D., E., and F. are standing five feet apart. A. negligently jostles B., knocking him down, and B., instead of recovering himself, negligently falls on C.; and C. negligently falls on D., and D., in the same negligent way, falls on E., and E. on F. A., let us assume, is a rich man, and F. sues A., naturally preferring to select him, as one who is able to pay, as the party to redress the hurt. But why, if we are to go thus back, stop with A.? Some antecedent negligence of some other person might be found which put A. in the position which occasioned him to jostle B., and hence, if we adopt this theory of indefinite vicarious liability, we are reduced to the alternative either of losing ourselves in the remote past in the search for the original negligence, or of perpetrating the injustice of selecting out of the long train of antecedents the one against whom a verdict can be most easily collected. The only relief we have from this absurdity is in holding that causal connection is broken by the intermediate negligence of a responsible independent agent. Nor is the principle changed if we substitute for B. a person, B. a house, supposing that B. the house is owned by persons whose duty it is to guard against fire. If there is negligence of any kind imputable to the owner of house B., or to those bound in any way to preserve house B. from catching fire, then the causal connection is broken. To hold that in case of such intermediate negligence the party guilty of such negligence is to be skipped, and satisfaction to be taken out of some prior antecedent who is a capitalist, would be to destroy non-capitalist as well as capitalist. The non-capitalist, leaving by the side of a railroad track a heap of combustible stuff, would indeed cease to be responsible to his neighbors on the other side for the flames which without his negligence would not have spread. But this irresponsibility, while making it a matter of indifference to him how negligent he may be in his own duties, gives him, with an outlaw's immunities, an outlaw's beggary. For he cannot honestly live unless honestly employed; and he cannot be employed without an employer; and no employer will venture into an industry of which it is one of the conditions that capital is to be made liable for all damage, and the non-capitalist to be excused from the exercise of all care.

[1] Supra, §§ 137–141.

CHAPTER IV.

LIABILITY OF MASTER FOR SERVANT.

Limitations of Roman Law, § 156.
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But no liability for work performed prior to acceptance, § 174.
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This applies to all departments of agency, § 182.
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Nor from liability for what is in the scope of his directions, § 184.
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Distinctive views as to municipal corporations, § 190.
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But not for collateral negligence, § 191.
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Not liable for negligence of contractor, § 193.
Nor for matters not within its legal province, § 195.
Distinctive views as to private corporations, § 196.
Distinction as to official subordinates, § 197.

§ 156. *Limitations of Roman law.* — The Roman law, in its treatment of vicarious liability, was affected by several considerations which do not apply to ourselves. In the first place, the office of servant, in the sense in which we now hold it, was then occupied exclusively by the slave; and consequently it was to the slave that attached the liabilities to which we subject the servant. Then, again, the Roman idea of the freeman had associated with it a haughty independence which was inconsistent with such a subordination of one freeman to another as the doctrine of *respondeat superior* assumes. Yet, as a third qualification, it was held that this notion of independence did not apply to the *filiusfamilias*, but that for the acts of the *filiusfamilias* the *paterfamilias* was under certain circumstances liable.

Keeping these peculiarities in mind, we can understand how, on the subject of vicarious liability, the Roman law should adopt the following positions: 1. The master was liable for the acts of the slave; but this liability, unless the slave's acts were in pursuance of the master's orders, was not extended further than to make the master bound to defend the slave, who was personally liable for the harm done. The master could by the old law relieve himself from personal liability by surrendering the slave, on the principle, *Noxa caput sequitur.* Subsequently this was changed, in favor of the master, as was alleged, by putting the master in the slave's place so far as to make the master responsible for the slave's delicts.[1]

2. The *paterfamilias*, by the old law, was in like manner liable, on the principle of family subjection, to a noxal action for the misconduct of the *filiusfamilias.* When the son was emancipated, however, this vicarious liability of the father for the son ceased, and the *filiusfamilias* became personally liable for his own delicts. But before emancipation, the father's liability was enforced by the *actio noxalis in patrem ex noxa filii.* The basis of the action was the theory of the subjection of the family to the *paterfamilias.* The father could not take the benefits of his supremacy without its burdens; if he was to receive the profits, he must be chargeable with the loss. The same reasoning made the husband liable for the wife's delicts which occurred during her subjection to him.

3. Where a person undertook by contract to perform a particular service, which required the coöperation of employees, he was liable for such negligence of such employees as occurred in the discharge of their duties.

§ 157. *By Anglo-American law the master is liable for the servant's negligent conduct in the course of his employment.* — Our own law, rejecting the idea of absolute subordination which the Roman law assigns to the relation of master and servant, makes the master generally liable for the negligent conduct of the servant within the range of the latter's employment, recognizing, however, the servant's liberty to act out of such range, and relieving the master from liability when the servant thus acts not on his master's account but his own. That the master is liable for the servant's negligences in the range of the latter's employment is an element-

[1] See Wyss' Haftung für fremde Culpa. Zurich, 1867.

ary principle upon which the whole of this branch of law rests.[1] "The liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim, *qui facit per alium facit per se*. The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill, or want of care, of the person employed; but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent acts the injury has been occasioned."[2]

So by Coleridge, J.,[3] it is said: "The maxims *qui facit per alium facit per se*, and *respondeat superior*, are unquestionable; but where they apply, the wrongful act is properly charged to be the act of him who has procured it to be done; he is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another — and he a free agent — that was employed."

§ 158. Thus, "if the master is himself driving his carriage, and from want of skill causes injury to a passer-by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: *qui facit per alium facit per se*."[4]

§ 159. So a railroad corporation is to be regarded as construc-

[1] Laugher *v.* Pointer, 5 B. & C. 547; Ramsden *v.* Bost. & A. R. R. 104 Mass. 117; Wilton *v.* Middlesex R. R. 107 Mass. 108; Johnson *v.* Brnner, 61 Penn. St. 58; Allison *v.* R. R. Co. 64 N. C. 382; Garretson *v.* Duenckel, 5 Mo. 104; Smith *v.* Webster, 23 Mich. 298; Pickens *v.* Dieckert, 21 Ohio St. 212; Pittsb., All. & M. R. R. *v.* Donahue, 70 Penn. St. 119; Bagley *v.* Manch. &c. R. R., L. R. 6 C. B. 415; Oliver *v.* N. Pac. Trans. Co. 3 Oregon, 184.

[2] Rolfe, B., in Reedie *v.* L. & N. W. R. R. 4 Exch. 255; So Laugher *v.* Pointer, 5 B. & C. 547; Quarman *v.* Bennett, 6 M. & W. 499; Butler *v.* Hunter, 7 H. & N. 826; Overton *v.* Freeman, 11 C. B. 873; Peachy *v.* Rowland, 13 C. B. 187; Sadler *v.* Henloch, 4 E. & B. 570; Cuthberton *v.* Parsons, 12 C. B. 304; Gayford *v.* Nicholls, 9 Exch. 702; Grote *v.* Chester & H. R. R. 2 Exch. 251.

[3] Lumley *v.* Gye, 2 E. & B. 216.

[4] Judgm. Hutchinson *v.* York, Newcastle & Berwick R. C. 5 Exch. 350.

tively present in all acts performed by its general agents within the range of their ordinary employments.[1]

§ 160. *Need be no specific directions.* — It is not necessary that there should be specific directions as to the particular act. It is enough if the general relation of master and servant, as to such act, exists.[2]

[1] Louisville, &c. R. R. *v.* Collins, 2 Duvall, 114; Pittsburg, &c. R. R. *v.* Ruby, 38 Ind. 312; infra, § 199.

"In general," says Lord Cranworth (Bartonshill Coal Co. *v.* Reid, 3 Macq. Sc. App. Cas. 266), "it is sufficient for this purpose (to charge the master) to show that the person whose neglect caused the injury was, at the time when it was occasioned, acting not on his own account but in the course of his employment as a servant in the business of a master, and that the damage resulted from the servant so employed not having conducted his master's business with due care. In such a case, the maxim, *respondeat superior* prevails, and the master is responsible.

"Thus, if a servant driving his master's carriage along the highway carelessly runs over a by-stander, or if a gamekeeper employed to kill game carelessly fires at a hare, so as to shoot a person passing on the ground, or if a workman employed by a builder in building a house negligently throws a stone or brick from a scaffold, and so hurts a passer-by: in all these cases (and instances might be multiplied indefinitely), the person injured has a right to treat the wrongful or careless act as the act of the master.

"*Qui facit per alium facit per se.* If the master himself had driven his carriage improperly, or fired carelessly, or negligently thrown the stone or brick, he would have been directly responsible; and the law does not permit him to escape liability because the act complained of was not done with his own hand. He is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself, or of those acting under his orders in the course of his business. Third persons cannot, or at all events may not, know whether the particular injury complained of was the act of the master or the act of his servant. A person sustaining injury in any of the modes I have suggested has a right to say, I was no party to your carriage being driven along the road, to your shooting near the public highway, or to your being engaged in building a house. If you chose to do, or cause to be done, any of these acts, it is to you, and not to your servants, I must look for redress, if mischief happens to me as their consequence. A large portion of the ordinary acts of life are attended with some risk to third persons, and no one has a right to involve others in risks without their consent. This consideration is alone sufficient to justify the wisdom of the rule, which makes the person by whom or by whose orders these risks are incurred responsible to third persons for any ill consequences resulting from due want of skill or caution."

[2] Barwick *v.* Eng. Joint Stock Bank, L. R. 2 Exch. 265; Tuberville *v.* Stamp, Raym. 266; Seymour *v.* Greenwood, 7 H. & N. 355; Patten *v.* Rea, 2 C. B. (N. S.) 606; Mitchell *v.* Crasweller, 13 C. B. 237; Storey *v.* Ashton, L. R. 4 Q. B. 476.

§ 161. Thus it has been judicially declared in England,[1] that "the general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo."[2] It applies, also, to actions of false imprisonment, in cases where officers of railway companies improperly or negligently expel, or confine, persons who are supposed to come within terms of the by-laws.[3] "It is true," as has been said by the learned judge last cited, "that the master has not authorized the particular act, but he has put the agent in his place to do that class of acts; and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in."

So, also, as is said by Maule, J.,[4] the master "is liable, even though the servant in the performance of his duty is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But where the servant (as will presently be seen more fully), instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it."

§ 162. "*Course*," "*scope*," *or* "*range*" *of employment*. — It has been already said that to make the master liable for the servant's negligence, this negligence must be in the course, or as it is sometimes called "scope," or "range," of the latter's employment.

§ 163. *Illustrations of what may be considered as "course," "scope," or "range."* — The master of a ship,[5] in making a deviation in order to perform salvage services, is held as acting within the general scope of his authority, and therefore the owners are liable for damage caused by a collision occurring through the master's negligence while so deviating from his track.

[1] Berwick *v.* Eng. Joint Stock Bank, L. R. 2 Exch. 265.

[2] Ewbank *v.* Nutting, 7 C. B. 797.

[3] Goff *v.* Great Northern R. C. 3 E. & E. 672; Hamilton *v.* Third Av. R. R. 53 N. Y. 25.

[4] 13 C. B. 247.

[5] The Thetis, L. R. 2 Adm. 365.

For the driver of a street car to invite and permit children to ride on its platform without pay, is an act sufficiently within the range of the driver's employment to make the road liable for injuries incurred by one of the children through the driver's negligence.[1] Yet the principle of the last cited cases cannot be stretched so as to imply authority on the part of the engineer of a locomotive to invite a child on the machinery. Thus in a Pennsylvania case,[2] the evidence was that of a train of cars belonging to the defendants coming into a city, the engine, tender, and one car were detached from the remainder, and run under the charge of the fireman in the engineer's place, to a water-station belonging to the defendants. At the station, the fireman asked a boy ten years old, standing there, to turn on the water; whilst he was climbing on the tender to put in the hose, the remainder of the train came down with their ordinary force, and struck the car attached to the engine. The jar threw the boy under the wheel and he was killed. In an action by the parents for his death, it was ruled that it not being in the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendants were not liable.[3]

§ 164. So persons employed to repair a particular road have been held responsible for the negligence of their servants in leav-

[1] Wilton *v.* Middlesex R. R. 107 Mass. 169.

[2] Flower *v.* Penn. R. R. Co. 69 Pa. St. 210.

[3] In the last cited case this point is thus satisfactorily discussed by Agnew, J.: . . . . "The business of an engineer requires skill and constant attention and watchfulness; and that of a fireman requires some skill and much attention. They are in charge of a machine of vast power, and large capacity for mischief. The responsibility resting on them, and especially on the engineer, is great, and neither should be permitted to delegate the performance of his duties to others. In doing so without permission, they transcend their powers. There cannot, therefore, be any general authority in the engineer and fireman which can embrace a request to perform the fireman's duty. Even an adult to whom no injury would be likely to ensue could not justify under the fireman's request. Much less can there be any presumption of authority to invite a boy of tender years to perform a service, which required him to clamber up the side of the engine or tender. It was a wrong on the part of the fireman to ask such a youth to do it. Whether the boy could be treated as a mere trespasser is scarcely the question. His youth might possibly excuse concurrent negligence where there is clear negligence on the part of the company. Such were the cases of Lynch *v.* Nurdin, 1 A. & E. N. S. 29 (41 E. C. L. 422); Rauch *v.* Loyd & Hill, 7 Casey, 358."

ing a heap of stones on the highway against which the plaintiff, on a dark night, drove, upsetting his cart, and being thereby damaged.[1]

§ 165. A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by laborers), to carry the rails from the quay to the ship *after* the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured the plaintiff who was passing by. It was held in the English common pleas (per Grove and Denman, JJ., Brett, J. dissenting), that there was evidence for the jury that the foreman was acting within the course of his employment, so as to render the stevedore responsible for his acts.[2]

§ 166. So where the defendant, a contractor under a district board, was engaged in constructing a sewer, and employed men with horses and carts, and the men so employed were allowed an hour for dinner, but were not permitted to go home to dine or to leave their horses and carts; but one of the men went home about a quarter of a mile out of the direct line of his work to his dinner, and left his horse unattended in the street before his door. The horse ran away and damaged certain railings belonging to the plaintiff; it was held that it was properly left to the jury to say whether the driver was acting within the scope of his employment, and that they were justified in finding that he was.[3]

§ 167. The plaintiff, a passenger on another road, on walking across a platform occupied by the defendants in company with other railroad companies, was injured by the negligence of a porter, a servant of the defendants, in dropping from a truck a portmanteau, which fell on the plaintiff. The defendants were held by the court of queen's bench, in 1870, liable for the porter's negligence.[4]

§ 168. But when the servant departs from the performance of his master's business, and wrongfully, though with the master's materials unlawfully taken, undertakes to do something on his

[1] Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214.

[2] Burns *v.* Poulson, L. R. 8 C. B. 363.

[3] Whatman *v.* Pearson, L. R. 3 C. P. 422.

[4] Tebbutt *v.* Bristol & Ex. R. R. Co., L. R. 6 Q. B. 73.

own account, the master ceases to be responsible for the servant's negligence.[1]

Thus in a leading case, the master has been held not to be liable for the negligence of a servant who burned a house down in trying to cleanse a chimney, it being shown that the servant's duty was not to cleanse the chimney but only to light the fire.[2]

So where a coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking them to the stable, used them in going upon an errand of his own, without his master's knowledge or consent, and, while doing so, he negligently ran into and injured the plaintiff's horse; it was ruled that his master was not liable.[3]

§ 169. So in another case,[4] it appeared that the defendant bought some boards from the plaintiff, a timber merchant, and at the defendant's request the plaintiff gave him permission to use his shed for the purpose of making a sign-board. The defendant employed D., a carpenter, to make the sign-board at a fixed price, and D. used the shed for that purpose, with the plaintiff's knowledge. D., while so working, lighted a pipe from a match with a shaving, which he accidentally dropped, and the shed was burnt down; and upon an action being brought against the defendant, it was held, that he was not liable; for that the act of D. was not a negligent act within the scope of his authority. In the course of giving the judgment of the court, Martin, B., said: "Now, we are not aware of any authority which shows that any contract exists between a person so occupying a shed under a license beyond that which the law would itself impose in respect of negligence; and we think, therefore, that the only duty which was imposed upon the defendant was, that there should not be negligence in the use of the shed; and if, in the course of the employment, Davis, the carpenter, had been guilty of any negligence which could be at all applicable to the employment in which he was engaged, it may be that the defendant would be responsible; but we think, upon the best consideration that we can give to the

[1] Mitchell *v.* Crassweller, 13 C. B. 237; Sleath *v.* Wilson, 9 C. & P. 607; Peachey *v.* Rowland, 13 C. B. 182; Gray *v.* Pullen, 5 B. & S. 970; Sadler *v.* Henlock, 4 E. & B. 570; Williams *v.* Jones, 3 H. & C. 602.

[2] McKenzie *v.* McLeod, 10 Bing. 385.

[3] Sheridan *v.* Charlick, 4 Daly, 338.

[4] Williams *v.* Jones, 3 Hur. & C. 256; 33 L. T. Ex. 297.

case, it is impossible to hold, that a man who employs another for a sum of money to do a job is to be responsible because that man does a very natural and common act, and lights a pipe, which the jury have found to be a negligent act; it is impossible to say that that casts any liability upon the employer. If the facts were correctly found by the verdict, Davis himself would be liable and responsible for this negligence, for he would have acted negligently when on the premises of another person, towards whom he was, at all events, bound to use reasonable care for the purpose of protecting the premises from injury, and therefore the action would lie against him."

§ 170. So, where the defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles; on their return, when about a quarter of a mile from the defendant's offices, the carman, instead of performing his duty, and driving to the defendant's offices, depositing the bottles, and taking the horse and cart to stables in the neighborhood, was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk's, and while they were thus driving the plaintiff was run over, owing to the negligence of the carman; it was ruled that the defendant was not liable; for that the carman was not doing the act, in doing which he had been guilty of negligence, in the course of his employment as servant.[1]

[1] Story *v.* Ashton, L. R. 4 Q. B. 476. "I am of opinion," said Cockburn, C. J., "that the rule must be discharged. I think the judgments of Maule and Cresswell, JJ., in Mitchell *v.* Crassweller,[1] express the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in Sleath *v.* Wilson,[2] that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in Mitchell *v.* Crassweller [3] the

[1] 13 C. B. 237; 22 L. J. C. P. 100.
[2] 9 C. & P. 607, 612.
[3] 13 C. B. 237; 22 L. J. C. P. 100.

§ 171. *It makes no difference that the negligence was in direct disobedience to master's private instructions.* — Where the servant is acting within the scope of his employment, the master is responsible, even for an act "the very reverse of that which the servant was actually directed to do."[1] Thus, in an English case,[2] the evidence was that a servant, employed by the defendants to drive their omnibus, drew his omnibus across the road in front of a rival omnibus of the plaintiff to block the latter, and in so doing collided with and injured the plaintiff's omnibus. It was proved that the defendants' servant had express directions from his masters not to obstruct other omnibuses; and he proved that he did it on purpose, and to serve the plaintiff's driver as the latter had served him. On the trial of the case the judge (Martin, B.) directed the jury that if the defendants' driver acted carelessly, recklessly, wantonly, or improperly, but in the course of his

servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable."

"Mellor, J.: I am of the same opinion. Generally speaking, the master is answerable for the negligent doing of what he employs his servant to do; and it is not, as Cresswell, J., says, because the servant, in executing his master's orders, does so in a roundabout way, that the master is to be exonerated from liability. But here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles, when he had got within a quarter of a mile from the defendant's office, he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary, every step he drove was away from his duty."

"Lush, J.: I am of the same opinion. The question in all such cases as the present is, whether the servant was doing that which the master employed him to do. If he was, the master is liable for the negligence just as if he himself was guilty of it. Here the employment was to deliver the wine, and carry the empty bottles home; and if he had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment."

[1] Kelly, C. B., in Bayley *v.* Manchester, Sheffield & Lincolnshire Ry. Co., Law Rep. 8 C. P. 153 (Exch. Ch.); aff. *S. C.* Law Rep. 7 C. P. 445; Burns *v.* Poulson, Law Rep. 8 C. P. 563; Joel *v.* Morrison, 6 C. & P. 501; Whatman *v.* Pearson, Law Rep. 3 C. P. 422; Cosgrove *v.* Ogden, 49 N. Y. (4 Sick.) 255; Weed *v.* R. R. 17 N. Y. 362; Southwick *v.* Estes, 7 Cush. 385; Priester *v.* Angley, 5 Rich. 44.

[2] Limpus *v.* London Gen. Om. Co. 1 Hur. & C. 526.

employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant, and that the instructions given by the defendants to the driver not to obstruct other omnibuses, if he did not observe them, were immaterial as to the question of the master's liability; but that if the true character of the driver's act was, that it was an act of his own, and in order to effect a purpose of his own, then the defendants were not responsible. Upon this direction being excepted to, the exchequer chamber held that it was correct. Willes, J., in giving his judgment, said: "It appears clearly to me that this was (and it was treated by my brother Martin as) a case of improper driving, and not a case in which the servant did anything altogether inconsistent with the discharge of his duty to his master, and out of the course of his employment, a fact upon which it appears to me that the case turns. This omnibus of the defendants was driven in before the omnibus of the plaintiff. Now, of course, one may say, that it is no part of the duty of a servant to obstruct another omnibus, and that in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say, in my opinion, those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servant, in the course of his employment, and the law is not so futile as to allow the master, by giving secret instructions to a servant, to set aside his liability. I hold it to be perfectly immaterial that the masters directed the servant not to do the act which he did. As well might it be said, that if a master, employing a servant, told him that he should never break the law, he might thus absolve himself from all liability for any act of the servant, though in the course of the employment." "I am also of opinion," said Byles, J., "that my brother Martin's direction in this case was correct. He uses the words, 'in the course of his employment,' which, as my brother Willes has pointed out, are expressions directly justified by the decisions. His direction, as I understand it, amounts to this: that if a servant acts in the prosecution of his master's business with the intention of benefiting his master, and not to benefit or gratify himself, then the master is responsible, although it were in one sense a wilful act on the part of the servant. Now, it is said, that this was contrary to the master's instructions. That might be said in ninety-nine cases out of a

hundred, where actions are brought against the master to recover damages for the reckless driving of a servant. It is said that it was an illegal act. So, in almost every case of an action against the master for the negligent driving of a servant, an illegal act is imputed to the servant."[1]

§ 172. *Not necessary that the service should have been permanent. A special service, for a particular period or purpose,*[2] *is enough to constitute the liability*, provided the servant at the time is acting within the general scope of his employment, and is not obeying the directions of a third person[3] who has some title to give directions,[4] such person not being an intermediate agent of the master,[5] and is not wilfully acting for himself instead of for his master.[6]

§ 173. *Nor does it matter that the servant is in the general employ of third persons.* — Hence it is a logical inference that the principle does not cease to operate when the servant is in the employ of a third person, if released for the particular work in question. Thus the fact that a person, who, being in charge of a horse with the assent of its owner, and engaged on his business, caused an injury by negligent riding, was in the general employment of a third person, does not exempt the owner of the horse from liability for the injury, unless the relation of the third person to the business was such as to give him exclusive control of the means and manner of its accomplishment, and exclusive direction of the persons employed therefor.[7]

So, as is said by Parke, J.,[8] "there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual manage-

[1] See also Green *v.* The London General Omnibus Co. 7 Com. B. (N. S.) 290.

[2] McLaughlin *v.* Pryor, 4 M. & G. 48; 1 C. & M. 354; Croft *v.* Allison, 4 B. & Ald. 590; Taverner *v.* Little, 5 Bing. N. C. 678; Wheatley *v.* Patrick, 2 M. & W. 650; Wilson *v.* Peverly, 2 N. H. 548.

[3] Murphy *v.* Caralli, 3 H. & C. 462; Coomes *v.* Houghton, 102 Mass. 211; Kimball *v.* Cushman, 103 Mass. 194.

[4] Garretzen *v.* Duenckel, 50 Mo. 104.

[5] Stone *v.* Cartwright, 6 Tenn. 411; Brown *v.* Lent, 20 Vt. 529.

[6] Mitchell *v.* Crassweller, 13 C. B. 237; Storey *v.* Ashton, L. R. 4 Q. B. 476; Story on Agency, § 451, note by Green.

[7] Kimball *v.* Cushman, 103 Mass. 194.

[8] Quarman *v.* Burnett, 6 M. & W. 499.

ment of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of."

§ 174. *No liability for work merely accepted and performed prior to acceptance.* — A person contracting to do a particular job does not, by accepting and paying for work done thereon by a mechanic without his prior authority, make himself liable for injuries caused to a third person by a negligent act committed by the mechanic while doing the work, but not a part or result of the work itself. "This would not be an adoption by the defendant of anything that was not a part of or result from the work thus accepted. It would not, of itself, establish the relation of master and servant, with all its incidental consequences."[1]

§ 175. *Not necessary that appointment should spring directly from master.* — Nor is the case varied when the servants are appointed by middle-men. Thus a railroad corporation on this principle is responsible for the negligence of its subalterns of the lowest grade, provided they are in the range of its appointments;[2] a municipal corporation for negligence of sub-contractors;[3] the owner of a mine, who controls it, for the negligence of under-servants who are appointed by a manager whom the owner appoints;[4] the owner of property who receives its profits, but deputes its intermediate management to an agent, for the negligence of the laborers whom the agent appoints;[5] and the owner of a ship for the negligence of the crew who are selected by the master at the owner's desire, the master being selected by the owner.[6] But the mere fact that an owner has the power of removing workmen appointed by a contractor not under the owner's control, does not make the owner responsible for the workman's negligence.[7]

§ 176. *But there must be the power of appointment or super-*

[1] Coomes *v.* Houghton, 102 Mass. 211.

[2] Machu *v.* London & S. W. R. C. 2 Exch. 415. See Flower *v.* Penn. R. R. 69 Penn. St. 210, as to limit of servant's power of appointing subalterns.

[3] Hamburg Turnpike Co. *v.* City of Buffalo, 1 N. Y. Sup. Ct. 537.

[4] 5 B. & C. 554.

[5] Holmes *v.* Orion, 2 C. B. N. S. 790; Suydam *v.* Moore, 8 Barb. 358; Althorf *v.* Wolf, 22 N. Y. 355.

[6] Martin *v.* Temperley, 4 Q. B. 298; Dunford *v.* Trattles, 12 M. & W. 529; Fenton *v.* City of Dublin Steam Packet Co. 8 Ad. & El. 835; Cuthbertson *v.* Parsons, 12 C. B. 304; Shuster *v.* McKellar, 7 E. & B. 724.

[7] Reedie *v.* London & N. W. R. R. 4 Exch. 244. See Overton *v.* Freeman, 11 C. B. 867.

vision reserved.[1] — A brig, which was towed at the stern of a steamboat, employed in the business of towing vessels in the river Mississippi, below New Orleans, was, through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor in the river. A suit was brought by the owners of the schooner against the owner of the brig for the damages sustained by the collision; and the question was, whether he was liable therefor. It was held, upon full argument, that he was not, upon the ground that the master and crew of the steamboat were not the servants of the owner of the brig; were not appointed by him; did not receive their wages or salaries from him; he having no power to order or control them in their movements.[2]

The defendants were employed by certain paving commissioners, to pave a particular district, and contracted with B. to pave one of the streets included in such district. B.'s workmen, while paving the street, left a heap of stones at night in so unsafe a position that the plaintiff fell over it and sustained an injury. No evidence was adduced to show that the defendants in any way sanctioned the placing of the stones; and it appeared that B. was in reality acting under the directions of the engineer and surveyor of the commissioners. It was held that as the relation of master and servant did not here exist between the defendants and B.'s employees, the defendants were not responsible for the latter's negligence.[3] But where the owner of land employs a contractor to make certain excavations on the sidewalk adjoining such land, reserving a right to supervise the contractor's work; and it appears that the contractor leaves the sidewalk in a dangerous condition, of which the owner has notice; the owner is liable for damages caused by such negligence.[4]

[1] See Knight *v.* Fox, 5 Exch. 721; Burgess *v.* Gray, 1 C. B. 578; Reedie *v.* London & N. W. R. R. 4 Exch. 244; McGuire *v.* Grant, 1 Dutch. 356; Elder *v.* Bemis, 2 Metc. 599; Ballou *v.* Farnum, 9 Allen, 47; Corbin *v.* Mills, 27 Conn. 274; Stevens *v.* Squires, 6 N. Y. 435; Williamson *v.* Wadsworth, 49 Barb. 294; Merrick *v.* Brainerd, 38 Barb. 574.

[2] Sproul *v.* Hemingway, 14 Pick. 1.

[3] Overton *v.* Freeman, 11 C. B. 867; Rapson *v.* Cubitt, 9 M. & W. 710. See also Cuthbertson *v.* Parsons, 12 C. B. 304; Allen *v.* Hayward, 7 Q. B. 960; Mersey Dock Trustees *v.* Gibbs, 11 H. L. Cas. 686; Scrivener *v.* Pask, 18 C. B. N. S. 785.

[4] City of Chicago *v.* Robbins, 2 Black, U. S. 419; Congreve *v.* Morgan, 5 Duer, 495; Congreve *v.* Smith, 18 N. Y. 79; Creed *v.* Hartman, 29 N. Y. 591.

§ 177. *Relationship of master and servant must exist as to the act the imperfect performance of which constitutes the negligence complained of.*[1] — Thus in a leading English case, A. the owner of a carriage, hired to draw his carriage, of B. a stable-keeper, a pair of horses for a day, the driver C. to be appointed by the stable-keeper, and there being no evidence of any adoption or recognition by A. of C. as his servant. Through the negligence of C. injury occurred to D. It was held by Lord Tenterden, C. J., and Littledale, J., that A. was not responsible for C.'s negligence. "According to the rules of law," said Littledale, J., "every man is answerable for injuries occasioned by his own personal negligence; and he is answerable also for acts done by the negligence of those whom the law denominates *his* servants; because such servants represent the master himself, and their acts stand upon the same footing as his own. And in the present case, the question is, whether the coachman, by whose negligence the injury was received, is to be considered a servant of the defendant. For the acts of a man's own domestic servants there is no doubt that the law makes him responsible; and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is that he is hired by the master either personally, or by those who are intrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him." And this applies to "other servants whom the master or owner selects and appoints to do any work; or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master."[2] So, where[3] the owner of a carriage hired four post-horses and two postilions of A., a livery stable-keeper, for the day, to run from London to Epsom and back, and in returning, the pos-

[1] McLaughlin *v.* Pryor, 4 Scott, N. R. 655; *S. C.* 1 Car. & M. 354; Quarman *v.* Burnett, 6 M. & W. 499; the judgments of Abbott, C. J., and Littledale, J., in Laugher *v.* Pointer, 5 B. & C. 547; Dalyell *v.* Tyrer, E., B. & E. 898; Hart *v.* Crowley, 12 A. & E. 378; Taverner *v.* Little, 5 Bing. N. C. 678; Croft *v.* Alison, 4 B. & Ald. 590; Judgm., Seymour *v.* Greenwood, 7 H. & N. 358; *S. C.* 6 Ibid. 359; Smith *v.* Lawrence, 2 Man. & Ry. 1; Sammell *v.* Wright, 5 Esp. N. P. C. 263; Scott *v.* Scott, 2 Stark. N. P. C. 438; Brady *v.* Giles, 1 M. & Rob. 494; per Patteson, J., 8 A. & E. 839.

[2] Laugher *v.* Pointer, 5 B. & C. 547.

[3] Smith *v.* Lawrence, 2 Man. & R. 1.

tilions damaged the carriage of B.; — it was held, that A., as owner of the horses and master of the postilions, was liable to B. for such damage.[1]

So in another English case,[2] the lessee of a ferry hired of the defendants for the day a steamer with a crew to carry his passengers across. The plaintiff, having paid his fare to H., passed across on the steamer, and while on board was injured by the breaking of a rope, owing to the negligence of the crew in the manner of mooring; and it was held, that the crew remained the servants of the defendants, who were therefore liable for their negligence; and that, as the negligence was such as would have made the defendants liable to a mere stranger, and the plaintiff was on board with their consent, it was immaterial that he was a passenger under a contract with H.

The defendants,[3] two elderly ladies, being possessed of a carriage of their own, were furnished by a job-master with a pair of horses with a driver by the day or drive. They gave the driver a gratuity for each day's drive, provided him with a livery hat and coat, which were kept in their house; and after he had driven them constantly for three years, and was taking off his livery in their hall, the horses started off with their carriage and inflicted an injury upon the plaintiff. It was held, that the defendants were not responsible, as the coachman was not their servant, but the servant of the job-master. Yet as has been already seen, a person may under such circumstances render himself personally liable by giving special directions to the driver or by otherwise taking the management of the coach into his own hands.

§ 178. *Where a person undertakes to do a particular work, he is liable for his subordinate's negligence in performing such work.* — By the Roman law, to adopt the exposition of a recent intelligent Swiss writer,[4] the *conductor operis* is liable for the wrongful acts (Schuld) of his workmen, which prevent the performance of his contract. Of this contract the first element is the due performance of the work assumed; the second is the careful handling and care of the locator's material given to be worked upon.

[1] See Dansey *v.* Richardson, 3 E. & B. 144.

[2] Dalyell *v.* Tyrer, Ell., Bla. & Ell. 899; 28 L. T. Q. B. 52; Crocker *v.* Calvert, 8 Ind. 127.

[3] Quarman *v.* Burnett, 6 Mee. & W. 499.

[4] Wyss, Haftung für fremde Culpa. Zürich, 1867.

Hence the contract may be violated either by imperfect execution either as to quality or time, or by the injury of the locator's material.[1]

The Roman law does not accept the theory which rests the conductor's liability in such case on a silent guarantee. Some passages from the Digest are cited, indeed, to sustain this theory; but as to the principal,[2] it has been well observed that if the jurist here apparently makes the *conductor operis* liable for the *damnum* of the *custos*, this is to be understood *cum grano salis;* the true meaning being that the *conductor* becomes liable for neglect in respect to the choice or oversight of the *custos*.

§ 179. *Nor does it make any difference that the service is gratuitous, or for the benefit of the plaintiff.* — If in such case the defendant would be liable for his own negligence, he is liable for the negligence of his servants, acting within the range of their employment. Thus where the defendant (a gas company), being informed that gas was escaping in the cellar of an occupied house, sent its employee to ascertain the location of the leak (it being responsible for the loss and repairs, if the leak was in the service pipe), and the person so sent, by lighting a match in the cellar, caused an explosion, by which the plaintiff was injured, it was ruled in New York, that the employee, although acting for the benefit of the occupants of the house as well as of the defendant, was the agent of the defendant only, and the defendant was liable for his negligence. If the employee, so argued the court, is incompetent or ignorant, it is negligence to select him or send him without proper instruction. If competent, the master is liable for his careless performance of his employment. If the service was the business of the defendant, although beneficial to the occupants, the defendant was bound to exercise ordinary care and prudence. Even if the service was gratuitous, the company was bound to due diligence in discharge of the duties it undertook.[3]

§ 180. *Master cannot by special contract with employee make the latter exclusively liable.* — An employer cannot relieve himself from liability for negligence by a contract with his employee that the latter shall be exclusively liable.[4]

[1] See Ellis *v.* Sheffield Gas Co. 2 E. & B. 767; infra, § 183.

[2] L. 41. D. h. t. 19. 2.

[3] Lannen *v.* Albany Gas Co. 44 N. Y. 459.

[4] Water Co. *v.* Ware, 16 Wall. 566; Milford *v.* Holbrook, 9 Allen, 21; Congreve *v.* Smith, 18 N. Y. 79; Congreve *v.* Morgan, 18 N. Y. 84; Storrs

§ 181. *When, however, a contractor or other special agent takes entire control of a work, the employer not interfering, the employer, supposing there was no negligence in the selection of the contractor, is not liable to third parties for injuries to such parties by the contractor's negligence.*[1] — Thus, for instance, where the owner of land employs a contractor to build a house for him, and while the building, under the contract, is in the contractor's exclusive possession, a stranger is injured by the negligence of the contractor's workman, the owner of the land is not liable for such injury.[2] "The test is, whether the defendant retained the power of controlling the work."[3] Thus in an action[4] for negligently pulling down a wall of the defendant's house adjoining the plaintiff's, evidence was given that the wall was taken down by a builder at an estimated cost, in pursuance of directions given to him by an architect employed by the defendant, and who had the general superintendence of the work at the defendant's house. It appeared that, in consequence of the removal of a beam from the wall, the front of the plaintiff's house fell down. It appeared, also, that the plaintiff's house ought, as a reasonable precaution, to have been shored up before the defendant's wall was removed. The judgment of the court was that the defendant was not liable; Pollock, C. B., saying: "We have no evidence but this: that a tradesman was applied to, to do that which was necessary to be done, under the circumstances of the case, and it must be assumed, that a direction was given to do it in the ordinary way, with all proper precautions, and taking care not to do any mischief. No doubt, where a thing in itself is a nuisance, and must be prejudicial, the party who employs another to do it is responsible for all the consequences that may have arisen; but when the mischief

v. Utica, 17 N. Y. 108; Creed *v.* Hartmann, 29 N. Y. 591.

[1] Cuthbertson *v.* Parsons, 12 C. B. 304; Rapson *v.* Cubitt, 9 M. & W. 710; Hole *v.* Sittingbourne R. R. 6 H. & N. 488; Welfare *v.* Brighton R. R. Co. 4 Q. B. 698; Readle *v.* London & N. E. R. R. 4 Exch. 243, overruling Bush *v.* Steinman, 1 B. & P. 403; Hilliard *v.* Richardson, 3 Gray, 349; Barry *v.* City of St. Louis, 17 Mo. 121; Kelly *v.* Mayor, 11 N. Y. (1 Kernan) 432; Forsyth *v.* Hooper, 11 Allen, 419. See infra, § 279.

[2] Steel *v.* S. E. R. R. 16 C. B. 556; Scammon *v.* Chicago, 25 Ill. 424; Felton *v.* Deall, 22 Vt. 171.

[3] Crompton, J., in Sadler *v.* Henlock, 4 E. & B. 570; cited in Warburton *v.* Great West. R. Co. Law Rep. 2 Exch. 30, and Murray *v.* Currie, Law R. 6 C. P. 25. See Murphy *v.* Caralli, 3 H. & C. 462.

[4] Butler *v.* Hunter, 7 H. & N. 826.

arises not from the thing itself, but from the mode in which it is done, then the person ordering it is not responsible unless the relation of master and servant can be established." So in another case,[1] the defendants, who were employed by A. to pave a district, sub-contracted with B. to pave a particular street. B.'s workmen, when paving such street, left some stones exposed in such a way that the plaintiff was injured by falling over these stones. No personal interference of the defendants with, or sanction of, the work of laying down the stones was proved. The court held that the defendant was not liable; and in his judgment Maule, J., said: "One mode of inquiring whether the defendant is liable in cases like the present is, to see whether the act was done by his servant. If the person who committed the act can be so considered, the defendant will be liable, but he cannot be so considered if he is a sub-contractor. If a person is employed to do the particular thing done, the cases show that the person employing him is liable. So, in this case, the sub-contractor might be liable for the acts of his servants; but it does not follow that the defendants who contracted with him are liable for his acts. I think that this case falls within the principle of those cases which decide that when work is being done by a sub-contractor, he is civilly and criminally liable; the contractor not liable. . . . . But here the defendants are sought to be charged, simply because they have contracted with another man to do the work, whose servants have been guilty of negligence. They are guilty of no negligence. They contract with a person who does what is wrong, and he alone is liable." So, where a builder had contracted with the committee of a club to make alterations and improvements in the club-house, and prepare and fix the necessary gas-fittings, and the builder made a sub-contract with a gas-fittter to do this latter portion of the work, and the gas-fitter's workmen allowed the gas to escape and cause an explosion which injured the butler of the club and his wife, — it was held that the gas-fitter, and not the builder, was liable for the negligence.[2] So it has been held in New York, that where the defendants, who had a license from the city to construct, at their own expense, a sewer in a public street, engaged another person by contract to construct the whole work at a stipulated price, they were not liable to third persons

[1] Overton *v.* Freeman, 11 C. B. 867.

[2] Rapson *v.* Cubitt, 9 Mee. & W. 710.

for any injury resulting from the negligent condition in which the sewer had been left over night by the workmen engaged in its construction.[1]

The rule is thus well expressed in Pennsylvania, by Sharswood, J.:[2] "It may be considered as now settled that if a person employs others, not as servants, but as mechanics, or contractors in an independent business, and they are of good character, if there was no want of due care in choosing them, he incurs no liability for injuries resulting to others from their negligence or want of skill.[3] If I employ a well known and reputable machinist to construct a steam-engine, and it blows up from bad materials or unskilful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and *respondeat superior* is the rule."[4]

§ 182. *Same principle extends to all departments of agency.* — Nor, as has already been incidentally noticed, is this principle limited to cases of contracts entered into for building houses, or carrying on of public works. It applies to the simplest as well

[1] Blake *v.* Ferris, 5 N. Y. (1 Selden) 48.

[2] Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 150.

[3] Painter *v.* The Mayor of Pittsburg, 46 Penn. St. (10 Wright) 213.

[4] Godley *v.* Hagerty, 8 Harris, 387; Carson *v.* Godley, 2 Casey, 111. See infra, §§ 727, 774, 775.

So also in California by Sanderson, J. (Du Pratt *v.* Lick, 38 Cal. 691): "The question presented by these exceptions is not an open one in this court. In Boswell *v.* Laird, 8 Cal. 469, it was most elaborately argued by counsel, and considered by the court, and it was held, after a review of all the cases, that the responsibility in cases of this character is upon him who has the control and management of the work; or, in other words, that the doctrine of *respondeat superior* has no application when the relation of master and servant does not exist; that unless the relation of master and servant exists between the defendant in an action of this character and the person through whose negligence the plaintiff sustained his injury, the very reason upon which the doctrine of *respondeat superior* is founded is wanting; that where there is no power of selection or direction there can be no superior; and that where a man is employed to do the work with his own means and by his own servants, he has the power of selection and direction, and he, and not the person for whom the work is primarily done, is the *superior*. The doctrine of that case has been since recognized in the case of Fanjoy *v.* Seales, 29 Cal. 243. We are entirely satisfied with it, and find no occasion to renew the discussion."

as to the most comprehensive forms of agency. Thus, where a butcher employed a licensed drover, in the way of his ordinary calling, to drive a bullock to Smithfield to the butcher's slaughter-house, and the drover negligently sent an inexperienced boy with the bullock, who drove the beast into the plaintiff's show-room, where it broke several marble chimney-pieces; it was held, that the butcher was not liable for the damages.[1]

§ 183. Where a railway company entered into a contract with A. to construct a portion of their line, and A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant, and as a surveyor, and had the management of B.'s business in London, for which he received an annual salary. B. entered into a contract with C. by which C. agreed for £40 to erect a scaffold, which had become necessary in the building of the bridge; but it was agreed that B. should find the requisite materials, and lamps, and other lights. The scaffold was erected upon the footway by C.'s workmen, a portion of it improperly projected, and owing to that and the want of sufficient light, D. fell over it at night, and was injured. After the accident, B. caused other lights to be placed near the spot, to prevent a recurrence of similar accidents. It was held that an action was not maintainable by D. against B. for the injury thus occasioned.[2]

§ 184. In a New York case the evidence was that the plaintiff, being the owner of a canal boat, employed the defendants to tow the same from Albany to New York. The boat used by the defendants in towing the same did not belong to them, but to a steamboat company, and was chartered by the defendants for the season, under an arrangement by which they were to pay so much for a round trip for the use thereof, and the company were to pay the expense of running the boat, and were to hire and pay the men engaged thereon, and the defendants were to receive the earnings of the boat after paying expenses. The canal boat, after being towed to New York, was sunk, in the harbor, through the negligence of the hands managing the tow-boat. It was properly ruled, in conformity with the above law, that the

[1] Mulligan *v.* Wedge, 4 Ad. & Ell. 737. See also Bissell *v.* Torrey, 65 Barb. 188; infra, § 778.

[2] Knight *v.* Fox, 5 Exch. 721; to be distinguished from Steel *v.* S. E. R. R. 16 C. B. 550.

defendants were not liable to the plaintiff for the consequences of such negligence, but that for the negligence of those employed on the towing boat, the owners of such boat alone were liable.[1]

§ 185. *But employer cannot thus be relieved of duty attaching to himself specifically.* — When, however, the thing the contractor does is one which it is the duty of the employer to do either personally or through an agent, the employer is liable for the contractor's negligence.[2] And this is eminently the case when the contractor does the work under the employer's authorization.[3]

§ 186. *So employer is not relieved when negligence is within the scope of the employer's directions.* — "Common justice," said Clifford, J., in a case where this question was raised in the supreme court of the United States,[4] "requires the enforcement of this rule, as, if the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself; but if the act which is the subject of complaint is purely collateral to the matter contracted to be done and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the thing to be done." [5]

§ 187. *Nor can a principal on this ground evade liability for a nuisance.* — A registered joint-stock company contracted with an individual for the laying down of their gas-pipes in the town of Sheffield, without having obtained any special powers for that purpose, so as to make the contractors primarily responsible. While making the necessary excavations, a heap of stones was left in one of the streets over which the plaintiff fell in the dark, thereby sustaining damage. The plaintiff sued the company for a nuisance, alleging special damage to himself. It was objected that the suit should have been against the contractor. But Lord Campbell, C. J., held that the defendants were responsible, as principals in an unlawful act.[6] So, it must be remembered, to

[1] Bissel *v.* Torrey, 65 Barb. 188.

[2] Picard *v.* Smith, 10 C. B. (N. S.) 470; Gray *v.* Pullen, 5 B. & S. 970. See supra, § 178.

[3] See infra, § 279; Cincinnati *v.* Stone, 5 Ohio St. 38.

[4] Water Co. *v.* Ware, 16 Wall. 566.

[5] See also Hole *v.* R. R. Co. 6 Hurls. & N. 497; Ellis *v.* Gas Co. 2 Ell. & B. 770; Newton *v.* Ellis, 5 Ell. & B. 770; Lowell *v.* R. R. 23 Pick. 31; Robbins *v.* Chicago, 4 Wall. 679; Chicago *v.* Robbins, 2 Black, U. S. 428.

[6] Ellis *v.* Sheffield Gas Co. 2 E. & B. 767. In this case the maxim, *qui facit per alium facit per se*, may be said to have controlled. But the

adopt the language of Willes, J., that it is not necessary "that the relation of principal and agent, in the sense of one commanding and the other obeying, should subsist in order to make one responsible for the tortious act of another; it is enough if it be shown to have been by his procurement and with his assent. The cases where the liability of one for the wrongful act of another has turned upon the relation of principal and agent are quite consistent with the party's liability, irrespective of any such relation: as if I agree with a builder to build me a house, according to a certain plan, he would be an independent contractor, and I should not be liable to strangers for any wrongful act done by him in the performance of his work, but clearly I should be jointly liable with him for a trespass on the land if it turned out that I had no right to build upon it." [1]

§ 188. So it has been ruled in Indiana, that the owner of a lot on which a similar excavation was made was liable for injuries sustained by a passenger from neglect properly to fence in such excavation, though the land was at the time in the hands of a contractor exclusively charged with the work.[2]

§ 189. *When an employer employs a contractor to do a particular work which involves the interposition of sub-contractors, and the first contractor engages with such sub-contractors to do the work, leaving the entire control of such work in the hands of the sub-contractors, the first contractor is not liable to the employer for the sub-contractors' negligence.* — This, when it is a part of the contract, either express or implied, that the work should be so sublet, or when it is essential to the nature of the work that such should be the case, is a doctrine of the Roman law. The *conductor operis*, in such case, is not liable to the *locator* for the negligence of the persons so employed by the conductor.

§ 190. *Distinctive views as to municipal corporations. Municipal corporation is liable for the negligence of its servants in executing its specific orders.*[3] — Liability necessarily attaches where

same result would have been reached if the suit had been against the company for negligence in not sufficiently guarding the ditches.

[1] Upton *v.* Townend, 17 C. B. 71.

[2] Silvers *v.* Nordlinger, 30 Ind. 53. In this case, however, the neglect was in not fencing in the excavation, the duty to do which, not being by the contract attached to the contractor, remained with the owner. Infra, §§ 816–818.

[3] Foreman *v.* Mayor of Canterbury, L. R. 6 Q. B. 214; Grimes *v.* Keene, 52 N. H. 330; Hamburg Turnp. Co. *v.* Buffalo, 1 N. Y. Sup. Ct. 537; Hen-

the work negligently performed by the agent is one from which the municipal corporation derives emolument. Thus, in a case hereafter more fully discussed, the city of Philadelphia has been held liable to third parties for the negligence of its board of water-works in the waste of the water power of the river Schuylkill, from which water power the city receives large rents.[1] The same rule applies to negligence by sub-employees in performing a specific work directed or ratified by the corporation.[2]

§ 191. *But not liable for collateral negligence.* — If an officer is independent of the municipal corporation, so far as concerns the orbit of his action, the corporation cannot at common law be made liable for his negligence in duties neither directed nor ratified by the corporation. "While it is undoubtedly true," correctly declares Burrows, J., in a late case in Maine,[3] "aside from all statute remedies provided against them, cities, towns, and other *quasi* corporations will be liable for the actual malfeasance of their officers, agents, and employees, when their acts are authorized or ratified by the corporation councils having control of the subject matter; as, for example, for all wrongs done to another party in the assertion of alleged rights of property in the corporation, and also for neglects in the performance of corporate duty, where there has been a special duty imposed, or a special authority conferred by and with the consent of the corporation; there is a strong line of decisions in which it is held, that for the neglects of their officers and agents in the performance of those duties imposed upon them by law for public purposes exclusively independent of their corporate assent, they are liable only when a right of action is given by statute; that as to them, in such cases, the maxim, *respondeat superior*, does not apply; that negligence in the performance of such duties cannot be held to be the negligence of the corporation."[4] When the officer is clothed by

ley *v.* Lyme, 5 Bing. 91; *S. C.* 1 Bing. N. C. 222; 2 Cl. & Fin. 331; Bailey *v.* New York, 3 Hill, 531; Pittsburg *v.* Grier, 22 Penn. St. 54; Weightman *v.* Washington, 1 Black, 39; Bigelow *v.* Randolph, 14 Gray, 543; Thayer *v.* Boston, 19 Pick. 511; Cincinnati *v.* Stone, 5 Ohio St. 38.

[1] City of Phil. *v.* Gilmartin, 71 Penn. St. 140.

[2] Hamburg Turnp. Co. *v.* Buffalo, 1 N. Y. Sup. Ct. 537.

[3] Morgan *v.* Hallowell, 57 Me. 377.

[4] See Mitchell *v.* Rockland, 52 Maine, 118; Bigelow *v.* Randolph, 14 Gray, 541; Eastman *v.* Meredith, 36 N. H. 284; Storrs *v.* Utica, 17 N. Y. 104, and the cases therein cited, for a full discussion of the distinction which obtains between ordinary corporations

statute with distinct responsibilities and powers, this qualification is indisputable, even though the officer may be appointed by the corporation.[1] Thus, it has been correctly determined in New Hampshire,[2] that a town is not liable by reason of the negligent conduct of a surveyor in the execution of his office; and it makes no difference, as to the rules to be applied in determining their liability, whether the defects arise from the neglect or fault of the surveyor or from some other cause. So also, in Massachusetts, a municipal corporation is not liable in damages for an injury sustained by the collateral carelessness of a laborer employed by a highway surveyor in repairing a highway.[3] At the same time, it is conceded that a surveyor, by whom or under whose direction repairs may be made or work done upon or with reference to a highway, may be deemed the agent of the town to receive and charge the town with notice of an alleged defect, insufficiency, or want of repair existing under his special observation and superintendence. The fact that a defect, insufficiency, or want of repair of a highway existed through the fault of the surveyor who caused it, would be evidence from which the jury might find knowledge of its existence on the part of the town.[4]

§ 192. *If negligence does not affect the work directed by corporation, no liability reverts.* — Hence it may be generally stated that municipal corporations are not responsible for the negligence of their employees, provided such negligence does not affect the work for the due execution of which the corporation is responsible. In such cases the rule "*respondeat superior*" does not apply.[5] On the other hand, when the work directed is done negligently, then the negligence is to be imputed to the person directing it, and the official *status* of the agent does not intercept the imputation. Thus it has been held in New Hampshire that

aggregate and *quasi* corporations in this respect. See infra, § 195, 258.

[1] Walcott *v.* Swampscott, 1 Allen, 101; White *v.* Phillipston, 10 Met. 108; Hafford *v.* New Bedford, 16 Gray, 297; Morrison *v.* Lawrence, 98 Mass. 219; Russell *v.* Mayor, 2 Denio, 461; Reilly *v.* Philad. 60 Penn. St. 467; Atwater *v.* Balt. 31 Md. 462.

[2] Hardy *v.* Keene, 52 N. H. 370.

[3] Walcott *v.* Swampscott, 1 Allen, 101, approved in Barney *v.* Lowell, 98 Mass. 571.

[4] Hardy *v.* Keene, *ut supra*; infra, § 967.

[5] White *v.* Phillipston, 10 Mete. 108; Bigelow *v.* Randolph, 14 Gray, 543; Child *v.* Boston, 4 Allen, 52; Barney *v.* Lowell, 98 Mass. 571.

the superintendent of water-works of a city, who, in searching for a leak, digs a hole in the street, acts in this respect, not as a public officer but as a servant of the town, which is hence liable for his negligence.[1]

§ 193. *No liability generally attaches for negligence of a contractor.* — In New York it is held that a municipal corporation is not liable for the negligence of a contractor, even though the contract specifies that the work is to be done under the direction and to the satisfaction of the city authorities, if practically the contractors move independently of the city.[2] In Pennsylvania[3] and Missouri[4] the same view is held.

"It is difficult," says Judge Strong,[5] "to discover any substantial reason or good policy for holding the present defendants (the city of Pittsburg) responsible to the plaintiff. The negligence complained of was not theirs. It does not appear that they knew of it. The verdict determines that the fault was the contractors'. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither servants nor agents. They were in an independent employment. And sound policy demands that in such a case the contractor alone should be held liable. In making a sewer he has, necessarily, the temporary occupancy of the street in which the work was done, and it must be exclusive. His servants and agents are upon the ground, and he can more conveniently and certainly protect the world against injury from the work than can the officers of the municipal corporation."

§ 194. On the other hand, where the municipal corporation has the exclusive care and control over public streets, it is no defence that the work of repairing the streets has been given over to a particular contractor, if the city has notice either express or constructive of a nuisance which is thereby produced.[6]

§ 195. *But a municipal corporation is not liable for its servants' negligence in matters not within its legal or constitutional power.*[7]

[1] Grimes *v.* Keene, 52 N. H. 330.

[2] Pack *v.* Mayor, 4 Selden, 222; Kelly *v.* Mayor, 11 N. Y. (1 Kernan) 432. See supra, § 181.

[3] Painter *v.* Mayor, 46 Penn. 213.

[4] Barry *v.* St. Louis, 17 Mo. 121. See Hilliard on Torts, § 453; Pierce on R. R. Law, 235; Scammon *v.* Chicago, 25 Ill. 424.

[5] Painter *v.* Mayor, supra.

[6] City of Chicago *v.* Robbins, 2 Black, U. S. 417.

[7] Mitchell *v.* Rockland, 52 Me. 118; Anthony *v.* Adams, 1 Metc.

§ 196. *Distinctive views as to private corporations.* — This topic is hereafter independently discussed.[1] It may, however, be incidentally observed that as corporations can only act through agents, there is necessity as well as policy in this case for enforcing the liability of the corporation for the agent within the restrictions specified above.[2]

§ 197. *Distinctive views as to official subordinates.* — The law on this point, also, is independently considered.[3]

Mass. 660; Morrison *v.* Lawrence, 98 Mass. 219; Mayor *v.* Cunliff, 2 Comst. 165; Cuyler *v.* Rochester, 12 Wend. 165; and other cases, cited in Dillon on Munic. Corp. (2d ed.) § 767–8. And see infra, § 258–9. See, however, Buffalo & Hamburg Turnpike Co. *v.* Buffalo, 1 N. Y. Sup. Ct. 537, cited infra, § 252.

[1] See infra, § 279.

[2] See also infra, § 222, 241.

[3] See infra, § 288.

CHAPTER V.

MASTER'S LIABILITY TO SERVANT.

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What is the negligence in appointment or retention that makes the master liable, § 237.
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§ 200. WHERE an employment is accompanied with risks of which those who enter into it have notice, they cannot, if they are injured by exposure to such risks, recover compensation from their employer. This proposition, which depends on principles hereinbefore stated,[1] will now be discussed in detail.

[1] Supra, § 130; Mear *v.* Holbrook, 20 Ohio St. 137; Pitts. & F. W. R. R. *v.* Divinney, 17 Ohio St. 197; Young *v.* Shields, 15 Ga. 359; Cen-

I. WHO ARE SERVANTS THUS ASSUMING THE RISKS OF SERVICE.

§ 201. *A volunteer assisting a servant stands in the same relation as a servant.* — It does not vary the case if it appear that the plaintiff, instead of being regularly employed by the defendant, voluntarily undertook without an appointment, to act as the defendant's servant.[1] "The defendants," said Bramwell, J., in stating a case in which this point was ruled, "were possessed of a certain railway, and carriages and engines, and their servants were at work on the railway in their service with those carriages and engines. The deceased Degg voluntarily assisted some of them in their work. Other of the defendants' servants were guilty of negligence about their work, and by reason thereof the deceased was killed. The defendants' servants were competent to do the work, and the defendants did not authorize the negligence. We are of opinion that, under these circumstances, the action is not maintainable. The cases show that if the deceased had been a servant of the defendants and injured under such circumstances as occurred here, no action would be maintainable, and it might be enough for us to say that those cases govern this; for it seems impossible to suppose that the deceased, by volunteering his services, could have any greater rights or impose any greater duties on the defendants than would have existed if he had been a hired servant. But we were pressed by an expression found in the cases, that a servant undertakes, as between him and his master, to run all ordinary risks of the service, including the negligence of a fellow-servant, Wiggett *v.* Fox being cited for this purpose; and it was said there was no such undertaking here. But in truth there is as much in the one case as in the other. The consideration may not be so obvious, but it is as competent to a man to agree, and as reasonable to hold that he does agree, that if allowed to assist in the work, though not paid for it, he will take care of himself from the negligence of his fellow-workmen, as it would be if he were paid for

tral R. R. *v.* Grant, 46 Ga. 417; Chic. & N. W. R. R. Co. *v.* Swett, 45 Ill. 197; Ill. Cen. R. R. *v.* Sewell, 46 Ill. 99; C. & A. R. R. Co. *v.* Murphy, 53 Ill. 339; Honner *v.* Ill. Cent. 15 Ill. 550; Harrison *v.* Cent. R. R. 2 Vroom, 293; Baulec *v.* N. Y. & H. R. R. 5 Lansing, 436.

[1] Potter *v.* Faulkner, 1 B. & S. 800; Degg *v.* Midland R. R. 1 H. & N. 773; Flower *v.* Penn. R. R. 69 Pa. St. 210; New Orleans, &c. R. R. *v.* Harrison, 48 Miss. 112.

his services. But we are also told that there was and could be no agreement; that Degg was a wrong-doer, and therefore that the action was maintainable. It certainly would be strange that the case should be better if he were a wrong-doer than if he had not been. We are of opinion that this argument cannot be supported. We desire not to be understood as laying down any general proposition that a wrong-doer never can maintain an action. If a man commit a trespass on land, the occupier is not justified in shooting him or injuring him. If the occupier were sporting or firing at a mark on his land, and saw a trespasser and fired carelessly and hurt him, an action would lie." [1]

[1] Degg v. Midland R. R. 1 H. & N. 773.

In Flower *v.* Penn. R. R. Co. 69 Penn. St. 210, Agnew, J., said: —

"The true point of this case is, that in climbing the side of the tender or engine at the request of the fireman, to perform the fireman's duty, the son of the plaintiffs did not come within the protection of the company. To recover, the company must have come under a duty to him, which made his protection necessary. Viewing him as an employee at the request of the fireman, the relation itself would destroy his right of action. Caldwell *v.* Brown, 3 P. F. Smith, 453; Weger *v.* Penna. Railroad Co. 5 Ibid. 460; C. V. Railroad Co. *v.* Myers, 5 Ibid. 288. Had the fireman himself fallen in place of the boy, he could have no remedy. It does not seem to be reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had he performed the service himself. It is not like the case of one injured while on board a train by the sufferance of the conductor, whose general authority extends to receiving and discharging persons to and from the train. Penna. Railroad *v.* Books, 7 P. F. Smith, 339. It is not like those cases where an injury happened to boys crawling under the cars to get through a train occupying a public street, which they had a right to cross. Rauch *v.* Loyd & Hill; Penna. Railroad Co. *v.* Kelly, 7 Casey, 358 & 372. Nor does it resemble the case of Kay *v.* Penna. Railroad Co. 15 P. F. Smith, 269, decided at Philadelphia last year, where detached cars were sent around a curve, without a brakeman in charge, upon a track which the public had been in the habit of travelling over constantly for a long time with the knowledge of the company, from one part of the city of Williamsport to another. Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection; where the company was in the use of its private ground, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has

§ 202. *Agents of express companies, and pedlers on railroads paying passage by contract, not servants of railroad.* — But the agent of an express company, doing business on a railroad, such agent having his passage paid for by contract, is not the servant of a railroad.[1]

Thus, it has been ruled that if a navigation or railroad company engaged in transporting freight and passengers for hire, as common carriers, rents a room to a person for selling liquors and cigars, at a stipulated rent, and is to carry and board him as a part of the contract, he is not an employee, nor is he a member of the establishment, and the company is not released from liability for injuries he may sustain from the negligence of other employees of the company, but must stand by the rule applicable to passengers.[2]

So, where a railroad corporation, in consideration of the payment to them by a person of a certain sum of money per year, in quarterly instalments, and of his agreement to supply the passengers on one of their trains with iced water, issued season tickets to him quarterly for his passage on any of their regular trains, and permitted him to sell popped corn on all their trains, it was held that his relation to them, while travelling upon their railroad under this contract, was that of a passenger and not of a servant.[3]

§ 203. *Injury, to be such as to make master irresponsible, must be received by servant when engaged in service.* — The master can only set up the relation of master and servant as a defence to a suit for hurts received by the servant when engaged in his employment. If the master's negligence is in a matter extraneous to the employment, — if the hurt be received by the servant at a time when the servant is not engaged in his duties as servant, — then the servant stands in the position of a stranger.[4]

In a case in which this question was agitated in the supreme court of the United States,[5] the evidence was that the plaintiff, when standing on a wharf, was hired by the mate of a boat desiring to sail soon, and which was short of hands, to assist in lading some goods, which were near the wharf, he not having

none. It may excite our sympathy, but cannot create rights or duties which have no other foundation."

[1] Yeomans *v.* Nav. Co. 44 Cal. 71.

[2] Ibid.

[3] Com. *v.* Vt. & Mass. R. R. 108 Mass. 7.

[4] Baird *v.* Pettit, 70 Penn. St. 477.

[5] Packet Company *v.* McCue, 17 Wall. 508.

been in the service of the boat generally, though he had been occasionally employed in this sort of work. It was proved that he assisted in lading the goods, an employment which continued about two hours and a half. He was then told to go to "the office," which was *on* the boat, and get paid. He did so, and then set off to go ashore. While crossing the gang-plank, in going ashore, the boat hands pulled the plank recklessly in and from under his feet, and he was thrown against the dock, injured, and died from the injuries. On a suit by his administratrix, for the injuries done to him, — the declaration alleging that he had been paid and discharged, and that after this, and when he was no longer in any way a servant of the owners of the boat, he was injured, — the defence was that he had remained in the service of the boat till he got completely ashore, and that the injuries having been done to him by his fellow-servants, the owners of the boat (the common master of all the servants) were not liable. There was no dispute as to the facts, unless the question as to when the relationship of master and servant ceased was a fact. This question the court left to the jury. It was ruled by the supreme court that there was in this no error. "It is insisted," said Davis, J., "on the part of the plaintiff in error, that a master is not responsible to a servant for injuries caused by the negligence or misconduct of a fellow-servant engaged in the same general business. Whether this general proposition be true or not, it is not necessary to determine in the state of this record. It is conceded, if the employment of McCue by the company terminated before the injury complained of was suffered, that the company is liable, and this the jury have found to be the fact.

"But it is said it was the province of the court, and not the jury, to determine the point of time at which the service was ended; that as the facts were undisputed, it was a question of law, and the court should have told the jury the relation of master and servant subsisted when the accident happened.

"We do not think so. One of the theories on which the suit was prosecuted was that McCue's special employment had ceased when he was injured. This theory was resisted by the defence, and the court, not taking upon itself to determine as an absolute proposition when the employment terminated, left it to the jury to find how the fact was. This ruling, in our opinion, was cor-

rect. It was for the jury to say, from the nature of the employment, the manner of engaging the hands, the usual mode of transacting such a business, and the other circumstances of the case, whether the service had or had not ceased at the time of the accident. The point was submitted fairly to the jury, with no more comments than the evidence justified. It was argued by the plaintiff in error that the employment of necessity terminated on the land, because it was there McCue was engaged to do the work, and he had the right to be provided with the proper means of reaching it from the boat. On the contrary, the defendant in error contended the special service ceased when McCue had finished his work and was paid off; that after this he was not subject to the control or direction of the officers of the boat, but at liberty to stay on the boat or go off as he pleased. The jury took this latter view of the relation of the parties, and we cannot say that they did not decide correctly. At any rate, their decision on a question of fact is not subject to review in this court. The defence at the best was a narrow one, and in our opinion more technical than just." [1]

§ 204. It is not necessary, however, that the injury, in order to give the master the benefit of the exception, should have been sustained by the servant when actually engaged in work. It is enough if it be sustained by him as one of the incidents and risks of his service. Thus in a late English case,[2] the evidence was that the plaintiff was employed by a railway company as a laborer to assist in loading what is called a "pick-up train" with materials left by plate-layers and others upon the line. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which the plaintiff was, through the negligence of the guard who had charge of it, came into collision with another train, and the plaintiff was injured. It was ruled that, since the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule which exempts a master from re-

[1] See B. & O. R. R. *v.* Trainor, 33 Md. 542.

[2] Tunney *v.* The Midland Railway Company, L. R. 1 C. P. 29.

sponsibility for an injury to a servant through the negligence of a fellow-servant when both are acting in pursuance of a common employment.

II. MASTER DOES NOT WARRANT SERVANT'S SAFETY, BUT IS DIRECTLY LIABLE FOR HIS OWN NEGLIGENCE TO SERVANT.

§ 205. The relationship of employer to employee does not involve a guarantee by employer of the employee's safety.[1]

Where the personal negligence of the master has directly caused the injury, there also the master's liability to the servant is the same as it would be to one not a servant.[2]

III. WHAT MECHANICAL RISKS SERVANT ASSUMES.

§ 206. *Servant generally assumes only those risks of which he has express or implied notice.* — Some risks are so obvious that notice of them will be presumed. Where, however, there are special risks in an employment of which the employee is not, from the nature of the employment, cognizant, or which are not patent in the work, it is the duty of the employer specially to notify him of such risks; and on failure of such notice, if he is hurt by exposure to such risks, he is entitled to recover from the employer.[3]

[1] Riley *v.* Baxendale, 6 H. & N. 443; Priestly *v.* Fowler, 3 M. & W. 1; Wright *v.* N. Y. Cent. R. R. 25 N. Y. 562; Tinney *v.* B. & A. R. R. 62 Barb. 218. As will hereafter be seen, the doctrine of warranty has been rejected as to passengers carried by common carriers. *A fortiori* should this be the rule as to servants. See infra, § 209.

[2] Roberts *v.* Smith, 2 H. & N. 213; Ashworth *v.* Stanwix, 3 E. & E. 701; Mellors *v.* Shaw, 1 B. & S. 437; Paulmeiser *v.* Erie R. R. Co. 34 N. J. 151; Ardesco Oil Co. *v.* Gilson, 63 Penn. St. 146.

[3] Paterson *v.* Wallace, 1 Macq. 751; Williams *v.* Clough, 3 H. & N. 258; Keegan *v.* R. R. 4 Selden, 178; Paulmier *v.* Erie R. R. 34 N. J. 151; Wonder *v.* Balt. R. R. 32 Md. 411; Indermaur *v.* Dames, Law Rep. 2 C. P. 313. Kelly (C. B.): "If a person occupying such premises (*i. e.* with shaft-holes in the different stories) enters into a contract in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him. That view was taken in the judgment in the court below, where it is said (by Willes, J.): 'With respect to such a visitor, at least we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that when there is evidence of

§ 207. This limitation, indeed, is essential to the due exercise of the relation of servant and master. "A servant," so is this point well illustrated by Blackburn, J.,[1] "who engages for the performance of services for compensation does, as an implied part of the contract, take upon himself, as between himself and his master, the natural risks and perils incident to the performance of such services; the presumption of law being that that compensation was adjusted accordingly, or, in other words, that those risks are considered in the wages; and that where the nature of the service is such that, as a natural incident to that service, the person undertaking it must be exposed to risk of injury from the negligence of other servants of the same employer, this risk is one of the natural perils which the servant, by his contract, takes upon himself as between him and his master; and consequently that he cannot recover against his master for an injury so caused, because, as is said by Shaw, C. J.,[2] 'He does not stand towards him in the relation of a stranger; but is one whose rights are regulated by contract.'

"If the master has, by his own personal negligence or malfeasance, enhanced the risk to which the servant is exposed beyond those natural risks of the employment which must be presumed to have been in contemplation when the employment was accepted, as, for instance, by knowingly employing incompetent servants, or defective machinery, or the like, no defence founded on this principle can apply, for the servant does not, as an implied part of his contract, take upon him-

neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, &c., is matter of fact for the jury.'" In Williams *v.* Clough (3 Hur. & N. 258; 27 L. J. Ex. 325), the declaration stated that the defendant was possessed of a ladder unsafe and unfit for use by any person carrying corn up the same, and that the plaintiff was the defendant's servant; yet the defendant, well knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder, and the plaintiff, in obedience to the order, and believing the ladder to be proper for the purpose, and not knowing the contrary, did therefore carry corn up it for the defendant, but by reason of its being unsafe and unfit, the plaintiff fell from it and was injured. Upon a demurrer to this declaration, it was held that it was sufficient.

[1] Morgan *v.* The Vale of Neath Railway Co. 5 Best & S. 570; 33 L. J. Q. B. 260; affirmed in the Ex. Ch. L. R. 1 Q. B. 145; 35 L. J. Q. B. 23.

[2] Farrell *v.* The Boston Railroad Corporation, 4 Metcalf, 49; also printed in 3 Macqueen, H. L. Cas. 316.

self any other risks than those naturally incident to the employment."

§ 208. Hence, whenever the employer is cognizant of a latent risk of which the employee has no knowledge or obvious means of knowledge, the employer is liable to the employee for hurt received by the latter through such risk.

Thus in an English case,[1] the plaintiff was employed by the defendants, as a miner, to work in the coal mine. In the course of his employment he received an injury by reason of the sides of the shaft being left in an insecure condition. One of the defendants was the superintendent of the mine, and although he knew of the condition of the mine, continued it in such condition. The plaintiff himself was ignorant that the shaft was unsafe. Upon this, it was held, that the action was maintainable against the defendants.[2]

So, in New Jersey,[3] it is laid down that a railroad company, whose road-bed is so constructed as to expose its employees to a latent danger, is liable to such of said employees as are injured thereby. If such danger is not obvious, it is the duty of such company to warn those who are to incur it, of its existence.

So in Missouri, in an action by a brakeman to recover damages for injuries received while coupling cars, which was a part of his duty, the company was held liable on the ground that the machinery was defective and dangerous, and so known to the company, but unknown to the brakeman.[4] So in Vermont, a declaration averred that the plaintiff was hired by the defendants to have charge of and conduct and run an engine, and that by virtue of said employment, it became the duty of defendants to furnish an engine that was well constructed and safe, &c., but that they carelessly and wrongfully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and, but for want of proper care and diligence, would have been known to the defendants; and that while the plaintiff was careful and prudent in

[1] Mellors *v.* Shaw & another, 1 Best & S. 437; 30 L. T. Q. B. 333.

[2] See also Ashworth *v.* Stanwix & another, 30 L. T. Q. B. 183; Roberts *v.* Smith & others, 2 Hur. & N. 213; 26 L. T. Ex. 319; Skipp *v.* The Eastern Counties Railway Co. 9 Ex. 223; 23 L. T. Ex. 23; Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. Cas. 266; Bartonshill Coal Co. *v.* M'Guire, Ibid. 300.

[3] Paulmier *v.* The Erie R. R. Co. 34 N. J. 151.

[4] Gibson *v.* Pacific R. R. Co. 46 Mo. 163.

the use of said engine, it exploded on account of such insufficiency, and injured the plaintiff. It was ruled, the declaration disclosed a sufficient cause of action.[1]

§ 209. *Employee must be advised of latent defects in his place of working.* — Nor is the employer merely required to keep the machinery and appurtenances of the business in good order. It is his duty to give the employee a place where he can work free from danger of which he has not notice. "An employer," it is said by Judge Hoar, "is under an implied contract with those whom he employs, to adopt and maintain suitable instruments and means with which to carry on the business in which he requires their services; and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment."[2] But this must not be so extended as to assume a warranty by the employer of the employee's safety. The question is that of *duty;* and without entering on the perilous regions of implied warranty, it is sufficient for the purposes of justice to assert that it is the duty in such case of the employer to advise the employee of all defects which the employer ought to know, and that the employer if he fail in performing this duty is liable to the employee for injury the latter may thereby receive.[3] It is with this limitation that we are to accept the proposition that it is the duty of a railway or other business corporation to furnish its employees with suitable and safe materials and

[1] Noyes *v.* Smith, 28 Vt. 59.

[2] Coombs *v.* New Bedf. Cord. Co. 102 Mass. 572, citing Cayzer *v.* Taylor, 10 Gray, 274; Seaver *v.* Boston & Maine Railroad, 14 Gray, 466; Snow *v.* Housatonic Railroad Co. 8 Allen, 441; Gilman *v.* Eastern Railroad Co. 10 Allen, 233, and 13 Allen, 433.

The plaintiff's intestate, an employee of defendant, while in the discharge of his duty, was killed by the breaking down of a floor in defendant's brewery, upon which stood a mash-tub filled with boiling mash. The evidence tended to show that the floor was rotten, weak, and insufficient to support the tub, through the negligence of defendant in not making repairs. *Held*, that it was the duty of defendant to furnish a safe structure in which the duties of his servants were to be performed, and it was for the jury to determine whether he had negligently failed to do so. Malone *v.* Hathaway, 2 N. Y. Sup. Ct. 664; Lanning *v.* N. Y. C. R. R. Co. 49 N. Y. 521; Plank *v.* N. Y. C. & H. R. R. R. Co. 1 N. Y. Sup. Ct. 319; Hoffnagle *v.* N. Y., C. & H. R. R. R. Co. Ibid. 346.

[3] See Tenney *v.* B. & A. R. R. 62 Barb. 218; and also cited supra, § 205.

structures for their use, and that it is liable for injuries sustained by them from its breach of duty in this respect.[1]

§ 210. *Employee to be advised of extraneous latent dangers.* — Nor is the exception confined to defects of machinery or structure. It applies to all dangers of which the servant is not cognizant. Thus in an interesting case in California,[2] the evidence was that B., who was a carpenter, was employed by R. to go in a boat upon a submerged lot owned by him, and do certain work of his trade. While there at work, a shot was fired from a house on an adjacent lot, which wounded B., hence his action for damages. It appeared that R. knew his possession of the lot was resisted, and a resort to arms was imminent at any moment. He did not inform B. of this fact, and the latter had no reason to believe he was going into danger when employed to do the work. It was ruled by the supreme court that R. was liable, for the reason that the concealment of facts, or the failure to state them by employer to employee, which would tend to expose any hidden and unusual danger to be encountered in the course of the employment, to a degree beyond that which the employment fairly imports, renders the employer liable for injuries resulting therefrom to the employee.[3]

[1] Chicago & N. W. R. R. Co. *v.* Jackson, 55 Ill. 492; Chicago & N. W. R. R. Co. *v.* Swett, 45 Ill. 197; Chic., B. & Q. R. R. *v.* Gregory, 58 Ill. 198; Columb. R. R. *v.* Arnold, 31 Ind. 175.

[2] Baxter *v.* Roberts, 44 Cal. 187.

[3] The opinion of the court was delivered by Wallace, C. J.: "The evidence upon the part of the plaintiff tended to show, and the verdict of the jury upon the issues joined must be considered to have found the fact to be, that when the defendant engaged the services of the plaintiff to work upon these premises, and took him there in the boat for the purpose of performing the labor, the defendant knew or had information such as would reasonably lead him to believe that his interference with the newly erected fence would be forcibly resisted by certain other parties who had erected it and claimed to be in its possession, and who actually occupied the shanty already referred to with loaded firearms, within shooting range of this fence, and who had announced to the defendant their purpose to resist by force any interference therewith. The verdict must be considered, too, to have found that such knowledge, belief, or information as the defendant possessed upon these matters was not communicated to, but was withheld by him from the plaintiff, who went to the performance of the work in ignorance and without the apprehension or suspicion that in going he was incurring any personal danger or hazard.

"The learned judge of the court below stated to the jury that 'the turning point in this case is the charge, that the defendant, Roberts, employed the plaintiff, Baxter, to perform a ser-

§ 211. *So, also, as to defects of which the master may not have been cognizant, but which it was his duty to have searched for and*

vice which he, Roberts, knew to be perilous, without giving Baxter any notice of its perilous character;' and instructed them as follows:

"'If Roberts knew or if he had good reason to believe that rigid or forcible resistance would be offered to him and his party by parties whom he knew or believed to be there, on the ground or in the vicinity near by, it was his duty to inform Baxter of the nature of the employment, to disclose that knowledge so that Baxter might act understandingly and take the chances if he chose to do so. If Roberts had such knowledge and concealed it from the plaintiff, then he is liable.

"'If you find the persons shooting had any adverse possession or occupation, whether complete or otherwise, at the time of the shooting, and the defendant knew the fact, and if you further find that the defendant had knowledge that such possession would be maintained by force if interfered with by him by the taking of the "new fence," so called, and concealed such knowledge from the plaintiff, and failed to inform him of the danger of the employment, he must be held liable in damages, and you should find a verdict for the plaintiff.'

"That one contracting to perform labor or render service thereby takes upon himself such risks and only such as are necessarily and usually incident to the employment, is well settled. Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is from extraneous causes known to him to be hazardous or dangerous to a degree beyond that which it fairly imports, or is understood by the employee to be, he is bound to inform the latter of the fact or put him in possession of such information; these general principles of law are elementary and firmly established. They are usually applied to cases in which the employee has sustained injury by reason of some defect or unsoundness in the machinery or materials unknown to him, about which he is employed to perform labor, and of which the employer knew, or might have known, in the exercise of ordinary care and vigilance on his part. The general principle which forbids the employer to expose the employee to unusual risks in the course of his employment, and to conceal from him the fact of such danger, is not affected by the fact that the danger known to the employer arose from the tortious or felonious purposes or designs of third persons acting in hostility to the interests of the employer and through agencies beyond his control. The employee is as clearly entitled to information of such known danger of that character as of any other the existence of which is known to the employer. The employer, if he knew or was informed of a threatened danger of that character, was bound to communicate the information to his employee about to be exposed to it in the course of his employment and in ignorance of its existence. The nature or character of the agency, or means through which the danger of injury to the employee is to be apprehended, can make no difference in the rule, for the employee is entitled in all cases to such information upon the subject as the employer may possess, — and this with a view to enable him to determine for himself if, at the proffered compensation, he be willing to assume the risk and incur the hazard

remedied. — The rule in this respect has been wisely expressed by Cockburn, C. J.:[1] "Where a servant is employed on machinery, from the use of which danger may arise, it is the duty of the master to take due care and to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur. No doubt when a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective from its construction, or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment." But it is subsequently added that the risks necessarily involved in the service must not be aggravated *by any omission on the part of the master to keep the machinery in the condition in which, from the terms of the contract or the nature of the employment, the servant had a right to expect that it would be kept.*[2]

§ 212. In an action by a widow against a railroad company to recover for the accidental death of an employee, it was contended by the plaintiff, on the trial, that the deceased fell under the train by reason of a want of proper appliances on the end of the car he was descending to uncouple the train. The court charged the jury, in one of its instructions that "it was the defendant's duty to provide cars with such appliances as are best calculated to insure the safety of employees; and if a ladder on the end of the car, or a handle, as described by the witnesses,

of the business; and if the employer has such information or knowledge and withholds it from the employee, and the latter afterwards be injured in consequence thereof, the employer is liable to him in damages therefor.

In Patterson *v.* Wallace, 1 Macq. H. L. Cas. 748, Lord Cranworth, C., said: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows or ought to know that it is not so, and if from any negligence in this respect damage arise, the master is responsible."

[1] Clarke *v.* Holmes, 7 H. & N. 937, 943.

[2] Per Cockburn, C. J., 7 H. & N. 944; Weems *v.* Mathieson, 4 Macq. Sc. App. Cas. 215.

would be a better protection to life than the structure which *produced the accident*, then it would be defendant's duty to furnish a car with such appliances." It was ruled by the supreme court that a fair construction of the language used in the instruction under the circumstances of the case did not warrant the position that by it the defendant was held to use the highest skill in procuring the very best appliances, but rather that he was bound to adopt those appliances which were reasonably best calculated to insure safety, as compared with those furnished.[1] It was further correctly ruled that if the car in question was wanting in the appliances reasonably necessary for the safety of the employees at the time of its construction, and so continued when put and used upon the road, it would not be necessary to show any further knowledge thereof on defendant's part in order to fix its liability. If, however, it was said, it at one time had these appliances, and they were afterward removed by accident or otherwise, then before an employee could recover on account of such defect, it would have to be shown that the company or its agents had notice thereof, or might have known it by the use of ordinary care.[2] This, indeed, supposing *ordinary care* to be convertible with the *diligentia* of the *bonus paterfamilias*, as heretofore expressed,[3] gives the correct view. A railroad or other employer is not required to exercise that exquisite and exhaustive care in the constant examination and overhauling of its machinery and works which would be incompatible with the proper furtherance of business. And if in such case the employee knew of the particular defect, he is precluded from recovering on the ground above stated. The only basis, indeed, on which he can be entitled to recover, in a case such as that last cited, is, that not knowing as to the special defect through which he was injured, he had a right to presume that the structure had the proper appliances to enable him properly to do his work.

§ 213. *Employer not bound to adopt every possible improvement or guard.* — Hence an employer is not required to change his machinery in order to apply every new invention or supposed improvement in appliance, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than

[1] Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 14.

[2] Ibid.; Dewey *v.* Chic. & N. W. R. R. 31 Iowa, 374.

[3] See supra, § 31–57; infra, § 635.

another in use, without being liable to his servants for the non-adoption of the improvement; provided the servant be not deceived as to the degree of danger that he incurs.[1] Nor is an employer liable to his employee for injuries received by the latter from defects which the employer could only have known by the application of a system of constant guard and inspection incompatible with the nature of his business. Thus, in a New York case,[2] where a fireman in the employ of a railroad company lost his life by reason of a switch not being placed so that the locomotive he was on would run upon a track other than the one on which it went, and ran off; and it was insisted that the switch was wrongly placed, or was misplaced, and so caused the death of such fireman; but the fixing of the switch in the way it was placed was not traced to the railroad company, or either of its employees; it was ruled, in an action brought by the administratrix of the deceased to recover damages of the company, that the judge was right in nonsuiting the plaintiff.[3]

[1] Wonder *v.* R. R. 32 Md. 410; Greenleaf *v.* R. R. 29 Iowa, 14. Infra, § 635.

[2] Tinney *v.* B. & A. R. R. Co. 62 Barb. 218.

[3] By the court, Balcom, J.: "The head note to Snow *v.* Housatonic Railroad Company, 8 Allen, 441, is, that 'a railroad company may be held liable for an injury to one of its servants, which is caused by a want of repair in the road-bed of the railroad.' But there is no holding, in this state, that a railroad company is bound to furnish a safe road-bed, or in default thereof is liable for an injury to one of its employees by reason of such default. Bacon, J., in delivering the opinion of the court of appeals, in Warner *v.* The Erie Railway Company (39 N. Y. 468), referred to the case of Snow *v.* Housatonic Railroad Company (supra), and said: 'It is susceptible of the criticism, that the defect in the track, through which the injury was suffered, was palpable to view, and was known to, and was grossly neglected by, the track-repairer, whose specific duty it was to remedy the defect.' But it cannot be said that that decision was approved in Warner *v.* The Erie Railway Company (supra). Nor did this court hold, in Faulkner *v.* The Erie Railway Company (49 Barb. 324), that a railway company is bound to provide its employees with a safe road-way, or pay damages for injuries to such employees by reason of defects in its road-way. And no such principle was held in Brickner *v.* The New York Central Railroad Company (2 Lansing, 506). . . . . I do not think the obligation on the defendant, if conceded, of providing suitable and sufficient servants and appliances for its protection, according to the decisions of this court in Buckner *v.* N. Y. Central R. R. Co. (2 Lansing, 506) and Sprong *v.* Boston & Albany R. R. Co. (60 Barb. 30) rendered it liable to the plaintiff on the evidence in the case. And I am of the opinion a case would not have been proved against

§ 214. *When an employee, after having the opportunity of becoming acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure.* — Hence, to turn specifically to the consideration of the employer's liability, an employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he has had opportunity to ascertain.[1]

the defendant if the judge had received all the evidence he rejected, that the plaintiff offered to give. It is therefore unnecessary to determine whether the judge erred in rejecting any of the offers of evidence made by the plaintiff's counsel."

[1] Owen *v.* N. Y. C. R. R. Co. 1 Lansing, 108; Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 14; Vicksburg & Merid. R. R. *v.* Wilkins, 47 Missis. 404; Dewitt *v.* Pacific R. R. 50 Mo. 302; Haskin *v.* N. Y. C. & H. R. R. 65 Barb. 129; Priestly *v.* Fowler, 3 M. & W. 1; Williams *v.* Clough, 3 H. & N. 258; Alsop *v.* Yates, 2 H. & N. 258; Hayden *v.* Man. Co. 8 Conn. 548; Fifield *v.* R. R. 42 N. H. 240; Lansing *v.* N. Y. Cent. R. R. 49 N. Y. 534; Wright *v.* R. R. Co. 25 N. Y. 562; Moss *v.* Johnson, 22 Ill. 642; Sewell *v.* R. R. 46 Ill. 99; Frazier *v.* Penn. R. R. 38 Penn. St. 104; Buzzell *v.* Man. Co. 48 Me. 121; McGlynn *v.* Broderick, 31 Cal. 376; Coombs *v.* New Bed. Cord. Co. 102 Mass. 586; Wonder *v.* B. & O. R. R. 32 Md. 410; Button *v.* Great West. Ct. Co. L. R. 7 Exch. 130; Holmes *v.* Clark, 6 H. & N. 349; and other English cases cited, infra.

Mad River & Lake Erie R. R. Co. *v.* Barber, 5 Ohio St. 541, was an action by the conductor against the company, on whose trains he was running, to recover damages for injuries received, on the ground that the injury was the result of the insufficiency of the cars, and defects in the machinery and fixtures of the train. The court say: "It was the duty of Barber, as the conductor of the train, to use ordinary and reasonable skill and diligence on his part, not simply in the management of the train, but also in supervising the due inspection of the cars, machinery, and apparatus, as to their sufficiency and safety while under his charge; and on the discovery of any defect or insufficiency, to notify the company, and to take the proper precaution to guard against any danger therefrom. And if he was injured by the negligence of the company in furnishing, or continuing to use, defective cars and machinery, yet, if his own neglect of duty in the management of the train, or due inspection of the cars and machinery in his charge, contributed as a proximate cause of the injury, he could have no right of action against the company for damages; or, if he knew of the defects and insufficiency of the cars or machinery, and, without taking the necessary and proper precaution to guard against danger, continued to use them, he took upon himself the risk, and waived his right as against the company. If there was no neglect of due and ordinary care and diligence, on the part of the company, furnishing or continuing the use of the cars and machinery, and the injury was caused by latent defects, unknown alike to the company and to the conductor, and not discoverable by due and ordinary skill and diligence in the inspection of the cars and machinery, it

§ 215. *And so of employee unnecessarily exposing himself to collateral risks.*[1] — So the employee loses the right of action when he voluntarily and unnecessarily puts himself in a place of danger. Thus it appeared in a New York case that the plaintiff's intestate was the head brakeman on the rear train; his proper post was on the rear end of the first car behind the engine; it was against the rule of the company for brakemen to leave their posts, but there was no evidence that the deceased knew it; the day being severely cold and there being no caboose car for the protection or comfort of the brakemen, he went forward and rode on the locomotive for the purpose of warming himself; while there the collision occurred and he was killed; if he had remained at his post he would have been unharmed. The court held that the legal presumption is that the servant knows his master's rules; that the servant may not, for his own convenience or comfort, abandon his post, except at his own risk; and that the plaintiff having voluntarily exposed himself, could not recover.[2]

§ 216. *But this does not apply when employee is not competent to understand the risks.* — It is otherwise, however, when the em-

would be a misadventure falling among the casualties incident to the business, and for which no one could be blamed." Again: "It appears that a principal is liable in damages for an injury sustained by his agent or employee while in his service, only when the injury is the result of an omission of that reasonable and ordinary care on the part of the principal himself, in the discharge of his duty, which persons of ordinary prudence are presumed to exercise in that particular pursuit. Where, therefore, an agent or employee of a railroad company has been injured by means of the neglect of ordinary diligence and care on the part of the company, either in not employing a sufficient number of hands to manage and safely run a train, or in employing, or continuing in the employment of the company, incompetent and unsuitable persons, or in not keeping the road in repair, or in providing the road with insufficient, defective, and unsafe machinery and cars, in either case the company is liable. But the company would not be liable, even in such case, providing the agent or employee was himself guilty of neglect or misconduct at the time, which contributed to the injury, or providing the agent or employee, with a full knowledge of such omission of duty or neglect on the part of the company, waive the matter by continuing in the service of the company, without taking the precaution, or using his exertions, to have the omission or difficulty remedied. For, if the agent or employee of the company waive the omission of duty on the part of the company, he takes the risk upon himself, and, if damaged, he must abide by the maxim, '*Volenti non fit injuria.*'" But see Laning *v.* R. R. 49 N. Y. 521, qualifying this.

[1] Felch *v.* Allen, 98 Mass. 572.

[2] Sprong *v.* R. R. 60 Barb. 30.

ployee, from inexperience or infancy or imbecility, is incapable of estimating the danger.[1]

§ 217. *Question of employee's acquaintance with risks for jury.* — Where, however, there is any doubt whether the employee was acquainted, or ought to have made himself acquainted with the risk, the question of his negligence in this respect is for the jury. And so was it ruled in Massachusetts,[2] on an action brought by a servant against his master to recover for personal injuries received by him in breaking and falling through a floor in his master's shop, over which it was his duty to pass. The evidence was that the servant knew that the floor was decayed and that there were holes in it; but it did not appear that he could have ascertained that the place where he broke through was dangerous, without examining parts of the floor not open to his inspection. "In order," said Chapman, C. J., "to enable the plaintiff to recover, he must prove that he has not been careless or rash. In Priestly *v.* Fowler, 3 M. & W. 1, it is well stated, that 'the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care

[1] Supra, § 88; O'Byrne *v.* Burn, 16 Cas. in Ses. (2d ser.) 1025; Bartonshill Coal Co. *v.* Reid, 3 Macq. 266; Bartonshill Coal Co. *v.* McGuire, 3 Macq. 300; Grizzle *v.* Frost, 3 Fost. & F. 622; Coombs *v.* New Bedf. Cord. Co. 102 Mass. 572. See apparently contra, but really decided on another point, Flower *v.* Penn. R. R. 69 Penn. St. 210.

In Hayden *v.* Smithville Man. Co. 29 Conn. 548, the court said: "Every manufacturer . . . . may select his appliances and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, or occupy an old or new house, as he pleases. The employee, having knowledge of the circumstances, and entering his service for the stipulated reward, cannot complain of the peculiar tastes and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service. . . . . An employee, having knowledge, cannot claim indemnity except under particular circumstances. He is not secretly or involuntarily exposed, and likewise is paid for the exact position and hazard he assumes; and so he may terminate his employment, when, from unforeseen perils, he finds his reward inadequate or unsatisfactory. We need hardly remark that as this distinction rests upon knowledge in the employee, *it is quite obvious that he must have mind sufficient to acquire the necessary knowledge.*" The plaintiff in this case, being a child only ten years old, having been injured by being caught in exposed machinery, it was held to be a question for the jury whether he had a sufficient understanding of the hazards of the employment to bring him within the general rule.

[2] Huddleston *v.* Lowell Machine Shop, 106 Mass. 282.

of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which damage may be incurred if not in all, he is just as likely to be acquainted with the probability and extent of it as the master.' If he has such knowledge, he is negligent in disregarding it, and takes the risk. It has been decided that if there be a hole in a floor over which he has to pass in the dark, and it is not lighted or guarded, and he knows its condition but chooses to pass in the dark, he does so at his own risk.[1] There are many employments that are known to be dangerous, and sometimes business is carried on in buildings or other places that are obviously unsafe, or with machinery and implements of the same character. In such cases, the workman takes the risks which he knows to be incident to the place and to the business." Whether, however, the plaintiff knew of the risk, or ought to have known of it, is a question, it was ruled, for the jury, supposing the evidence to be conflicting. Of the legal proposition thus reached there can be no doubt; though it may be seriously questioned whether the evidence in the particular case before the court could be said to present such a conflict, and whether on the face of the case it did not appear that the servant had such notice of the defects as to put him on his guard, and to transfer to him the risk of treading on the floor without further inquiry.

§ 218. So it has been ruled in the same state that the fact that, very near where an employee is working in a manufactory, machinery not connected with his work is in motion, the dangerous nature of which is visible and constant, is not conclusive that he has taken on himself the risk of being injured by it, in modification of the implied contract of his employer to provide for him a reasonably safe place in which to do his work; and if, through inattention to the danger, he meets with such an injury while doing his work, and sues his employer therefor, the questions whether he displayed due care on his own part, and whether there was a neglect of his employer to give him suitable notice

[1] Seymour *v.* Maddox, 16 Q. B. 326.

of the danger, are for the jury. Under such circumstances, his youth and inexperience, and the directions previously given to him by agents of the employer about the manner of doing the work, are to be considered upon the question of due notice.[1]

§ 219. *If employee is in haste called upon to execute an order requiring prompt attention, he is not to be presumed to necessarily recollect the defect so as to avoid it.* — A prompt and faithful employee, suddenly called upon by a superior to do a particular act requiring immediate attention, cannot be supposed to remember at the moment the defect that would make his doing the act dangerous; and even should he remember it, he may suppose, from the fact that he is ordered to do the particular act, that the defect, which would have interfered with the execution of such an order, is remedied. Although he may be proved to have previously known of the existence of the defect, yet it cannot, under such circumstances, be justly inferred that this knowledge was present to him at this particular time. "Under such circumstances," well reasons Judge Wright in a case decided in Iowa, in 1870, "compelled as he necessarily would be to act

[1] Coombs *v.* New Bedf. Cord. Co. 102 Mass. 572.

"The plaintiff," said Hoar, J., "received the injury of which he complains from his hand being caught in the cogs of a machine, which was running within a foot or two of the place where he was set to tend another similar machine. The work in which he was employed would naturally occasion him to extend his arms and hands in such a manner as to bring his fingers very near to the cogs. But the cogs were in sight, and the danger of getting the fingers into them manifest; and it is argued on behalf of the defendants: 1. That the facts show that the plaintiff did not use due care; and 2. That they were under no legal obligation to fence or inclose the dangerous machinery, or to protect the plaintiff against a peril which, being visible and permanent, came within the risks which he assumed by entering upon the employment.

"Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw or might have seen the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it. Reed *v.* Northfield, 13 Pick. 94; Whittaker *v.* West Boylston, 97 Mass. 273." See further supra, § 216.

with promptness and dispatch, it would be most unreasonable to demand of him the thought, care, and scrutiny which might be exacted where there is more time for observation and deliberation. Thus if a ladder is usually found upon such cars, in the haste necessarily attendant upon uncoupling cars and stopping the train, he is not bound to deliberate and settle in his mind that a like means of ascending the car was on this one, though he knew by prior observation that it was wanting."[1]

§ 220. *Whether, when upon employer being notified of defect in machinery, he undertakes to remedy it, but fails to do so, the employee may recover, though he has full knowledge of the defect.* — The English rule in this respect is, that where machinery is required by statute to be fenced, and the protection is removed by decay or otherwise, the owner, having notice of the defect, is responsible to a servant, who, having entered into the employ when the machinery was fenced, continues in the service in the reasonable expectation of the defect being repaired, and who, without negligence on his part, sustains a personal injury.[2] In a case of this class, Pollock, C. B., said: "We think that in a case where machinery is by act of parliament required to be protected so as to guard the persons working in the mill from danger, and a servant continues in the employment, entering upon it when the machinery is in a state of safety, and if (in consequence of danger accruing from the protection being decayed or withdrawn) the servant complains of the want of protection, and it is promised to him from time to time that it shall be restored, we think during that period a master must be considered to take on himself the risk; and, therefore, if any accident occurs to the servant during that period, the master is responsible for it."[3]

§ 221. In this country the exception has been still further extended, and we have gone so far as to hold that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to in-

[1] Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 47; and see, to same effect, Snow *v.* Housatonic Co. 8 Allen, 441; Reed *v.* Northfield, 13 Pick. 98; Un. Pac. R. R. *v.* Fort, 2 Dillon, 259; *S. C.* in Sup. Ct. of the U. S., Am. Law Times, March, 1874, 121. See supra, § 94.

[2] Holmes *v.* Clarke, 6 Hur. & N. 349.

[3] See also Couch *v.* Steel, 3 Ell. & Bla. 402; 23 L. J. Q. B. 121.

duce a confidence that they will be remedied.[1] The only ground on which this exception can be justified is, that in the ordinary course of events the employee, supposing the employer would right matters, would remain in the employer's service; and that it would be reasonable to expect such continuance.[2] But this reasoning does not apply to cases where the employee sees that the defect has not been remedied, and yet continues to expose himself to it. In such case, on the principles heretofore announced,[3] the employee's liability in this form of action ceases. He may be liable for breach of promise; but the causal connection between his negligence and the injury is broken by the intermediate voluntary assumption of the risk by the employee.

§ 222. *Negligence of middle-man in selection of materials, &c., is negligence of employer, so far as concerns subordinate employee.* — Where the principal selects a superintendent to manage the concern, there the superintendent or middle-man represents the principal, and his negligence in this respect is the principal's negligence.[4] "If a workman, or servant," says Wagner, J., when discussing this point in Missouri,[5] "is to work in conjunction with others, he must know that the carelessness of one of his fellow-servants may be productive of injury to himself, and he must know that neither care or diligence by the master can prevent the want of due care and caution on the part of his fellow-servants. The servant on entering upon the employment is supposed to know and assume this risk. But does he risk the carelessness and negligence of those placed over him, in the selection of suitable materials, machinery, and the appliances incident to the employment? He acts in subordination. His simple duty is obedience. He has no means or opportunity of knowing whether the articles furnished are safe, and has to rely on the judgment of his superiors. If the master in person superintends the work, then there is no controversy or dispute as to where the responsibility belongs. If the master deputes the superintending control of the work, with the power to employ and discharge hands and purchase and remove materials, to an agent, then the master acts through the

[1] Kroy *v.* Chic. R. I. & P. R. R. 32 Iowa, 357; Greenleaf *v.* Dubuque & S. City R. R. 33 Iowa, 52; Snow *v.* Housatonic R. R. 8 Allen, 441.

[2] See supra, § 74.

[3] See supra, § 130.

[4] See Laning *v.* N. Y. Cent. R. R. 49 N. Y. 521; Flike *v.* Bost. & A. R. R. 53 N. Y. 549; and observations made infra, 229, 241.

[5] Brothers *v.* Carter, 52 Mo. 375.

agent and the agent becomes the master. The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by their delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms. He is an agent, and stands instead of the principal, and is not a fellow-servant within the meaning of the rule as applied to laborers and workmen. His acts are the acts of a master and superior, and the servants are bound to use whatever materials, machinery, apparatus, or appliances he may see fit to provide for them. This question was carefully considered in the case of Harper *v.* Indianapolis & St. Louis R. R. Co.,[1] and decided in accordance with the doctrines above announced." But to make the employer liable for the middle-man's negligence in this respect, the employer must withdraw from the management of the concern, and constitute the middle-man its sole superintendent. Otherwise the middle-man is but one of several servants, each of whom takes the risk of the other's negligence.[2]

§ 223. *Notice to middle-man not necessarily notice to employer. The employer must have known or have been in a position where he ought to have known of the defect.* — Several rulings are reported in which it is held that the employer is not chargeable with his superintendent's knowledge of a defect. Thus in a New York case, the plaintiff, who was an employee in a mill, which was owned by the defendant, and operated by his superintendent, a person of recognized competency, was injured in using an elevator. This elevator was originally constructed and designed for the carriage of materials and not of persons, and was unfit and unsafe for persons, but the employees, including the plaintiff, had contracted the habit of riding on it; this habit was known to the superintendent and agent, but not to the defendant, and the latter did not even know there was an elevator in the mill; the elevator was originally safe for the purpose for which it was designed, and for aught that appeared was safe until three weeks before the accident, but by constant use the supporting chain had worn thin and weak, and three weeks before the accident it had

[1] 47 Mo. 567.

[2] See infra, § 229.

broken with a load of goods; this was known to the superintendent, but not communicated or known to the defendant; on these facts the referee held that the defendant was liable, on the ground that the knowledge of the superintendent and agent was imputable to him; but he did not find that from the circumstances the defendant ought in fact to have acquired that knowledge. This holding was reversed on appeal, the court deciding that the purpose of the elevator must be deemed to be that for which it is customarily used, and that the purpose of its original construction did not control; but that the defendant was not liable unless he had *or ought to have had* personal knowledge of the defect, and that his superintendent's knowledge was not in such case imputable to him.[1] That such knowledge of a superintendent is not to be generally imputed to the master, has been not unfrequently ruled,[2] it being argued that such is necessarily the law in cases where the employer leaves the whole control of the business to the manager, who has absolute power of rectification, and who is prudently chosen and retained. But in ordinary cases of business, it is hard to deny that the employer is in a position in which he ought to acquaint himself with such defects. And as to corporations, the case is still stronger. A corporation can only see through its agents, and what they see, if they are charged with this special branch of oversight, it must see.[3]

[1] Corcoran *v.* Holbrook, N. Y. Gen. T. R., Alb. Law J., Jan. 31, 1874.

[2] Wigmore *v.* Jay, 5 Exch. 354; Searle *v.* Lindsay, 11 C. B. N. S. 429; Gallagher *v.* Piper, 16 C. B. N. S. 669; Feltham *v.* England, 7 Best & Smith, 676; Wilson *v.* Merry, L. R. 1 Scotch App. 326; Hard *v.* Vt. & Can. R. R. Co. 32 Vt. 473; Albro *v.* Agawam Canal Co. 6 Cush. 75. These cases I take from the article just cited from the Albany Law Journal. Fordham *v.* R. R. infra, § 229.

[3] The position in the text, I must admit, after being adopted by the supreme court of New York (Warner *v.* Erie R. R. 49 Barb. 558), was overruled by the court of appeals of the same state (*S. C.* 39 N. Y. 468), and is disapproved of in Vermont (Hard *v.* Vt. Cent. R. R. 32 Vt. 473). The following thoughtful observations are from the article already referred to in the Albany Law Journal: —

"As the law now stands, therefore, we should incline to add a concluding rule, as follows: 10. In the case of a delegated authority to engage and discharge workmen, and select material appliances for the prosecution of the work, there is no difference between the liability of a corporation and that of an individual; the delegation does not discharge the liability; and in respect to defects subsequently arising in material appliances originally sufficient, there is the same necessity, in order to fix liability on the master for injuries arising to the servant therefrom, to show personal no-

IV. WHAT NEGLIGENCE OF FELLOW-SERVANTS A SERVANT ASSUMES.

§ 224. *Master not liable for negligence of fellow-servants who have not been negligently appointed or retained.* — The master is not liable to his servants for injuries to them produced by the negligence of a fellow-servant, engaged generally in the same business, provided there be no negligence in the appointment of such negligent servant, or in the retention of such servant after notice of his incompetency.[1]

tice, knowledge, or culpable ignorance of the defects, to or on the part of a corporation, as in the case of an individual; notice to, or knowledge, or culpable ignorance on the part of a managing agent will not charge the master in either case. We must say, however, that there seems to be difficulty in reconciling the decisions in the cases of Warner and Laning. As a corporation can act only through agents, we cannot see why, if it is liable for the neglect of its hiring agent to dismiss an incompetent servant, after notice of his incompetency, it is not likewise liable for the neglect of its inspecting or constructing agent to repair a decayed structure or a deteriorated machine, after notice of such defect, or in culpable ignorance of it. We think there is an increasing disposition to extend the doctrine of constructive presence and knowledge to corporations: a corporation cannot be excused from liability, simply because they must always act by servants; to hold otherwise, say the court in Gilman *v.* Eastern R. R. Co. (10 Allen, 239), 'would be to exempt them from liability altogether.' And the fact that they can only thus act, would seem to excuse showing knowledge in or bringing notice to any one but their managing agents. One of the most prominent examples of the tendency spoken of is Lalor *v.* Chicago, &c. R. R. Co. (52 Ill. 401) A. D. 1869. In this case a common laborer, engaged to load and unload freight cars, was ordered by a depot superintendent to couple freight cars, and going between them for that purpose, was crushed by the careless management of the engine. On demurrer, the court held that the company was constructively present by its officer, and liable for the damage, on the ground that the deceased was thus exposed to a peril out of the line of the business which he had contracted to perform." See also infra, § 229.

[1] Skipp *v.* Eastern Co. R. R. 9 Exch. 223; Murray *v.* Currie, L. R. 6 C. P. 24; Albro *v.* Agawam C. C. 6 Cush. 75; Wright *v.* N. Y. Cent. R. R. 25 N. Y. 562; Laning *v.* N. Y. Cent. R. R. 49 N. Y. 528; Priestly *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* Y., N. & B. R. C. 5 W., H. & G. 343; Wonder *v.* B. & O. R. R. 32 Md. 410; Indiana, &c. R. R. *v.* Love, 10 Ind. 29; Columbus R. R. *v.* Arnold, 31 Ind. 175; Pittsburg *v.* Ruby, 38 Ind. 294; Yeomans *v.* C. C. S. Nav. Co. 44 Cal. 71; Davis *v.* Detroit, &c. Co. 20 Mich. 105; Harper *v.* Indian. & St. Louis R. R. 47 Mo. 567; Devitt *v.* Pacific R. R. 50 Mo. 302; Brothers *v.* Carter, 52 Mo. 372; Un. Pac. R. R. *v.* Young, 8 Kans. 658; Sizer *v.* Syracuse R. R. 7 Lansing, 67; Plank *v.* N. Y. C. & H. R. R. 1 N. Y. Supr. Ct. 319; Hoffnagle *v.* N. Y. C. & H. R. R. 1 N. Y. Supr. Ct. 346.

§ 225. The several constituents of this exception will be now considered as follows: —

. . . . "The leading principles of law upon which the rights of the parties depend are simple and well defined, and have been frequently stated in judicial decisions. Thus it is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow-workmen in the course of the employment." Hoar, J., in Coombs *v.* New Bed. Cord. Co. 102 Mass. 572, citing Farwell *v.* Boston & Worcester Railroad Co. 4 Met. 49; King *v.* Boston & Worcester Railroad Co. 9 Cush. 112; Gillshannon *v.* Stony Brook Railroad Co. 10 Cush. 228.

"The liability of the master to a third person, a stranger to the agency, for the negligence of his servant, is an exception to the rule that one is liable only for his own torts. Shall the exception be extended to embrace cases where the person injured, instead of being a stranger to the agency, is himself a part of it; or, as it is usually expressed, to the case of a servant injured by a fellow-servant? Now, whatever reasons can be given for making an exception to the general rule, by holding the master liable for the negligence of his servant towards a third person (and various reasons of greater or less weight can be given), many of them fail entirely, or are more or less weakened, when applied to the case of servants who are jointly engaged in the same undertaking. But the reason which appears to have had the most influence in preventing the *extension* of the exception to the case of so-called fellow-servants is that the servant, who is himself engaged in the employment, working in unison with other servants, and knowing what is taking place, is generally in a better position to guard himself against things passing around him, and in his sight, than his master, who may be at a distance, can be to protect him. It is now the generally received law that a master is not liable to one servant for the negligence of another servant; provided that at the time of the original employment the servant was a fit servant; and provided that, if the servant has become subsequently unfit, the master did not know, and might not have known, of his subsequent unfitness. Hutchinson *v.* Newcastle, &c. Railw. Co. 5 Exch. 343; Morgan *v.* Vale of Neath Railw. Co. 5 B. & S. 570; L. R. 1 Q. B. 149; Feltham *v.* England, L. R. 2 Q. B. 33; Gilman *v.* Eastern R. R. Co. 10 Allen (Mass.), 233; Beaulieu *v.* Portland Co. 48 Me. 291; Weger *v.* Pennsylvania R. R. Co. 55 Penn. St. 460. The rule as to the hiring or continued employing of unfit servants is the same as the furnishing or employment of unfit machines. Harper *v.* Indianapolis, &c. R. R. Co. 47 Mo. 567; Davis *v.* Detroit, &c. R. R. Co. 20 Mich. 105. A man, in relation to labor, is a machine." Story on Agency, § 453 *a*, note by Green.

In Davis *v.* Detroit & Mil. R. R. Co. 20 Mich. 105, it was said by Cooley, J.: —

. . . . "In the case of The Indianapolis & Cincinnati R. R. Co. *v.* Love, 10 Ind. 556, the court say that where both parties have equal knowledge, and the servant continues in the service, the true rule of decision is, that each party takes the risk, unless the employer undertakes to give special directions. The same rule was recognized in the case of Thayer *v.* St. Louis, Alton & T. H. R. R. Co. 22

1. Who are "servants" precluded from recovery under this exception.

Ind. 29, and in numerous cases which we need not quote from here. The case of Skipp *v.* Eastern Counties R. Co. 9 Exch. 223; Griffiths *v.* Gidlow, 3 H. & Nor. 654; Williams *v.* Clough, Ibid. 258; Assop *v.* Yates, 2 H. & Nor. 768; Hayden *v.* Smithville Manuf. Co. 29 Conn. 558, and McMillan *v.* Saratoga & Wash. R. R. Co. 20 Barb. 449, are particularly referred to." . . . .

"There is no difference between liability to a stranger and to a servant for a man's own negligence or want of skill; though a master is not responsible for an injury to a servant by the negligence of a fellow-servant, unless he has failed in ordinary care in the employment of the culpable party. Ryan *v.* The Cumberland Valley Railroad Co. 11 Harris, 384; Frazier *v.* The Pennsylvania Railroad Co. 2 Wright, 104; Hunt *v.* The Same, 1 P. F. Smith, 475; Caldwell *v.* Brown, 3 Ibid." . . . . Sharswood, J., in Ardes Co. Oil Co. *v.* Gilson, 63 Pa. St. 150.

In a leading English case the reason given is that the fellow-servants concerned "have both engaged in a common service, the duties of which impose a certain risk on each of them; and, in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew when he engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms, that as between himself and his master he would run this risk." [1]

In Tebbutt *v.* Bristol & Exeter Railway Co., L. R. 6 Q. B. 76, Hannen, J. says: "In such case the maxim 'Respondeat superior,' as a general rule, applies. The exception is where the injured party stood at the time of the injury in such a relation to the master that it may reasonably be presumed he agreed to undertake the risk arising from the negligence of those whom the master employed." The distinction is thus put by Lord Cranworth, in Bartonshill Coal Company *v.* Reid: [2] "So far as persons external to the master and his servants are concerned, the master is to be considered as responsible for every one of those servants, ... but the case is different where the question arises within the circle of the master and his servants." And again: "The principle which makes the master liable to complaints made *ab extra* does not make him liable to complaints arising *intra*, the whole body consisting of himself and his workmen." Upon this ground the master is held irresponsible for injuries done by one servant to another in the course of their common employment, or to a person who, by volunteering to assist a servant, puts himself in the position of the latter: Potter *v.* Faulkner; [3] or to a guest in his house, who becomes

[1] Judgm. 5 Exch. 351; Tunney *v.* Midland R. C., L. R. 1 C. P. 291. "A servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both." Per Erle, C. J., L. R. 1 C. P. 296. See also Murphy *v.* Smith, 19 C. B. N. S. 361; Gallagher *v.* Piper, 16 C. B. N. S. 669.

[2] 3 Macq. at pp. 276, 277.

[3] 1 B. & S. 800; 31 L. J. (Q. B.) 30.

2. What are the class of injuries to which this exception relates.

for the time being a member of his family. Southcote *v.* Stanley.[1] The plaintiff stood in no such relation. He was allowed the use of the defendants' platform in the same manner and upon the same conditions as if he had been one of their passengers, and is as "external" to the defendants and their servants as he would have been if the accident had happened to him in the public street. The rule will be discharged."

"When the workman," says Lord Cranworth (Bartonshill Coal Co. *v.* Reid, 3 Macq. Sc. App. 266), "contracts to do work of any particular sort, he knows, or ought to know, to what risk he is exposing himself; he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say the master need not have engaged in the work at all, for he was party to its being undertaken.

"Principle, therefore, seems to me to be opposed to the doctrine, that the responsibility of a master for the ill consequences of his servant's carelessness is applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work."[2]

Lord Cairns strikes at the reason of the rule when he tells us, that the master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. But the master, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. Wilson *v.* Merry, L. R. 1 Sc. App. Cas. 332. See, however, qualifications of this given infra, § 229.

In the Bartonshill colliery cases (3 Macq. 266–300), the plaintiffs claimed to recover damages sustained in a fatal casualty in the shaft of a coal-mine, caused by the negligence of the engine-man, who omitted to stop the engine when the cage containing workmen arrived at the pit-head. The engine-man had an excellent character for carefulness and steadiness. The Lord President, in the trial, directed the jury, that "if they were satisfied on the evidence that the injury was caused by culpable negligence and fault on the part of the engine-man in the management of

[1] 1 H. & N. 247; 25 L. J. (Ex.) 339.

[2] 3 Macq. H. L. Cas. 282–284. See also Priestley *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* York, Newcastle & Berwick R. C. 5 Exch. 349; Wigmore *v.* Jay, Ibid. 354; Skipp *v.* Eastern Counties R. C. 9 Exch. 223; Couch *v.* Steel, 3 E. & B. 402; Paterson *v.* Wallace, 1 Macq. Sc. App. Cas. 748; Hall *v.* Johnson, 3 H. & C. 589; Senior *v.* Ward, 1 E. & E. 385–391; Riley *v.* Baxendale, 6 H. & N. 445; Bryden *v.* Stewart, 2 Ibid, 30; Bartonshill Coal Co. *v.* McGuire, 3 Macq. Sc. App. Cas. 300.

3. Who are the "fellow-servants" whose negligence are thus considered part of the common risk.

4. What is the negligence in appointment and retention which precludes the master from taking advantage of this exception.

5. Whether the master is liable for the negligence of a middleman in appointment of improper servants.

6. Whether the master's liability is revived by his promise, upon notice of the negligence of an improper servant, to remove such servant.

§ 226. 1. *Who are "servants" precluded from recovery under this exception.* — As this point has been already generally discussed,[1] it is sufficient to say that to prejudice a person injured by the negligence of another, under this limitation, the relation of master and servant must be affirmatively made out.

§ 227. 2. *What are the injuries to which the exception relates.* — Not merely positive acts of misfeasances, but nonfeasances, are within the scope of the exception. Neglect on the part of a fellow-servant to search for and correct a latent defect is a risk which the other servants of the same concern engage to assume as much as they do overt acts of negligence.

Thus in an English case,[2] the deceased, G. W., was a railway

the machinery, the defenders were, at law, answerable." This ruling was found erroneous, on the ground that damage by the negligence of the engine-man, a fellow-servant in a common employment with the pursuer (plaintiff), was one of the risks of the service in which he had voluntarily engaged for hire. Lord Brougham, on appeal, declared that the liability depended on the question, "whether the negligence was that of a fellow-workman engaged with the plaintiff upon the same work," or, to use a word which has been much employed in these arguments, the negligence of a *collaborateur*.

It is ruled in Kentucky, "that while exemption is conceded as to the common hazards incident to the acceptance of employment in connection with others, and which the employee is presumed to have undertaken to risk, the rule as applicable to cases of gross or wilful neglect on the part of another servant, by whose want of fidelity or criminal fault harm results to his fellow employee in the discharge of his duty, was rejected as inconsistent with principle, analogy, and public policy!" Hardin, J. — Louisville & N. R. R. *v.* Filbern, 6 Bush, 579; relying on Louisville & N. R. R. *v.* Collins, 2 Duvall, 114; and Louisville & N. R. R. *v.* Robinson, 4 Bush, 507. But such wilful neglect "must involve either an intentional wrong, or such a reckless disregard of security and right as to imply bad faith." Louisville & N. R. R. *v.* Filbern, *ut supra*.

[1] Supra, § 201.

[2] Waller *v.* The South Eastern Railway Co. 2 Hur. & C. 102; 32 L. T. Ex. 205.

guard, employed by the defendants at weekly wages, and it was his duty as such guard to travel with and in the passenger trains worked by the defendants on the North Kent Railway, a line belonging to and worked by the defendants under certain powers. In the course of such duty, while he was travelling in a passenger train of the defendants, the train ran off the line and overturned the break-van in which he was, whereby he was killed. The accident happened through the decayed condition of the treenails which fastened the chains to the sleepers on the railway. It was the duty of the *ganger* of the plate-layers, a servant of the defendants, to see and keep in proper repair and condition the permanent way by renewing such treenails as were decayed. The ganger was a person of competent skill, and through his neglect of duty the road became unsafe. W. was killed by the train running off the line through the decayed condition of the treenails; none of the directors, officers, or servants of the company knew of such defects, but the ganger ought to have known it, and it was negligence in him not to have known it. Upon this, it was held, that the defendants were not liable, the deceased and the ganger being servants engaged in one common purpose. In his judgment, Pollock, C. B., said: "I think if we look at the observations of Lord Chelmsford,[1] and consider what are the dangers that any servant engages to encounter, and look at the probable dangers attendant upon entering into the engagement in question, there can be no doubt that the conductor of a railway train must anticipate, among the sources of probable danger arising on the journey, the neglect of a servant to oil the wheels of the carriages, the neglect of one man to properly adjust the points, and the neglect of another man to take care that the rails are properly bolted and fastened and secured, so as to make the journey safe. Under these circumstances, I am of opinion that the special case ought to be decided in favor of the defendants, the facts falling entirely within the case of Priestley *v.* Fowler, which is not opposed, as it strikes me, to any case or to any authority which has arisen out of that, the first case on the subject."[2]

§ 228. Should, however, the defendant be aware of the defect (which in the suit last cited was not the case), he must

[1] Bartonshill Coal Co. *v.* Maguire, 3 Macq. H. L. Cas. 303.

[2] Waller *v.* S. E. R. R. *ut supra.*

notify his employees, and if he fail to do so he becomes liable for hurt sustained by them in consequence of this failure. It is on this ground that we can explain a New Jersey case,[1] where it appeared that the track over a trestle-work was not capable of supporting an engine, and the engineer in charge had orders not to put his engine thereon, which orders he disobeyed, and the intestate of the plaintiff, who was a fireman on said engine, and who was unaware of said orders or of the danger, was thereby killed, the trestle-work giving way. It was ruled by the court that the plaintiff was entitled to recover; and on the single ground that the defendant should have notified the plaintiff of the defect, this ruling is consistent with the law already expressed.[2]

3. *Who are "fellow-servants" whose negligence is thus part of the common risk.*

§ 229. *Need not be on a parity of service.* — It makes no difference, in the application of the exception, that the employee receiving the injury is inferior in grade to the one by whose negligence the injury was caused.[3]

"A master," says Folger, J.,[4] "is not liable to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow-servant engaged in the same general busi-

[1] Paulmier *v.* Erie R. R. 34 N. J. 151.

[2] See supra, § 209.

[3] Flike *v.* Bost. & A. R. R. 53 N. Y. 549; Columbus, &c. R. R. *v.* Arnold, 31 Ind. 174; overruling Fitzpatrick *v.* N. A. & S. R. R. 7 Ind. 436; Albro *v.* Agawam C. C. 6 Cush. 75; Feltham *v.* England, Law Rep. 2 Q. B. 33; Wonder *v.* B. & O. R. R. 32 Md. 460; Morgan *v.* Vale of Neath R. R., Law Rep. 1 Q. B. 149; 5 B. & S. 570, 736; Un. Pac. R. R. *v.* Fort, 2 Dill. C. C. 259; *S. C.* in Sup. Ct. of U. S., Am. Law T. for Mch. 1874.

"The rule now apparently established in England, and generally, perhaps, in this country, is, that the term fellow-servant includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it. Wonder *v.* Baltimore R. R. Co. 32 Md. 411; Wilson *v.* Merry, L. R. 1 H. L. S. & D. 326; Columbus & Indianapolis, &c. R. R. Co. *v.* Arnold, 31 Ind. 174; Warner *v.* Erie Railw. Co. 39 N. Y. 470; Hard *v.* Vermont & Canada R. R. Co. 32 Vt. 480; Beaulieu *v.* Portland Co. 48 Me. 291; Wiggett *v.* Fox, 11 Exch. 832; Searle *v.* Lindsey, 11 C. B. N. S. 429; Morgan *v.* Vale of Neath R. R. Co. L. R. 1 Q. B. 149; Weger *v.* Pennsylvania R. R. Co. 55 Penn. St. 460; Harper *v.* Indianapolis, &c. R. R. Co. 47 Mo. 567. But this rule must be considered as subject to future modifications and exceptions." Story's Agency, § 453 *e*, note by Green.

[4] Laning *v.* N. Y. Cent. R. R. 49 N. Y. 528.

ness. Nor is the liability of the master enlarged when the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness, or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end. And though the inferior in grade is subject to the control and directions of the superior whose act or omission has caused the injury, the rule is the same. Nor is it necessary, to exempt the master from liability, that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes, the master is not liable. These rules seem to have been laid down with care after due consideration, to be sustained by reason, to have been assented to by more than a bare majority of this court, in at least two instances, at some interval of time, and should be adhered to in any case the facts of which bring it within the purview of them.[1] The cases cited hold, further, that the master is liable to a servant for his (the master's) own personal negligence, or want of care and prudence, and for his own personal act or misconduct occasioning injury and damage to the servant. And such negligence, want of care and prudence, act or misconduct, may be shown in the mismanagement of the master's affairs, in the selection and employment of incompetent and unfit agents and servants, or the furnishing of improper and unsafe machinery, implements, facilities, or materials for the use or labor of the servant.[2] And to charge a master with liability to one servant for an injury, on the ground that he has selected and employed another unskilful and incompetent servant, it must appear that the injury complained of was the result of the want of skill and competency of the other."[3]

[1] See Wright *v.* N. Y. C. R. R. 25 N. Y. 562; Warner *v.* Erie Railway, 39 N. Y. 468; and the cases cited in them.

[2] Ibid.

[3] Wright *v.* R. R. 25 N. Y. supra.

"This case," says an able article in the Albany Law Journal for Jan. 30, 1874, "was succeeded by that of Flike, Adm'x, *v.* Boston & Albany R. R. Co. in the same court, but not yet reported (since reported in 53 N. Y. 549; infra, § 241). The facts were as follows: The plaintiff's intestate was a fireman in the employ of defendant; on the occasion in question he was upon an engine attached to a freight train, proceeding up a heavy grade; a short distance ahead of the train in question was another freight train, going in the same direction; the three rear cars of the forward train became

Otherwise when superior servant has control of the concern. — Where, however, the employer leaves everything in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the employer's negligence, for which the latter is liable.[1]

detached from their train, and rolled back, down the heavy grade, upon the engine of the rear train, and killed the intestate; the forward train had only two brakemen, whereas it should have had three, and it was shown that the accident would not have occurred if it had had the usual number of brakemen. It was the duty of one Rockafeller to man the forward train on its start, and he had employed three brakemen for it and directed them to accompany it; one of the brakemen so employed and directed overslept, and did not accompany the train. On these facts the court held that it was the duty of Rockafeller to see that the proper number of brakemen started out with the train; that the neglect of the brakeman himself did not excuse Rockafeller's neglect in this particular; that the fundamental duty of the master to furnish sufficient and competent co-servants for the performance of the work, was not performed, and that the defendant was liable, upon the principle laid down in the Laning case."

[1] Grizzle *v.* Frost, 8 F. & F. 622; Brickner *v.* R. R. 49 N. Y. 672; Murphy *v.* Smith, 19 C. B. (N. S.) 361; supra, § 222; infra, § 241.

See to the last point Ford *v.* Fitchburg R. R. Co. 110 Mass., where the plaintiff was an engineer, engaged in running a locomotive engine, and was injured by explosion of his engine, which was old and out of repair. It was objected to the maintenance of the action, that the want of repair of the engine was caused by the negligence of his fellow-servants; but Colt, J., in delivering the opinion of the court, said: "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suitable instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risk of the master's negligence in this respect. The fact that it is a duty which must always be discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from the obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with the master's duty to the servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one, the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may. This case *pro tanto* overruled. Albro *v.* Canal Co. 6 Cush. 75. See also Fort *v.* R. R. 2 Dillon, 259.

"In Iowa, by statute, railroad companies are made liable for all damages sustained by any person, including *employees* of the company, in consequence of any neglect of the agents,

§ 230. *Must be in same "circle" of appointment.* — In other words, the plaintiff and the fellow-servant causing the injury must be coöperating in the same business, so that the former knows that the employment of the latter is one of the incidents of their common service.[1]

The agreement to accept a common risk constitutes in this sense fellowship of service.[2] But the work need not be one in which the *immediate* object is common.[3] It is enough if the servants are employed to effect a common general object.

§ 231. Of this rule we have many illustrations. Thus in an English case, elsewhere cited,[4] the evidence was that the plaintiff was employed by the defendants as a carpenter and joiner, and in the course of such employment was engaged in painting an engine shed, near which was a turn-table. The servants of the company, in the course of managing the traffic, so negligently turned a carriage upon the turn-table that a ladder, supporting a plank upon which the plaintiff was standing, was thrown down, and the plaintiff was consequently injured; and, upon an action being brought by him against the company, it was held that he could not recover. In the exchequer chamber, Pollock, C. B., said: "I am only desirous to add, that it appears to me that if we were to decide this case in favor of the plaintiff, we should open

or by any mismanagement of the engineers or other employees of the corporation. Hunt *v.* Northwestern R. R. Co. 26 Iowa, 363.

"It is held in Ohio that, where one servant is placed in a position of subordination to, and subject to the orders and control of, another servant of a common master, and the subordinate servant, without fault of his own, and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies, in favor of the inferior servant so injured, against the master. Pittsburg, Fort Wayne, &c. R. R. Co. *v.* Devinney, 17 Ohio St. 197, 210." Story on Agency, § 564, note by Green. See also Cleveland, &c. R. R. Co. *v.* Keary, 3 Ohio St. 201; Little Miami R. R. *v.* Stevens, 20 Ohio, 415; Gillenwater *v.* R. R. 5 Port. 339; Fitzpatrick *v.* R. R. 7 Port. 436; Walker *v.* Bolling, 22 Ala. 294. See, however, qualifying remarks of Lord Cairns in Wilson *v.* Merry, supra.

[1] Lush, J., in Feltham *v.* England, L. R. 2 Q. B. 36; cited Morgan *v.* Vale of Neath Ry. Co., Law Rep. 1 Q. B. 149; 5 B. & S. 570, 736.

[2] Waller *v.* Co. 2 H. & C. 109; Bartonshill Coal Co. *v.* Reid, 3 Macq. 266; Gray *v.* Brassey, 15 Court of Ses. Cas. 2d series, 135; Lovegrove *v.* Ry. Co. 16 C. B. N. S. 699; Baird *v.* Pettit, 70 Pa. St. 477.

[3] Wiggett *v.* Fox, 11 Exch. 832.

[4] Morgan *v.* Vale of Neath R. R. 5 B. & S. 570; aff. in Exchequer Ch. L. R. 1 Q. B. 145.

the gates to a flood of litigation. In every large manufactory, where a number of workmen are employed in different departments of the same business, we should have it split up into any number of objects, although they all had the same common purpose. Thus, in one manufactory the making of screws would be called one object, and the doing wood-work another, and so on; and then a person employed in a superior department would be said to have nothing to do with the porter in the same establishment."

§ 232. So, in another English case, where the defendants, being the contractors for large works, employed M. to do part of the work by the piece for a certain sum, payable by monthly instalments, according to the work done, the defendants finding the tools. W., who was then in the defendants' service, was taken by M. from his work and put to assist in the piece-work at weekly wages, but in accordance with the general regulations at the defendants' works, W. was paid his wages weekly by the defendants with their other workmen, and M., who before the contract piece-work, had also been in the defendants' employment at weekly wages, drew from the defendants money in that character, the whole being charged against him and deducted from the amount of the instalments when payable. W. having been killed while at work on the piece-work by the negligence of the defendants' servants, it was held, that W. and M. were both the servants of the defendants, and therefore that the administratrix of W. could not maintain an action against the defendants for the negligence of the defendants' other servants who were reasonably fit and competent for the service in which they were employed.[1] "We think," said Alderson, B., "that this question must be determined in favor of the defendants, and a verdict entered accordingly. The principle on which our opinion is founded is to be found in the case of Hutchinson *v.* The Newcastle, York & Berwick Railway Co.,[2] and it is this: that a master is not generally responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while he is acting in one common service; and the reason for that in another part of the judgment is stated to be, that the servant undertakes, as between him and the master, to run all ordinary risks of a service,

[1] Wiggett *v.* Fox & another, 11 Ex. 832; 25 L. J. Ex. 188.

[2] 5 Ex. 343; 19 L. J. Ex. 296.

including the risk of negligence of the other servants engaged in discharging the work of their common employer. Here both servants were, at the time of the injury, engaged in doing the common work of the whole contract, and for the contractors, the defendants; and we think that the sub-contractor and all his servants must be considered as being for this purpose the servants of the defendants while engaged in doing the work, each directing and limiting his attention to the particular work necessary for the completion of the whole work; and that otherwise we should not give full effect to the principle which governs such cases which, as stated in Priestly *v.* Fowler,[1] mainly arose from the enormous inconvenience that would follow from holding the common employer liable under such circumstances. Here the workman comes into the place to do the work knowingly and avowedly with others. The workman, as was suggested in Priestly *v.* Fowler, may, if he thinks fit, decline any service in which he apprehends injury will result to himself; and in cases in which danger is to be apprehended, he is just as likely, and probably more so, to be acquainted with the risk he runs than the common employer. If we are to hold the defendants liable, we should be obliged to hold that every contractor, where various painters, carpenters, plumbers, or bricklayers, and the like, were employed in building a house, would be liable for all accidents *inter se* to the various workmen so employed on the common object; and perhaps it is even difficult to say whether it could stop there, for possibly the common employer would be made liable in such cases. If indeed there were any ground for holding the person or persons whose act caused the death of the plaintiff's husband were persons not of ordinary skill and care, the case would be different, for the defendants were certainly bound to employ persons of ordinary skill and care in the work; but there is no suggestion of this sort."

§ 233. In a case in Illinois,[2] it appeared that A., whose death when in the service of the company was the basis of the suit, was one of several workmen, under the immediate charge of one Hill, as foreman, whose duty consisted in examining all trains on their arrival at the railway station in B—— and making all needed repairs. He and a fellow-workman had been engaged in "jacking up" and repairing a car in a freight train, and having

[1] 3 Mee. & W. 6; 7 L. J. Ex. 42.

[2] Chicago & A. R. R. *v.* Murphy, 53 Ill. 336.

finished his work, had started for the shop where they kept their tools, when, in passing down between the rails of the main track, he was overtaken and struck by a switch engine, and so injured that he soon after died. The switch engine was constantly engaged on the station grounds, and although under the immediate control of the yard master, it was used for whatever purpose it might be required, and among others, for switching such car or cars as were to undergo repairs by Hill's men. If a car in a train which had just arrived was found to need repairs, Hill would advise the yard master, and the latter would have the switch engine place the car in such a position in the yard as he might think proper, when Hill's men would make the necessary repairs. Under these circumstances it was ruled by the supreme court that the deceased, and the engineer managing the engine, through whose negligence A. received the injury which caused his death, were fellow-servants in such a sense as to subject them to the operation of the well established rule, which refuses a remedy against a common master, in favor of one employee, who receives an injury through the carelessness of another, while in the same line of duty.

§ 234. So it has been ruled in Maryland,[1] that a brakeman on a train of cars is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, with the inspector of the machinery and rolling stock of the road, and with the superintendent of the movement of trains. It was consequently decided that a brakeman cannot maintain an action against a railroad company by which he was employed, for an injury sustained by him, and which resulted from a defect in the brake on the train he was operating, if the defect existed by reason of the neglect or want of care of his fellow-servants, unless the railroad company was negligent in the selection of those servants; and the *onus* of proof of such negligence is on the plaintiff. "The case of Searle *v.* Lindsay,"[2] said Alvey, J., in giving the opinion, "before referred to, well illustrates this. There the plaintiff was employed by the defendants as their third engineer on board their steam-vessel. While turning a winch, one of the handles came off, in consequence of the want of a nut or pin to secure it, and the plaintiff was thereby seriously

[1] Wonder *v.* B. & O. R. R. 32 Md. 410.

[2] 11 C. B. N. S. 429.

injured. He was, with others, at work at the winch by the orders of the chief engineer, who knew that the instrument was out of order, but was, nevertheless, a competent person for the position he occupied. There was no evidence of personal negligence on the part of the defendants, and it was held that the chief engineer and the plaintiff were fellow-servants, and that, as the defect existed by reason of the negligence of the chief engineer, whose duty it was to see that the machinery was kept in proper condition, the plaintiff could not recover. And, in the concurring opinion of Mr. Justice Williams in that case, the law is briefly but clearly stated that governs cases like the present. He said: 'I think there was no foundation for the argument that Simpson, the chief engineer of the vessel, and the plaintiff, stood in any other relation towards each other than that of ordinary fellow-servants. Then, applying the rule of law which is now firmly established, the common employer is not liable to either for an injury sustained through the negligence of the other. In order to take this case out of the ordinary rule, it was contended that here there was negligence on the part of the employers themselves. In order to make that out, there must be reasonable evidence to show that they were to blame, either in respect to their not having provided proper machinery and appliances, or not having retained competent workmen. I do not find any evidence at all of any default in either of these particulars. If the winch was out of order, it was owing to Simpson's negligence. There was no evidence, nor any suggestion, that Simpson was not a perfectly competent engineer.' And such was the view of all the judges."

On the other hand, where the defendant employed a stevedore to unload his vessel, and the stevedore employed his own laborers, among whom was the plaintiff, and also one of the defendant's crew, named Davis, over whom he had entire control, and whom he paid, to assist in unloading; and where the plaintiff, while engaged in the work, was injured by the negligence of Davis; it was held that Davis was not the servant of the defendant so as to make the defendant responsible for Davis's negligence.[1]

§ 235. In an Illinois case, a fireman upon a railroad locomotive was killed by coming in collision with a mail-catcher while the train was in motion, the accident being occasioned by the

[1] Murray *v.* Currie, L. R. 6 C. P. 24.

negligence of the company in permitting the mail-catcher to be placed in too close proximity to the track. In an action by the administrator of the deceased, to recover damages against the company, under the statute, it was held that the servants of the company whose duty it was to see that the mail-catcher was placed a safe and proper distance from the track could not be regarded as fellow-servants of the deceased in the same line of employment, so as to prevent a recovery in the action against the common master.[1]

§ 236. So, also, in a case in Pennsylvania, the plaintiff was employed as draftsman in the defendant's locomotive works; a carpenter employed in "jobbing" for defendant about the works was, by the direction of the defendant, superintending the excavation of a cellar under the building, and employing and paying hands. He had a large pile of dirt thrown on the public foot-walk; the plaintiff in leaving the house after dark, after ceasing his day's work, fell over the dirt and was injured. It was held by the supreme court, that the plaintiff and the carpenter were not fellow-servants in the same common employment, so as to relieve the defendant from liability from the carpenter's negligence.[2]

§ 237. 4. *What is the negligence in appointment and retention which precludes the master from taking advantage of this exception.* — The question of negligence, in such case, is one of fact, to be determined by a jury, if there is any evidence on the subject which may properly be committed to their consideration. At the same time there are several points as to which the court may properly speak in directing the consultations of the jury on this topic.

§ 238. *Single exceptional acts of negligence do not prove an officer to be incompetent.* — If so, no officer could be retained in service, for there is no person who is not at some time to some degree negligent. Hence it has been properly said, that intelligent men of good habits, who are engineers, or brakemen, or switchmen on railroads, are not required to be invariably discharged by their employers for the first error or act of negligence such employees commit; nor will railroad companies necessarily be liable for a second error or negligent act of a servant, to all other servants of such companies, when the latter sustain damages by reason

[1] Chic., B. & Q. R. R. *v.* Gregory, 58 Ill. 272.

[2] Baird *v.* Pettit, 70 Pa. St. 477.

thereof.[1] The question is, not whether there has not been a single act of negligence on the part of the person whose conduct is the subject of investigation, but whether this act of negligence, in connection with other circumstances, and with his general character and conduct, was such as to make his discharge by his employer a step of such prudence as diligent and prudent employers in the particular line of business are accustomed to exert. At the same time such act or acts of negligence on the part of such employee are proper articles of evidence, it appearing that such acts were known to the employer, or his agents in chief.[2]

[1] Baulec *v.* N. Y. & H. R. R. Co. 62 Barb. 623, per Balcom, J. See Moss *v.* Pac. R. R. 49 Mo. 167.

[2] Pittsburg, &c. R. R. *v.* Ruby, 38 Ind. 294; though see contra, Frazier *v.* Penn. R. R. 38 Penn. St. 104. But if the pleading rests, not on the negligence of the employer in retaining the employee, but on a specific act of negligence by the latter, then such evidence of prior negligence is inadmissible. Robinson *v.* Fitchburg R. R. 7 Gray, 92. See Collins *v.* Dorchester, 6 Cush. 396.

In Pittsburg R. R. *v.* Ruby, Buskirk, J., argues as follows: "The case of Frazier *v.* The Pa. R. R. Co., supra, is directly in point. It was an action on the case brought against the railroad company by Frazier, who was a brakeman employed by the defendant, to recover damages for personal injuries received by him in the course of his employment, by reason of a collision of trains caused by the negligence of one of the conductors of the defendant.

"The plaintiff proved that several collisions had occurred previously, and that they were produced by the careless and reckless conduct of the same conductor, and that the company had notice of such previous conduct of the conductor.

"The court, in reference to the admission of such evidence, say: 'The question of character thus became an important one, and we are constrained to say that it was tried on improper evidence. Character for care, skill, and truth of witnesses, parties, or others, must all alike be proved by evidence of general reputation, and not of special acts.'

"The court, in support of this position, referred to 7 Casey, 67, and 1 Greenl. Ev. secs. 461–9. The authorities referred to wholly fail to sustain the ruling of the court. Both authorities relate to the mode of impeaching witnesses, and it was held, in accordance with the uniform and well settled doctrine, that a witness could not be impeached by proof of specific acts.

"The effect of the ruling in the Pennsylvania case was, that a railroad corporation could not be charged with notice of the incompetency of one of its employees, by proof of special instances of want of care, skill, and capacity, although the acts were well known to the directors, president, and superintendent, and that the only mode in which such proof could be made was by proof of general character. This case stands alone, unsustained and unsupported, so far as we have been able to discover, by any elementary work or decision. Nor can the decision be sustained in reason or on principle. Under the operation of that rule, corporations would

§ 239. *No presumption to be drawn from the fact that the employee whose negligence is under examination was promoted from a lower to a higher grade*, if, in the same line of duty, the expectation of such promotion stimulates diligence. Hence corporations as well as individuals must be at liberty to raise men from lower to higher places; and such elevation of them cannot

in many instances be relieved of responsibility for injuries received, resulting from the reckless conduct of such corporations in employing and retaining negligent, careless, and unskilful persons to run and operate railroads. The safety and lives of the great mass of our people depend upon the care, prudence, and skill of those charged with managing and operating our numerous railroads. The care and skill should be in proportion to the dangers of the service. It is certainly a sound principle, that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them goes to this extent, that he, and where the nature of the business requires agents, his employees, shall possess skill; and that so far as human care and foresight can go, he will carry them safely. He is bound to the highest degree of care that a reasonable man would use.

"In a case like this, where the injury was caused by the negligence of a co-employee, the law only requires ordinary care. What is ordinary care, cannot be determined abstractly. It has relation to, and must be measured by, the work or thing done and instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. The degree of care required is higher when life or limb is endangered, or a large amount of property is involved, than in other cases. These rules are founded in reason, and sustained by the authorities, not only in this country, but in England; and every day's experience demonstrates their wisdom and policy and the necessity of a rigid adherence to and enforcement of them.

"We think that it is well settled, not only by the authorities, but in reason and on principle, that for the purpose of showing that the officers of a railroad company had not exercised due care, prudence, and caution in the employment, or in retaining in service of careful, prudent, and skilful persons to manage and operate such road, and for the purpose of charging such corporation with notice of the incompetency of its employees, it may be shown that such employees had been guilty of specific acts of carelessness, unskilfulness, and incompetency, and that such acts were known to such officers prior to the employment of such agents, or that such employees had been retained in such service after notice of such acts; and in support of these propositions we refer to the following authorities:

"1 Redf. Railw. 552; Gahagan *v.* Boston & Lowell R. R. Co. 1 Allen, 187; The Illinois Central Railroad *v.* Reedy, 17 Ill. 580; The Galena & Chicago Union R. R. Co. *v.* Yarwood, 17 Ill. 509; Quimby *v.* Vermont Central R. R. Co. 23 Vt. 387; The Louisville & Nashville R. R. Co. *v.* Collins, 2 Duvall, 114."

be imputed to the employers as negligence, unless the places from which they are raised are not such as to properly prepare them for the higher posts.[1]

§ 240. *Negligence on the occasion of the injury not by itself sufficient to charge the employer with negligence in appointing the negligent employee.* — This results from the express limitations of the exception under consideration. Of the application of these limitations we have an illustration in an English case in which the defendant was a maker of steam-engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present; his foreman or manager directed the crane to be moved on, having just before ordered the plaintiff to get on the engine to clean it. The plaintiff having got on the engine, the piers gave way, the engine fell, and the plaintiff was injured. This was the first time the crane had been used and the plaintiff employed in this manner. It was ruled that there was no evidence to fix the defendant with liability to the plaintiff; for that, assuming the foreman to have been guilty of negligence on the present occasion, he was not the representative of the master so as to make his acts the acts of his master; he was merely a fellow-servant of the plaintiff, though with superior authority; and there was nothing to show that he was not a fit person to be employed as foreman; neither was there any evidence of personal negligence on the part of the defendant, as there was nothing to show that he had employed unskilful or incompetent persons to build the piers, or that he knew or ought to have known that they were insufficient.[2]

§ 241. 5. *Negligent appointments by middle-men or superintendents.* — Wherever the nature of the business is such as to involve the appointment of subalterns by middle-men, and to withdraw the principal from the management of the business, then the principal is liable for the negligence of the middle-man in making the appointments, on the ground that the negligence is that of the

[1] Haskin *v.* R. R. 65 Barb. 129. See Edwards *v.* R. R. 4 F. & F. 53.

[2] Feltham *v.* England, L. R. 2 Q. B. 33.

principal, and not of a fellow-servant of the plaintiff.[1] In New York the liability of the master in such cases was at first doubted.[2] But now it is settled that the master is as liable for the retention by his manager of incompetent subalterns, after notice of such incompetency, as he would be liable for their retention by himself, under similar circumstances.[3] *A fortiori* is this the case where the middle-man has direct authority to make such appointment. Thus, permission given by the company to an engineer to allow a fireman to act as an engineer, when he deemed the fireman competent, makes the company responsible for injuries resulting from a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty.[4] We may therefore accept as binding the ruling of the court of appeals of New York, that if the master delegates to an agent the duty of employing workmen, or of originally selecting physical appliances for the conduct of the business, the master is responsible to any servant who suffers injury from the negligence of that agent in the performance of that duty.[5] Indeed, if we do not accept this, it is

[1] Supra, § 222, 229; Brothers *v.* Carter, 52 Mo. 375.

[2] Wright *v.* New Y. C. R. 25 N. R. 562. See *S. C.* 28 Barb. 80.

[3] Laning *v.* N. Y. Cent. R. R. 49 N. Y. (4 Sickels) 521; Chapman *v.* N. Y. & E. R. R. 1 N. Y. Supr. Ct. 526; Bissel *v.* N. Y. C. R. 29 Barb. 613; Warner *v.* Cent. R. R. 49 Barb. 572; and see Gilman *v.* East. R. R. 13 Allen, 433; Noyes *v.* Smith, 28 Vt. 59; Frazier *v.* Penn. R. R. 38 Penn. St. 104; Walker *v.* Bolling, 22 Ala. 294.

[4] Harper *v.* Indiana & St. Louis R. R. 47 Mo. 567.

[5] Laning *v.* N. Y. Cent. R. R. 49 N. Y. 521.

In a still later case, it was expressly ruled by the same court, that a corporation is liable to an employee for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance.

It was declared that as to such acts, the agent occupies the place of the corporation, and that the corporation is to be deemed present, and consequently liable for the manner in which they are performed.

It was accordingly held (Allen, Grover, and Folger, JJ., dissenting), that where an agent of the defendant, a railway corporation, whose duty it was to make up and dispatch trains, and to hire and station brakemen, sent out a heavy freight train with but two brakemen, when three were required, and where the train broke in two, and in consequence of the want of necessary brakemen the rear part ran backward and collided with another train which had been dispatched five minutes after the first, killing the fireman thereof, that the defendant was liable.

It was further also held (Allen, Grover, and Folger, JJ., dissenting),

hard to see in what case a corporation, which can only appoint and dismiss through a general superintendent, can be liable for negligence in appointing or retaining. On the other hand, if the master holds control of the business, and is known so to do, retaining in himself, according to the settled usage of the business, the power of dismissal and retention, it is not right that he should be chargeable, in a suit by one servant, with the negligence of another servant in the retention of an incompetent subaltern, when the servant injured could have brought the matter home to the master himself. A servant, to put the matter in other words, who sees an incompetent subaltern at work by his side, and neglects to notify the master of such incompetency, when there is opportunity so to do, and when the master exercises the power of revision, must be presumed to acquiesce in the retention of such subaltern; nor can he defeat this presumption by showing that he complained to a middle-man or managing agent of the subaltern's incompetency.[1]

§ 242. 6. *Master who, on being complained to of the negligence of a servant, gives reason to believe that such negligence will be corrected, cannot defend himself if such negligent servant works injury to other servants.* — In other words, A., a fellow-servant of the

that the fact that the agent had employed a third brakeman to go upon the train, who failed to appear, did not excuse the company from liability. Such hiring was only one of the steps to be taken to discharge the principal's duty; that required the train to be supplied with sufficient help before it was dispatched. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. This would only make the negligence contributory with the brakeman, but would not effect the liability of the company. Flike *v.* Boston & Albany R. R. Co. 53 N. Y. 549.

[1] Beyond this it would not be safe to push the case of Smith *v.* Howard (22 L. T. Rep. 130, Court of Exch. 1870; Albany Law J. January 31, 1874), where the evidence was that the plaintiff was employed by defendant to work at a steam-saw; it was necessary that he should have an assistant in the performance of his work, and the defendant's foreman engaged a boy for the purpose, who proved to be incompetent, and who, although complaint was made of his incompetence to the foreman, was retained in the service; it was the foreman's duty to engage or discharge the helper; an accident happened to the plaintiff while working at the saw, through the boy's incompetence. Held, that in the absence of any proof to show that the foreman was incompetent for his position, there could be no recovery; it being the foreman's duty to engage and discharge the boy, his retaining him, after knowing of his incompetence, was merely an act of negligence by the plaintiff's fellow-servant, for which defendant was not responsible. See supra, § 222–229.

plaintiff, shows himself incompetent, and the plaintiff complains to the common master, who by promises of correction induces the plaintiff to remain in the service. The plaintiff is subsequently injured by A.'s negligence. Is the master liable? If a master is liable for injuries produced by defects in machinery which he has promised to rectify but does not,[1] *a fortiori* is he liable for the negligence of subordinates which he has promised to rectify but does not. For an employee, working at machinery, may generally by inspection determine whether the master has or has not kept his promise of remedying a defect. The machinery is patent, inspection will determine whether it has been repaired or its deficiencies made good. But this is not so with human agents. My fellow-servant may heretofore have been negligent; but it is likely that his negligence may have been corrected by his master's admonitions and threats, brought about by my remonstrances; nor can I tell by looking at him whether such has been the case. Hence, in such case, I am not guilty of negligence on my part, if, trusting in my master's assurances, I go on with my work; and if I am injured by my master's neglect in this respect, my master is liable to me for the injury.[2]

V. PROVINCE OF JURY AND OF COURT.

§ 243. In ordinary cases, where the defence is contributory negligence, it is incumbent on the defendant, negligence on his part being shown by the plaintiff, to prove, if he can, that the injury was brought about by the plaintiff's negligence;[3] and this rule obtains in all cases in which the plaintiff presents a case of negligence on the defendant's part, unmixed with any contributory negligence on his own part. But the case is different in a suit by a servant against a master; for here as the plaintiff's own case assumes that he voluntarily entered into the employment where he was exposed to particular risks, it is necessary for him to prove, as part of his case, that the risk by which he was injured was not one of those which he agreed to assume.[4] Hence, if he does not prove this, in other words, if he rests his case after show-

[1] See supra, § 220.

[2] See Laning *v.* R. R. 49 N. Y. 534; and particularly supra § 220.

[3] See infra, § 423. In Massachusetts, however, a contrary rule obtains. Murphy *v.* Dean, 101 Mass. 455.

[4] See supra, § 217; Beaulieu *v.* R. R. 48 Me. 291; Kunz *v.* Stuart, 1 Daly 431; Columbus R. R. *v.* Webb, 12 Oh. St. 475.

ing that he was injured by an ordinary incident of his service, of which he was aware, or ought to have been aware, when he entered into it, he may be nonsuited by the court.[1]

At the same time, if the plaintiff's case simply shows injury received through the defendant's negligence, and there rests, the burden is on the defendant to show that between them existed the relation of master and servant.

[1] The following cases are cited on this point by the Albany Law Journal of March 14, 1874: —

The inquiry arises, after considering these cases, is the question of contributive negligence always one for the jury, or may the court nonsuit where the fact seems clear? A perusal of Owen *v.* N. Y. Cent. R. R. Co. 1 Lans. 108, will convince one that a case can be conceived where a nonsuit would be proper. In that case the plaintiff, a brakeman, in the employ of a railroad company, while discharging duties in the line of his employment upon the roof of a freight car, was carried against a highway bridge and sustained injuries. The bridge was only three and a half feet higher than the top of the cars, and had been so ever since the construction of the railway, and for many years. The brakeman entered into his employment with knowledge of its position and height, and had opportunity to learn of its continuance. A motion for a nonsuit was denied, and the case went to the jury, who, we suppose, rendered a verdict for the defendant, although the reporter acutely neglects to say so. On appeal, the judgment was affirmed, the court saying that the motion for a nonsuit should have been granted. Now, let us suppose, as a test, that this plaintiff had complained to the defendant of the dangerous position of this bridge, and the defendant had promised him to procure it to be raised, or to change his route so as to avoid it, would that have made the plaintiff any less careless, and have rendered the question a proper one for the jury? We cannot conceive that it would, and yet, if Holmes *v.* Clark is law, it would have that effect. The same doctrine was held in Assop *v.* Yates, 2 Hurl. & N. 768: 1858. Plaintiff was a contractor, employed by defendant as a mason in the erection of a house. A hoarding had been put up, which was alleged to have projected too far into the street, but it was shown that sufficient room was left for carts to pass. Between the hoarding and the building was a heavy machine called a crab and cradle, used for lifting stones, so placed that anything that knocked down the hoarding would knock down the machine. The plaintiff had complained to the defendant of the position of the machine. A cart, driven along the street, swung against the machine, knocked it down and hurt the plaintiff. A nonsuit was sustained, because "after having complained of the hoarding, and knowing all the circumstances, he voluntarily continued at work."

So in Skip *v.* Eastern Counties Railway Co. 24 Eng. L. & Eq. 396. The plaintiff was a guard in the service of defendants, and his duty was to couple carriages to an engine; while doing this, in consequence of not having another person to assist him, he was injured; but for three months previously he had done the same work without assistance, and without making objection. A nonsuit was approved.

VI. CONTRIBUTORY NEGLIGENCE BY SERVANT.

§ 244. The law as to contributory negligence, which will be hereafter discussed in an independent chapter,[1] applies in general to suits brought by servant against master. It may here, however, be distinctively stated that an employee who puts himself in a position of danger cannot recover for injuries which are thereby received.[2] Thus, in an Iowa case, where it appeared that a railroad employee, not being engaged in operating the train in question, on which he was riding, voluntarily got upon the tender of the engine, and while he was in this position the engine broke through a defective culvert or bridge, and he was killed; and it appearing that a "caboose" car was attached to the train for passengers and those not engaged in operating the train, to ride in, and that if the deceased had been in there he would not have been injured; it was ruled, that the employee was guilty of contributory negligence.[3]

In an Indiana case, it appeared from the evidence that B. and others, in the employment of a union railway company, were at work at a certain point on the railroad track of the company over which trains could pass at that point; that a train of cars owned and run by the defendant was backing at the time; that the bell of the locomotive was ringing; that there were four or five cars in the train, and no method of communicating with the engineer from the rear of the train; nor was there any brake in working order on the car farthest from the locomotive, although a brakeman was on the rear end of the car, the locomotive being at the other end of the train; nor was any person in advance of the train to warn others of its approach. The locomotive was in charge of the fireman, the engineer being absent to procure a drink. The other persons employed with B. at work on the track stepped off, and some one called to him, "look out," when B., instead of stepping back, stepped forward, and was struck and killed. The fireman and one brakeman were the only persons in charge of the train. This instruction was asked and refused: "If, at the time deceased was killed, it was his duty to be en-

[1] See infra, § 300.

[2] See L. & R. R. R. *v.* Burke, 6 Cold. 45; B. & O. R. *v.* Trainor, 33 Md. 542.

[3] Doggett *v.* Ill. Cent. R. R. 34 Iowa, 284.

gaged upon the track at that place, and he might have seen the approach of the train by exercise of reasonable care, as by looking up, then the failure to do so, if he did so fail, was negligence on his part; and if such negligence contributed to his injury, then the jury should find for the defendant." It was held by the supreme court that there was no error in this ruling, and that this evidence was sufficient to sustain a finding against the railroad company.[1]

§ 245. Where the workman is at his proper place, pursuant to orders, and there is negligently struck by a train, then his right to recover is clear. Thus in an action for personal injuries sustained by the plaintiff by being run over by a locomotive engine of the defendants, while at work on a side track of the defendants, in the employment of a contractor, who under an agreement with the defendants was building a wall to support the road-bed, there was evidence that at the time of the accident the plaintiff and other servants of the contractor were standing on the side track and holding one of the guys of a derrick in actual use for moving stones to build the wall with; that the work required the derrick and the guy to be in the position in which they were, and the plaintiff and his comrades to stand where they did and concentrate their attention on it; and that the engine, after having just before moved a train of freight cars from the side track to the main track, was detached from the train and backed down the side track, without any signal of its approach until it struck the plaintiff, who knew and relied upon a usage of the defendants to ring the bell or sound the whistle whenever one

[1] Indianapolis, &c. R. R. v. Carr, 35 Ind. 510.

In a trial in Mississippi, the evidence was that H., who was in no way connected with the railway company, was standing at the crossing in Canton, when the engineer or conductor of the train ordered him to go in and uncouple the cars. He refused at first, but, in fear of some bodily harm from the railway employee, who had cursed and threatened to beat him if he refused, was forced to perform the service required. After he had uncoupled the cars, the train commenced moving, the tender came against his shoulder and knocked him under the cars, and the tender wheels ran over his left leg. There was no brakeman on the train. It was held that H. was not bound to obey the orders under which he acted, and the evidence was clear that he could have gotten away had he seen proper; and that, under the circumstances, the company was not liable. New Orleans, Jackson & Great Northern Railroad Company v. Harrison, 48 Miss. 112. But if he acted in fear, and under compulsion, this cannot be sustained. See supra, § 89.

of their engines approached men working upon the railroad. It was ruled by the supreme court of Massachusetts, that on this evidence a jury would be warranted in finding that there was due care upon the part of the plaintiff.[1]

VII. ACTION BY ONE SERVANT AGAINST ANOTHER.

It has been said that one servant is not liable to a fellow-servant for negligence.[2] But unless the negligence be one of the risks which the injured servant assumed, this position cannot be sustained.[3]

[1] Goodfellow *v.* Boston, H. & E. R. R. 106 Mass. 461.

Gray, J. . . . . "It appears by the bill of exceptions that the plaintiff and other workmen, employed by a contractor, who, under agreement with the defendants, was constructing a wall to support their railroad, were engaged in holding a rope attached to a derrick in actual use for moving stones for that purpose; that the work required the derrick and rope to be in the position in which they were, and the plaintiff and his comrades to be upon the side track of the railroad; that while they were there, busily at work, and while the safety of all required their most careful attention to their duty, a locomotive engine, attached to a train of cars which had just passed over the side track to the main track of the railroad, was separated from the train, and, without any bell rung or signal given, run back upon the side track, and there struck and injured the plaintiff; and that he knew and relied on the custom of the defendants to ring the bell or sound the whistle whenever one of their engines approached men working upon the railroad. These facts, if not varied or disproved, would have warranted the jury in finding that the plaintiff was rightfully where he was, and was not in fault in being engrossed in his work and unaware of the approach of the engine until it was too late to avoid it. Quirk *v.* Holt, 99 Mass. 164; Hackett *v.* Middlesex Manufacturing Co. 101 Mass. 101; Mayo *v.* Boston & Maine Railroad, 104 Mass. 137; Wheelock *v.* Boston & Albany Railroad Co. 105 Mass. 203.

"In Burns *v.* Boston & Lowell Railroad Co. 101 Mass. 51, the ground upon which the plaintiff was held not to be entitled to recover was, that the circumstances of that case did not show that he was rightfully upon the side track of the railroad. And the remark quoted by the defendants from Quirk *v.* Holt, 99 Mass. 166, in which a man sustained an action for being struck by a wagon while at work in the highway, that 'his duty to keep watch for the defendant's approach was not the same as if he had been at work upon a railroad when the defendant was coming with a locomotive,' does not warrant the inference that in such a case as the present he must be held wanting in due care."

[2] Southcote *v.* Stanley, 1 H. & N. 247; Albro *v.* Jaquith, 4 Gray, 99.

[3] See note by Green to Story on Agency, § 453 *e*.

CHAPTER VI.

MUNICIPAL CORPORATIONS.

Generally liable, apart from statute, for so misusing any property belonging to them, as to injure private persons, § 250.

Charter not to be construed to impose extraneous duties, § 257.

Not liable for omission or negligence in discharge of discretionary functions, § 260.

As in management of fire department, § 261.

Otherwise as to negligence in sewerage, § 262.

Liability for damages arising from abuse of power, not to be confounded with liability for damages arising from its imperfect exercise, § 264.

When, having power to remove a nuisance, liable for neglect, § 265.

"Towns," as distinguished from municipal corporations, § 266.

When municipal corporations are liable for neglect of servants, § 267.

[*The duties of municipal corporations in respect to highways are discussed in a separate chapter, infra*, § 956.]

§ 250. *Generally liable, apart from statute, for so misusing any property belonging to them, as to injure private persons.* — No doubt a municipal corporation is not liable in a private suit for injuries resulting from its neglect of a discretionary public duty; but when it does acts for its own private advantage or emolument it becomes so liable, for the reason that "municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly."[1]

§ 251. In New England where, as will be hereafter seen, from the peculiar division of the territory into towns, a distinctive jurisprudence on this topic has grown up,[2] the common law liability of municipal corporations for negligences of this class is strictly guarded. Thus in Massachusetts, "to render," as is well argued by Gray, J., "municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corpo-

[1] Nelson, C. J., in Bailey *v.* New York, 3 Hill, 531; Brown *v.* N. Y. 3 Barb. 254; Cowley *v.* Sunderland, 6 H. & N. 565.

[2] See infra, § 266, 956.

rate capacity, an express statute is doubtless necessary. Such is the well settled rule in actions against towns or cities for defects in highways.[1] The same rule has been held to govern an action against a town by a legal voter therein, for an injury suffered while attending a town meeting, from the want of repair in the town-house erected and maintained by the town for municipal purposes only; or by a child, attending a public school, for an injury suffered from falling into a dangerous excavation in the school-house yard, the existence of which was known to the town, and which had been dug by order of the selectmen to obtain gravel for the repair of the highways of the town, and to make a regular slope from the nearest highway to the school-house.[2] But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument. Thus where a special charter accepted by a city or town, or granted at its request, requires it to construct public works, and enables it to assess the expense thereof upon those immediately benefited thereby, or to derive benefit in its own corporate capacity from the use thereof, by way of tolls or otherwise, the city or town is liable, as any other corporation would be, for any injury done to any person in the negligent exercise of the powers so conferred.[3] So where a municipal corporation holds or deals with property as its own, not for the direct benefit and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, it is liable to the same extent as he would be for the negligent management thereof to the injury of others. In Thayer *v.* Boston, 19 Pick. 511, it was held that a city was liable for the acts of its agents, previously authorized or afterwards

[1] 5 Edw. 4, 2, pl. 24; Riddle *v.* Proprietors of Locks and Canals, 7 Mass. 169, 187; Mower *v.* Leicester, 9 Mass. 247; Holman *v.* Townsend, 13 Met. 297; Brady *v.* Lowell, 3 Cush. 121; Providence *v.* Clapp, 17 How. 161, 167.

[2] Eastman *v.* Meredith, 36 N. H. 284; Bigelow *v.* Randolph, 14 Gray, 541. How far this law is distinctive of New England will be seen infra, § 266.

[3] Henley *v.* Lyme, 5 Bing. 91; *S. C.* 3 B. & Ad. 77; 1 Scott, 29; 1 Bing. N. C. 222; 2 Cl. & Fin. 331; 8 Bligh (N. S.), 690; Weet *v.* Brockport, 16 N. Y. 161, note; Weightman *v.* Washington, 1 Black. 39; Nebraska City *v.* Campbell, 2 Black. 590; Perley, C. J., in Eastman *v.* Meredith, 36 N. H. 289–294; Metcalf, J., in Bigelow *v.* Randolph, 14 Gray, 543; Child *v.* Boston, 4 Allen, 41, 51.

ratified by the city, in obstructing a highway to the special and peculiar injury of an individual, by erecting buildings under a claim of title in the fee of the land, for which the city received rent. In Anthony *v.* Adams, 1 Met. 284, cited for the defendant, the town was held not liable, solely because the act which occasioned the injury was one which the town had not authorized, and was not required by law to do." He proceeds to cite with approval from Perley, C. J., the statement,[1] that "towns and other municipal corporations, including counties in this state, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property." "So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another."[2] It was consequently held, that if in repairing a building belonging to a city, and used in part for municipal purposes, but in considerable part also as a source of revenue by being let for rent, which is situated on a public common crossed by footpaths cared for by the city and used by the public for more than twenty years, the agents or servants of the city, acting by its authority, dig a hole in the ground adjoining, and negligently leave it open and unguarded, so that a person walking on one of the paths and using due care falls into it and is injured, the city is liable to an action at common law for the injury.

§ 252. In New York, a larger liability is maintained. Thus, where it appeared that the common council of the city of Buffalo ordered the moving of one end of a bridge belonging to a turnpike company, in order to have it conform to certain street improvements, and employed contractors to do the work of removal under the superintendence of the city surveyor, and the contractors employed one S. to superintend such removal; and the evidence was that the work was negligently performed, whereby the bridge fell and was destroyed; it was ruled that the city was liable for the destruction of the bridge, and this whether the city

[1] Eastman *v.* Meredith, 36 N. H. 295, 296.

[2] Oliver *v.* Worcester, 102 Mass. 490.

had a lawful right to attempt its removal or not. The city, if it had no lawful right, was a trespasser and liable as such for the illegal acts of its officers. If it had lawful power to do the act, it was bound to do it in a careful and skilful manner, and was liable for the negligence of its agents.[1]

[1] Buffalo & Hamburg Turnpike Co. *v.* The City of Buffalo, 1 N. Y. Sup. Ct. 537. See supra, § 195. In Thurston *v.* City of St. Joseph, 51 Mo. 510, Adams, J., said: . . . . "What are the rights of a lot holder in reference to the adjacent streets and alleys? The owner in fee of a tract of land may have it surveyed into town lots, streets, and alleys; and without selling any of the lots or acknowledging the plat, he may destroy the survey and vacate the streets and alleys. But if he convey away any of the lots, the right to the free use of the adjacent streets will pass to the grantees as appurtenant to their lots; and such grantees will not only have a servitude or easement in the adjacent streets and alleys as appurtenant to the lots, but the conveyance itself would be a dedication of the streets and alleys to the public as well as to the private use of the lots. This would be the result without any statutory dedication, by acknowledging and filing the plat with the county recorder. The effect of a statutory dedication, however, is precisely the same. It vests in the adjacent lot-holder the right to the use of the streets as appurtenant to his lot, and this easement is as much property as the lot itself. It is a property interest, independent of the right of the public to use and improve the streets as public highways, and the lot-holder is as much entitled to protection in the enjoyment of this appurtenant easement as he is in the enjoyment of the lot itself. Hence, whatever injures or destroys this easement is, to that extent, a damage to the lot. So if in grading a street it be raised so high as to throw the surface water back upon the lot, or prevent a free access to the street; or if the street be excavated so low as to render the easement of no use to the lot, the lot-holder is thereby damaged to the extent of the loss of such easement. The question here is whether the lot-holder has any remedy at all for such injuries. The case under consideration is a sewer, which the city no doubt had the power to construct. But the gravamen of the complaint is, that through negligence in the construction of this sewer, water was thrown on the lot of the plaintiff and thereby injured her property. If we are still to follow the rule as laid down in The City of St. Louis *v.* Gurno, 12 Mo. 414, and the subsequent cases of Taylor *v.* St. Louis, 14 Mo. 20; and Hoffman *v.* St. Louis, 15 Mo. 651, we must deny all remedy for such injuries. In the cases referred to, this court followed the lead of the King's Bench in The Governor, &c. *v.* Meredith & others, 4 T. R. (D. & E.) 794. The doctrines laid down in that case by Lord Kenyon and other judges, in my judgment, are not applicable to America. The improvements which caused the injury, were made under an act of parliament which authorized the commissioners to allow damages; but the court seemed to place their decision on the ground that parliament was omnipotent, and on this ground alone denied any remedy to the injured party. The court held that as the improvement was made for public convenience, the maxim '*salus populi suprema lex esto*' applied, and that private rights must

§ 253. In a Pennsylvania case, sustainable even on the narrow construction of the Massachusetts courts, it is ruled that a city, being in possession of a public wharf within its limits, exercising exclusive supervision and control over it, and receiving tolls for its use, is bound to keep it in proper condition, and is liable for special injury sustained by an individual in consequence of its neglect to keep the wharf in order.[1] But the courts have gone beyond this limit, maintaining the liability of municipal corporations, even as to acts for which they receive no emolument. Thus an incorporated district, authorized to pave and grade a public street, was held liable for an injury to a private right of way caused by the diversion of the water from the street upon the private way, on the ground that it had the power and was bound to make a proper provision for carrying

yield to public convenience. The same line of reasoning was maintained by the learned judge who determined the opinion in the leading case of St. Louis *v.* Gurno. In adopting the rule laid down by the king's bench, he said: 'It has long since passed into a maxim, that the safety of the people is the supreme law, and, as a corollary from this ancient truth, that individual convenience must yield to the public good.'

"Conceding the maxim to be just, the corollary, in the comprehensive sense used in England, is a *non sequitur* applicable to the American States. Our governments are republican, and are instituted for the protection of the people, in their individual rights of persons and property. These rights cannot be invaded as a mere matter of convenience to the public. It is only where the safety of the people is involved, that individual rights can be destroyed to protect the community from impending danger. Thus, in great conflagrations, private houses may be torn down or destroyed to stop the fire, and in like manner property of any kind may be destroyed to prevent the spread of contagious diseases. . . . . This line of argument and advice was tendered as a justification for refusing relief in St. Louis *v.* Gurno, and was followed without injury in the subsequent cases of Taylor *v.* St. Louis, and Hoffman *v.* St. Louis, *ubi supra*. The same course of reasoning was pursued by the courts of New York, Pennsylvania, and Massachusetts, relied on as authorities in St. Louis *v.* Gurno. See Wilson *v.* City of New York, 1 Denio, 595; 4 Serg. & R. 514; 9 Watts, 382; Callender *v.* Marsh, 1 Pick. 418. The same thing may be said in regard to all the American cases maintaining the doctrines laid down in St. Louis *v.* Gurno.

"It is a notable fact that most of the American courts have blindly followed the rulings of the British court in the leading case of The Governor, &c. *v.* Meredith & others, 4 D. & E. 794. In doing so, they have entirely ignored some of the plainest and most imperative provisions of the bill of rights contained in the constitutions of the several States."

[1] Pittsburg *v.* Grier, 21 Pa. St. (10 Harris), 54.

off the water from the street.[1] So, in another case,[2] in which the county was made responsible for the acts and omissions of the commissioners in relation to an unsafe bridge which fell with the plaintiff's wagon and team. The bridge being on the line of two counties and maintained by both, it was afterwards held that Armstrong County could recover contribution from Clarion County, notwithstanding the case was one of negligence.[3]

§ 254. In a still later case,[4] it was held that the city of Philadelphia was liable for the acts of its board of water-works for negligently drawing off, without necessity, so much water from the Schuylkill River as to endanger the water privileges below the dam.[5]

[1] Commissioners of Kensington *v.* Wood, 10 Barr, 93.

[2] Humphreys *v.* Armstrong Co. 56 Penn. St. (6 P. F. Smith), 204.

[3] 66 Penn. St. (16 P. F. Smith), 218.

[4] City of Phil. *v.* Gilmartin, 71 Pa. St. 140. See supra, § 127, 190.

[5] "We come now," said Agnew, J., "to the question of the liability of the city for the acts of her agents and officers in relation to the use of the water of the Schuylkill. This inquiry bears upon the case in two aspects, viz., the competency of the evidence in the bills of exception, and the right of the plaintiff to maintain his action. The agreements heretofore considered, and the other evidence in the cause, exhibit the city as the proprietor of a vast water-power, and its appropriate machinery, and of lands, buildings, reservoirs, and an extensive system of pipes, by which she distributes the water to nearly a million of people. She sends it not only to private dwellings, but to public buildings, mills, manufactories, fountains, and to other uses. She is a vendor of water, and sells it for use in the arts, employments, and pleasures of the people, deriving large revenues from the sales. In carrying on this vast business and trade in water she stands in the relation of an owner of private property, and employs many agents performing the functions of servants, who are accountable to and report to the municipality, are governed by its regulations, and are supervised and controlled by the councils, committees, and officers of the corporation. Thus, a mere statement of the facts discloses the relation of principal and agent in reference to the city water-works, and not that of ordinary corporation officers performing merely municipal functions."

. . . . "In performing municipal functions only, the corporation must act through officers, for whose negligence and irregularities it must be held liable. A municipal corporation is nothing more than an aggregation of persons, and it cannot be that liability is wholly lost in the number. Men, whether as individuals or communities, have duties to perform which lie at the foundation of responsibility." "When a municipal corporation transacts business as a vendor and distributor of water, the relation of her employees is that of servants to her; and the maxim *respondeat superior* applies to their acts and negligences in conducting this business. Surely it cannot stand in a higher relation to the business than the State herself when she forms business connections, and

§ 255. So in a case in Georgia,[1] the mayor and council of the city of Macon, having full power and authority to remove or cause to be removed any buildings, posts, steps, fences, or other obstructions or *nuisance*, in the public streets, lanes, alleys, sidewalks, or public squares of the city, it was held that under this power they are bound to keep the streets, lanes, alleys, and sidewalks in such condition that it is safe and convenient to pass them, and in case of failure that they are liable to any person injured by their neglect. It was further ruled, that a two-story brick wall of a house that had been burnt down some months previously, standing at the edge of the sidewalk, though private property, if it be so much dilapidated or decayed as to endanger the lives of persons passing the streets, is a nuisance, which the mayor and council are bound to have removed, and if they fail, and danger results to any person by reason of such neglect, the city is liable for the damages sustained. So in the same state a municipal corporation has been held liable for leaving a dangerous hole in one of its market places in which the plaintiff was hurt.[2]

§ 256. The same principle was implicitly affirmed in England,[3] in a case already alluded to, where the house of lords, on final review, held that the trustees of the docks at Liverpool, incorporated by act of parliament for the purpose of making and maintaining docks and warehouses for the use of the public, with authority to receive rates for such use, which were to be applied exclusively to the maintenance of the docks and warehouses, and the payment of the debt incurred in their construction, were liable to an action by an individual for an injury to his vessel in entering one of the docks, by striking upon a bank of mud which their servants and agents had negligently suffered to accumulate

for the time being lays down her sovereignty. Wheeling Bridge case, 13 Howard, 560; Turnpike Company *v.* Wallace, 8 Watts, 316. The facts of the case, as clearly ascertained, the weight of authority, and the demands of justice, make it evident that the relation of the city to the Fairmount Water-works renders her liable for the acts of her servants and employees in drawing off the water contrary to her duty to the State, and her contracts with the Navigation Company. The acts and declarations of her agents and officers in the course of their several employments, and duty of supervision and control, were part of the *res gestae*, and were evidence to the extent set forth in the bills of exception."

[1] Parker *v.* Mayor & Council of Macon, 39 Ga. 725.

[2] Savannah *v.* Cullens, 38 Ga. 334.

[3] Mersey Docks Trustees *v.* Gibbs, 11 H. L. Cas. 687; *S. C.* Law Rep. 1 H. L. 93.

at and about the entrance; and the reasoning on which this is based is extended to municipal as well as to private corporations.

§ 257. *Charter not to be construed to impose extraneous duties.* — A duty, however, not imposed specifically on a corporation, cannot be constructively attached so as to make its neglect the subject of a suit. Thus, it is held in Maine that no action can be maintained against a town for neglecting to repair a drain across its highways, *per quod* the water accustomed to flow through it was forced back upon the adjoining land, unless it appears that an obligation to construct the drain was imposed on the town by the statute or common law. It was also held that the common law requires a town to build a drain only where its highway would otherwise obstruct the flow of water in its natural channel, or cause it to collect and stand upon adjoining land to the injury of the owner.[1]

§ 258. So in another case in the same state,[2] where the health officers took possession of a vessel and used it with the consent of the owner as a hospital for a small-pox patient, and afterwards sent a person to fumigate and purify it, who accidentally caused a fire, by which the vessel was injured. The city was held not to be liable for the injury, because the health officers had no authority to take possession, and acted beyond their powers, and the city had no special property in the vessel.[3]

§ 259. So in a New York action,[4] to recover compensation for personal property destroyed by blowing up a building to arrest a fire, upon the order of the mayor and two aldermen, acting under a statute, it appearing that the duty being imposed by the statute on the officers and not on the city, and not by any city regulation, it was held that the city was not liable to respond in damages.[5]

§ 260. *Municipal corporations not liable for omission or negligence in performance of discretionary functions.* — A municipal corporation, it is frequently said, is not liable in a private action for omission to exercise discretionary functions for the benefit of the public at large.[6]

[1] Estes *v.* China, 56 Me. 407; supra, § 195.

[2] Mitchell *v.* City of Rockland, 52 Me. 118.

[3] See supra, § 195.

[4] Russell *v.* The Mayor of New York, 2 Denio, 461.

[5] See supra, § 195.

[6] Dillon on Mun. Cor. (2d ed.) § 753; Mower *v.* Leicester, 9 Mass. 247; Holman *v.* Townsend, 13 Metc. 297; Bigelow *v.* Randolph, 14 Gray, 541; Wilson *v.* N. Y. 1 Denio, 595; Mills *v.* Brooklyn, 32 N. Y. 489; Joliet *v.* Verley, 35 Ill. 58.

"Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the range of their charters. Such powers are generally regarded as discretionary, because in their nature they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie at the suit of an individual for the failure on their part to perform such a duty."[1] And this principle applies where a municipal corporation "has a discretion as to the time and manner of making corporate improvements, as for example, building market-houses, improving its harbors, and the like."[2]

§ 261. *Not liable for negligences in fire department.* — Thus, for instance, a municipal corporation, in the absence of an express statute, is not liable for injuries sustained by reason of its negligence in providing or using or keeping in repair the water power and fire-engines and machinery which such corporation is authorized by law to procure and employ,[3] nor is it liable for a personal injury caused by the negligence of the officers of the fire department in performing their duties, although the department was established by a special statute which required its acceptance by the city.[4]

So in a Pennsylvania case,[5] the evidence was that an act of assembly empowered a city to make a sufficient number of reservoirs "to supply water in case of fire," and that the city council,

[1] Weightman *v.* Washington, 1 Black, 39, 49, as adopted in Fisher *v.* Boston, 104 Mass. 94.

[2] Dillon on Munic. Corp. (2d ed.) § 753, citing Wilson *v.* Mayor of N. Y. 1 Denio, 595; Cole *v.* Medina, 27 Barb. 218; Lacour *v.* Mayor, 3 Duer, 408; White *v.* Yazoo City, 27 Miss. 357; Levy *v.* N. Y. 1 Sandf. 465; Griffin *v.* Mayor, 9 N. Y. 456; Kelley *v.* Milwaukee, 18 Wisc. 83; Goodrich *v.* Chicago, 20 Ill. 445, and other cases.

[3] Fisher *v.* Boston, 104 Mass. 87; Hafford *v.* New Bedford, 16 Gray, 297; Eastman *v.* Meredith, 36 N. H. 284; Torbush *v.* Norwich, 38 Conn. 225; Jewett *v.* New Hav. 38 Conn. 368; Wheeler *v.* Cincin. 19 Ohio St. 19; Patch *v.* Covington, 17 B. Monr. 722; Brinkmeyer *v.* Evansville, 29 Ind. 187; Weightman *v.* Washington, 1 Black, 38. Supra, § 84.

[4] Fisher *v.* Boston, 104 Mass. 87.

[5] Grant *v.* City of Erie, 69 Pa. St. 410. Supra, § 84.

in pursuance of this power, constructed reservoirs but suffered one to be dilapidated so that it would not hold water. A fire occurred near this reservoir, and as no water could be obtained from it, the buildings were burned. The owner claimed damages, alleging negligence on the part of the city. It was ruled by the supreme court, that it was discretionary with the city to construct the reservoirs, and therefore was not liable for neglect so to do; and that the city having in pursuance of the act constructed the reservoir, was not therefore bound to maintain it.

§ 262. *Otherwise as to negligence in building sewers.*— But even under the strict rule obtaining in Massachusetts, a city is liable for negligently performing a special statutory duty to meet which (as in case of a sewer) it is authorized to assess special taxes on parties benefited;[1] for neglect in the maintenance in due order of its system of drainage and sewerage when once established, so as to overflow the property of individuals;[2] and under the still more liberal expansion of liability obtaining in other states, for negligence in the planning of sewers, by which, through the insufficiency of the pipes to carry off water, the plaintiff's house is overflowed.[3] So it has been held in England that an action will lie against a local board of health, under the 11 & 12 Vict. c. 63, as a body, for negligently carrying out works within their powers, so as to cause injury to any person; and for so negligently and improperly constructing a sewer as to cause a nuisance by its discharge.[4] And again,[5] where commissioners acting under statutable powers, had ordered new sewers to be constructed under a contract and plans which did not provide for a "penstock," or flat necessary to prevent the plaintiff's premises from being flooded, and the consequence was that the premises were flooded with sewerage; it was held that the commissioners were liable to be sued for negligence.[6]

[1] Emery *v.* Lowell, 104 Mass. 13; *S. C.* 109 Mass. 197; Child *v.* Boston, 4 Allen 41. *A fortiori* under the N. Y. law; Bailey *v.* New York, 3 Hill, 531; *S. C.* 3 Denio, 433.

[2] Emery *v.* Lowell, 104 Mass. 13; *S. C.* 109 Mass. 197; Child *v.* Boston, 4 Allen, 41; New York *v.* Furze, 3 Hill, 612; Lloyd *v.* New York, 1 Selden, 369; Barton *v.* Syracuse, 36 N. Y. 54; Thurston *v.* City of St. Joseph, 51 Mo. 510.

[3] City *v.* Huffer, 30 Ind. 235; Rochester White Lead Co. *v.* Rochester, 3 Comst. 463.

[4] Southampton Bridge Co. *v.* Local Board of Health of Southampton, 8 Ell. & Bla. 801; 28 L. J., Q. B. 41.

[5] Ruck *v.* Williams, 3 Hur. & N. 308; 27 L. J. Ex. 357.

[6] See also Ward *v.* Lee, 26 L. J. Q. B. 142.

§ 263. In Michigan, however, a different conclusion has been reached,[1] and so also in Pennsylvania, in a case[2] where the evidence was that a power was conferred by its charter upon a municipal corporation "to build and erect from time to time, as might become necessary, sufficient close culverts in and over the common sewers established in the district." The municipality did proceed to build culverts in the exercise of the power granted by the act of incorporation. The plaintiff alleged, and gave evidence tending to prove, that the culverts were not sufficient to carry off the water falling in a heavy rain; that in consequence his store had been overflowed, and his stock of goods therein damaged. Chief Justice Lowrie, before whom the cause was tried in the court of nisi prius, at Philadelphia, without hearing any evidence for the defendants, entered a judgment of nonsuit, and the judgment was affirmed by this court. The same learned judge, before whom the case had been tried, in delivering the opinion affirming the judgment, said: "We do not admit that the grant of authority to the corporation to construct sewers amounts to an imposition of a duty to do it. Where any person has a right to demand the exercise of a public function, and there is an officer, or set of officers, authorized to exercise that function, there, the right and the authority give rise to the duty; but when the right depends upon the grant of authority, and that authority is essentially discretionary, no legal duty is imposed."

§ 264. *Liability for damages arising from abuse of power not to be confounded with liability for damages arising from its imperfect exercise.* — It must be remembered that the question whether a city shall be liable for flooding a house by bad drainage, and that whether it shall be liable for an insufficient supply of water, are very distinct. The first depends upon the principle *sic utere tuo ut alienum non laedas.* If, by a positive aggression, a city inflicts injury upon the estate of individuals, either by way of flooding or by such excavations as to cause the soil to fall in, then the city becomes liable; and this covers the case of defective sewerage. On the other hand, when we ask for damages against a city for injuries we claim to arise from an inadequate supply of water, or an inadequate police management, we are obliged, in order to sustain ourselves, to fall back upon the principle that a

[1] Dermont *v.* Detroit, 4 Mich. 435.

[2] Carr *v.* Northern Liberties, 35 Penn. St. (11 Casey) 324.

government that does not adopt all proper means for the relief of its subjects is liable in suits for damages to recompense them for injuries sustained by them from its neglect.[1] This principle, however, is the reverse of that which not only our own but the Roman jurisprudence proclaims. A government, whether state or municipal, cannot be made liable in suits for damages for injuries caused by its failure to supply its subjects even with necessities. Independently of other reasons, we must remember that if we accept this principle, government would be made liable not merely for what it undertakes, but for what it ought to undertake; and the city, from being compelled to pay for everything that is wrong, would soon be unable to do anything that is right. No doubt hardships arise from a city's defective execution of its function in the dispensing of water and the control of fire. It must be kept in mind, however, that insurance against fire is vested, by all sound economical reasoning, in special insurance companies, and not in cities; and that for any persistent abuse of discretion in this respect, we have a correction in our periodical municipal elections.

§ 265. *When having power to remove nuisance, liable for damages caused by its neglect.* — A municipal corporation having full power to remove a nuisance, but neglecting so to do, or producing a nuisance when in the discharge of its legal powers, is liable for injuries caused by such neglect.[2]

§ 266. *Towns as distinguished from municipal corporations are not liable unless made so expressly by statute.* — It has been stated that a municipal corporation is liable, apart from statute, for so misusing any remunerative franchise belonging to it as to injure a private person. This principle, however, is declared not applicable to the New England towns, which, it is ruled in Massachu-

[1] See this distinction sustained in Goodrich *v.* Chicago, 20 Ill. 445; Lloyd *v.* Mayor of N. Y. 1 Seld. 369; Skinkle *v.* Covington, 1 Bush, 617; Mayor of N. Y. *v.* Bailey, 3 Denio, 433; Middle Bridge *v.* Brooks, 13 Me. 391.

[2] Parker *v.* M. & C. of Macon, 39 Ga. 725; People *v.* Corporation of Albany, 11 Wend. 542; City of N. Y. *v.* Furze, 3 Hill, 614; Kelsey *v.* Glover, 15 Vt. 715; Willard *v.* Newbury, 22 Vt. 458; Currier *v.* Lowell, 16 Pick. 170; Lowell *v.* Boston & L. R. R. 23 Pick. 24; Palmer *v.* Andover, 2 Cush. 607; Bacon *v.* City of Boston, 3 Cush. 179; Raymond *v.* Lowell, 6 Cush. 529; Nebraska City *v.* Campbell, 2 Blackf. 592; Drake *v.* City of Lowell, 13 Metc. 292; Chamberlain *v.* Enfield, 43 N. H. 356.

setts, cannot be sued for neglect of duty in any case in which the remedy is not given by statute.[1] And this view obtains, not only in New England,[2] but throughout the country, so far as concerns townships, counties, school districts, road districts, and similar divisions of the state, though they have corporate capacity, and power to levy taxes.[3] At the same time, it is declared by Metcalf, J., when illustrating the Massachusetts law,[4] that the rule is "of limited application. It is applied in the case of towns, only to the neglect or omission of a town to perform those duties which are imposed on *all* towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs when a special duty is imposed upon it, with its own consent, express or implied, or a special authority is conferred on it, at its request."[5] And the distinction, based as it is on the supposition that a town is a political division of the commonwealth, subsides, as has been seen, when a town, by taking upon itself, at its own request, specific remunerative duties, places itself in the attitude, not of an integral portion of the commonwealth, but of a subordinate business agency.

§ 267. *When liable for negligence of servants.* — This point has been already independently discussed.[6]

[1] Mower *v.* Leicester, 9 Mass. 247; Bigelow *v.* Randolph, 14 Gray, 541.

[2] See Eastman *v.* Meredith, 36 N. H. 284, and cases hereafter cited, § 906 *et seq.*

[3] Dillon on Munic. Corpor. 2d ed. § 762; citing Treadwell *v.* Commis. 11 Ohio St. 190; Hedges *v.* Madison Co. 1 Gilm. Ill. 567; Freeholders *v.* Strader, 3 Harr. (N. J.) 108; Van Eppes *v.* Commis. 25 Ala. 460; Larkin *v.* Saginaw Co. 11 Mich. 88; Bray *v.* Wallingford, 20 Connect. 416; Governor *v.* Justices, &c. 19 Ga. 97; Haygood *v.* Justices, 20 Ga. 845; Com. *v.* Brice, 22 Pa. St. 211.

[4] Bigelow *v.* Randolph, 14 Gray, 541.

[5] See also remarks of Gray, J., supra, § 250.

[6] See supra, § 190–195.

CHAPTER VII.

PRIVATE CORPORATIONS.

Charter or license no defence to collateral nuisance, § 271.
Legislative authority to maintain public works and to receive tolls imposes the duty to keep such works in repair, § 272.
Remedies given by charter do not exclude remedies at common law, § 278.
Liability for acts of servants, § 279.

§ 270. PRIVATE corporations are generally subject to the same liabilities for negligence as are individuals. There are, however, several qualifications, peculiar to this branch of the law, which will now be noticed.

§ 271. *Charter or license no defence to collateral nuisance.* — A license from the state to permit a particular act to be done in a particular way is a defence for doing such act in such a way, even though the result be a nuisance, or a dangerous alteration of a highway.[1] But where the work is done negligently, even an approval by the town engineer will be no defence, though the ordinance authorizing the work required that the work should be done to his satisfaction; he not being invested with the power of determining the ultimate question of negligence.[2] And generally, a license or charter from the sovereign will be no defence to proceedings for a nuisance when such nuisance is not necessary to the exercise of the power.[3]

§ 272. *Legislative authority to maintain public works and to receive tolls from them, imposes the duty to keep such works in repair.* — The English law, as stated by Mr. Campbell,[4] is, that

[1] Young *v.* Inhab. of Yarmouth, 9 Gray, 386, a case where it was held that the erection of telegraph poles, as approved by the selectmen of the town, under a general act of the legislature, could not be the basis of a suit against the telegraph company by a person who was injured by driving against one of the poles.

[2] Delzell *v.* Indianapolis, &c. R. R. 32 Ind. 46.

[3] Del. Canal Co. *v.* Com. 60 Penn. St. 367; R. *v.* Morris, 1 B. & A. 441; State *v.* Buckley, 5 Harring. 508; Conn. *v.* Church, 1 Barr, 105; State *v.* Mulliken, 8 Blackf. 260; Com. *v.* Reed, 10 Casey, 275; Com. *v.* Kidder, 107 Mass. 188; People *v.* N. Y. Gas Light Co. 64 Barb. 55.

[4] Negligence, § 17.

where "a person or corporation is by statute intrusted with the making and maintenance of works, and entitled to demand toll for the use of those works, there is then a duty upon that person or corporation to the public (or at least to all persons lawfully using the works),[1] to take care that the works are so constructed and maintained with reasonable efficiency for the public purpose for which they are authorized to be made." Thus, in a conspicuous English case,[2] the plaintiff sued for damage to a ship and cargo caused by the ship grounding upon a bank of mud at the mouth of the dock. At the trial the Chief Baron Pollock directed the jury that, "if the cause of injury was a bank of mud in the dock, and if the defendants by their servants had the means of knowing the state of the dock, and were negligently ignorant of it, they were liable." A bill of exceptions was tendered to this ruling, and the jury having found for the plaintiffs, the question whether the chief baron's ruling was right in point of law came before the exchequer chamber, and afterwards on appeal to the house of lords.[3] It was argued for the defendants, at the final hearing, that, to establish a case of liability against them, it was not enough that they were proved to have the means of knowledge of the obstruction, unless they were also proved to have actual knowledge of the existence and dangerous nature of the bank. But this defence did not avail. And it was held that a body incorporated by statute, with the right to levy tolls for the profit of its members, in consideration of making and maintaining a dock or a canal, is liable in its corporate capacity to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. Nor were the defendants regarded as relieved from liability on the ground that they were not authorized to receive tolls for their own profit, since by the constitution of the corporation the profits of their undertaking were dedicated to the benefit of the public and of the shipping interest using the docks. It was held unanimously by the learned lords present, following the joint opinion of the consulted judges (delivered by Blackburn, J.), that the circum-

[1] Shoebottom *v.* Egerton, 18 L. T. (N. S.) 889.

[2] Mersey Docks and Harbor Trustees *v.* Gibbs and others, decided in 1865 in the house of lords, on appeal from the court of exchequer chamber. Reported L. R. 1 H. of L. 93.

[3] 7 H. & N. 329; 1 H. of L. 93.

stance of the profits being thus ultimately applied to public purposes made no difference.[1]

§ 273. So in another English case,[2] the defendants had, by act of parliament, the right to construct a canal and take tolls thereon: and had built the same across an ancient highway, having made a swivel bridge across the canal for the passage of the highway. A boatman having opened the swivel bridge to allow his boat to pass through in the night-time, a person walking along the road fell into the canal and was drowned. It was held that the defendants, having a beneficial interest in the tolls, were liable to an action, the same as any owner of private property would be, for a nuisance arising therefrom. "It has been urged," said Pollock, C. B., "that what was done by this Canal Company was done by them under the authority of an act of parliament, passed many years ago, and with the same responsibility as attaches to the trustees of a highway, or other persons, acting in the performance of functions intrusted to them by statute. I do not think that argument can prevail. The owners of this canal were to be looked on as a trading company, who, though the legislature permits them to do various acts described in the statute, are to be considered as persons doing them for their own private advantage, and are, therefore, personally responsible if mischief ensues from their not doing all they ought or doing, in an improper manner, what they are allowed to do."

§ 274. The same result was reached in a case[3] where it appeared that the trustees of a turnpike road converted an open ditch which used to carry off the water from the road into a covered drain, placing catchpits, with gratings thereon, to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water in very wet seasons, instead of running down the ditch, as it formerly did before the alterations by the trustees, overflowed the road, and made its way into the adjoining land, and injured the colliery of the plaintiff. Upon this it was held, that the trustees were liable for such injury, if

[1] Mersey Docks Trustees, &c. *v.* Gibbs, L. R. 1 H. of L. 93; see also Coe *v.* Wise, L. R. 1 Q. B. 711. As to Railway Companies, see Grote *v.* Chester & Holyhead Ry. Co. 2 Ex. 251; and Virginia, &c. Ry. Co. *v.* Sanger, 15 Grat. 230.

[2] Manley *v.* St. Helen's Canal and Railway Company, 2 Hurls. & Norm. 840.

[3] Whitehouse *v.* Fellows. 10 Com. B. N. S. 765; 30 L. J. C. P. 305.

they were guilty of negligence in respect of such gratings and catchpits.[1]

§ 275. So also a corporation having statutory power to maintain and repair the towing-path of a river, and to take tolls therefor, is bound to take reasonable care of the towing-path, so that it may be in a fit condition to be used, and is liable for neglect in the performance of this duty.[2] And this results, apart from all other considerations, from the general principle that a person receiving toll for making or repairing a bridge, canal, or thoroughfare of any kind, is liable for defective work.[3] "It (the duty to repair) is a condition attendant upon a grant of the

[1] See to same effect Coe *v.* Wise, Law R. 1 Q. B. 711; Clothier *v.* Webster, 5 B. & S. 970 (a case of not filling up a trench); Cumberland Valley R. R. *v* Hughes, 1 Jones (N. C.), 140.

Selden, J., in West *v.* Brockport, 16 N. Y. 161, says: "Whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect." In Bessant *v.* Great Western Railway Company, 8 C. B. (N. S.) 368, sheep were damaged by straying through a fence which the Railway Company were, by their act, bound to maintain as an accommodation work to a neighboring proprietor. It was held that in such a case the company warrant to the occupier the sufficiency of the fence for all purposes required for good husbandry.

In Coe *v.* Wise, L. R. 1 Q. B. 711, damage was caused to the plaintiff's land, by the bursting of a sluice through the negligence of the resident engineer and sluice-keeper in the service of the commissioners, a body constituted by statute with the duty of making and maintaining the sluice. The commissioners were held liable. "These all seem to be cases," says Mr. Campbell, in his Treatise on Negligence, § 17, "where the question is not merely that of ordinary negligence. In considering the effects of these statutory duties we must, however, consider whether the enactment is conceived in the interest of the public at large, or is merely in the nature of a covenant with the adjoining owners or occupiers. A statutory enactment of the latter class will not ground a remedy in favor of a stranger." Manchester, &c., Railway Company *v.* Wallis, 14 C. B. 213 (case of cattle straying on a highway adjoining the railroad.) As to how the obligation to maintain fences, &c., may be constituted by award in pursuance of statute see Lockhart *v.* Irish Northwestern Railway Company, 14 Irish C. L. 385.

[2] Winch *v.* Conservators of the Thames, L. R. 7 C. P. 458; Mersey Docks *v.* Gibbs, Law Rep. 1 H. L. 93.

[3] Nichol *v.* Allen, 1 B. & S. 916; Mayor of Lyme Regis *v.* Henley, 1 Bing. N. C. 222; 2 Cl. & Fin. 331; Parnaby *v.* Lancaster Canal Co. 11 Ad. & El. 230; Mersey Docks *v.* Gibbs, Law Rep. 1 H. L. 93.

privilege to construct a public road or highway for profit, which from its very nature enures to the benefit of all who may have occasion to use the thoroughfare." [1]

§ 276. So in a Massachusetts case,[2] where a statute provided that a turnpike corporation "shall be liable to pay all damages which may happen to any persons from whom toll is demandable, for any damage sustained by a traveller in consequence of a defect in the road," the supreme court was of opinion, and so ruled, that by this act it was intended to provide that whenever the traveller himself is not chargeable with negligence or rashness, but when from an unforeseen cause, the road is actually defective and in want of repair, and an accident occurs without the default of either party, the company should be held liable. The ruling rested on the consideration that the toll is an adequate compensation for the risk assumed, and that by throwing the risk upon those who have the best means of taking precautions against it, the public will have the greatest security against actual damage and loss.

§ 277. "Where a corporation," says Sharswood, J., in a case already cited, where the point was directly adjudicated,[3] "in consideration of the franchise granted to it, is bound by its charter to keep a road or bridge in repair, it is liable for any injury to a person, arising from want of repair, whether the defect be patent or latent, unless he be in default, or unless the defect arose from inevitable accident, tempest or lightning, or the wrongful act of some third person, of which they had no notice or knowledge. It matters not that ordinary care was used in the erection or repair of it, and that such work was done under contract by a competent workman. The principle of Painter *v.* The Mayor of Pittsburg, 10 Wright, 132, has no application. That was an action for an injury sustained by the plaintiff, from the negligence of the contractors of the defendants, while engaged in the actual construction of a sewer. Had the plaintiff, in this case, fallen into the canal in consequence of the negligence of the contractors employed by the defendants, while actually employed either in the construction or repair of this bridge, the case presented would have been entirely

[1] Sharswood, J. — Penn. & Ohio R. R. *v.* Graham, 63 Penn. St. 296.

[2] Yale *v.* The Hampden and Berkshire Turnpike Company, 18 Pick. 357.

[3] Penn. & Ohio R. R. *v.* Graham, 63 Pa. St. 296.

different. It is supposed that Oakland Railway Company *v.* Fielding, 12 Wright, 320, is inconsistent with this view. But it is to be remarked that the injury arose, in that case, from a hole in the road made by third persons. 'If, then,' said the learned judge below, 'the defendants had notice of the hole, — if they knew that it rendered the street unfit and dangerous for public travel, and if they knowingly suffered it to remain in that condition without an effort to repair it, they were guilty of negligence.' It is evident, then, that the case was rested upon an entirely distinct and independent ground, which does not touch the principle established in the other cases cited. It may be safely admitted that if a third person had wantonly or maliciously cut away part of the timbers of this bridge, in consequence of which it had fallen, the defendants would not be liable, unless notice or knowledge of the defect and neglect to repair it were brought home to them."

§ 278. *Remedies given in charter do not exclude common law remedies.* — Persons injured by such an abuse are not tied down to remedies given in charter. Thus it has been decided in Pennsylvania,[1] that the remedies against a canal company, provided by their act of incorporation, for injuries arising from the construction of the works, do not exclude the common law remedies for injuries arising from an abuse of their privileges, or for the neglect of their duties, and that they are, therefore, liable for injuries sustained by a riparian owner in consequence of an overflow of water, caused by the pool of their dam being filled up by dirt, without regard to the question by whose act such filling up was occasioned.

§ 279. *Liability of such corporations for acts of servants.* — As a general rule, as has been shown in another chapter, a master is liable for his servants' negligences when in the scope of their employment.[2] One or two cases bearing on corporations may be here specifically noticed.

Where an incorporated company undertook to lay water-pipes in a city, agreeing that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which may occur by reason of the neglect of their employees in the premises," it was ruled by

[1] Schuylkill Navigation Company *v.* McDonough, 9 Casey, 73.

[2] See supra, § 156–196.

the supreme court of the United States, in a case where the evidence was that the company let the work out to a sub-contractor, through the negligence of whose servants injury accrued to a person passing over the street, that the company could be properly sued for damages. "Where the obstruction or defect," said Clifford, J.,[1] "caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is, that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts *is equally liable* to the injured party.[2] Exactly the same view was advanced by this court when that case was brought here by the first writ of error, in which the court said that if the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servant, then he alone should be responsible;[3] common justice requires the enforcement of that rule, as if the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself; but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the work to be done.[4] It would be monstrous, said Lord Campbell, if a party causing another to do a thing were exempted from liability for the act, merely because there was a contract between him and the person immediately causing the act to be done, which may be accepted as correct if applied in a case where the work contracted to be done will necessarily, in its progress, render the street unsafe and inconvenient for public travel.[5] More than one party may be liable in such a case, nor can any one who employs another to make such an excavation relieve himself from liability for such

[1] Water Company *v.* Ware, 16 Wall. 566.

[2] Robbins *v.* Chicago, 4 Wallace, 679.

[3] Chicago *v.* Robbins, 2 Black, 428.

[4] Hole *v.* Railway Co. 6 Hurlstone & Norman, 497.

[5] Ellis *v.* Gas Cons. Co. 2 Ellis & Blackburn, 770; Newton *v.* Ellis, 5 Ibid. 124; Lowell *v.* Railroad, 23 Pickering, 31.

damages as those involved in the case before the court by any stipulation with his employee, as both the person who procured the nuisance to be made and the immediate author of it are liable." [1]

So, also, where the defendants being authorized by act of parliament to make an opening bridge over a navigable river, and they employed a contractor to construct it, it was held, that they were liable for damage caused by the defect of the bridge.[2]

"The law," says Mr. Broom (Com. Am. ed. p. 683), "requires that the execution of public works by a public body shall be conducted with a reasonable degree of care and skill; and if they, or those who are employed by them, are guilty of negligence in the performance of the works intrusted to them, they are responsible to the party injured." [1]

"In an ordinary case, moreover, where such commissioners in execution of their office enter into a contract for the performance of work, it seems clear that the person who contracts to do the work is not to be considered as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them.[2]

"And the person thus employed may himself, by virtue of an express statutory clause, be protected or absolved from liability to a suit whilst acting under the direction of the commissioners.[3] And a ship-owner is not responsible at common law[4] for in-

[1] Storrs *v.* Utica, 17 New York, 108; Creed *v.* Hartmann, 29 Ibid. 591; same case, 8 Bosworth, 123; Congreve *v.* Smith, 18 New York, 79; same *v.* Morgan, 18 Ibid. 84; Shearman & Redfield on Negligence, 423; Mayor *v.* Furze, 3 Hill, 616; Milford *v.* Holbrook, 9 Allen, 21.

[2] Hole *v.* The Sittingbourne Railway Co. 6 Hur. & N. 488; 30 L. T. Ex. 81.

The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person, or the company, are not applicable to the use of the individual corporators or to that of the corporation, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls themselves are to be proportionably diminished. Mersey Docks *v.* Gibbs, L. R. 1 H. of L. 93; Parnaby *v.* The Lancaster Canal Company, 11 Ad. & E. 223.

[1] Clothier *v.* Webster, 12 C. B. N. S. 790, 796. See Brownlow *v.* Metropolitan Board of Works, 16 C. B. N. S. 546; Gibson *v.* Mayor, &c. of Preston, L. R. 5 Q. B. 218; Parsons *v.* St. Matthew, Bethnal Green, L. R. 3 C. P. 56; Hyams *v.* Webster, L. R. 4 Q. B. 138.

[2] Judgm. Allen *v.* Hayward, 7 Q. B. 975; citing Quarman *v.* Burnett, 6 M. & W. 499; Milligan *v.* Wedge, 12 A. & E. 737, and Rapson *v.* Cubitt, 9 M. & W. 710.

[3] Ward *v.* Lee, 7 E. & B. 426; Newton *v.* Ellis, 5 E. & B. 115.

[4] See also stat. 17 & 18 Vict. c. 104, s.

§ 280. *Peculiar liability of corporations for the negligence of their upper to their under employees.* — In one respect a corporation, which can only act through servants, is subjected to a heavier liability than an ordinary master, who may be presumed to direct his affairs himself. In the latter case it is natural for the employer to say, "If you had cause to complain of a fellow-servant, why did you not come to *me?*" "If a middle-man appointed a negligent servant, his negligence was not mine." But a corporation, which can only act through servants, cannot say this, if its principal and superior servants are those guilty of the negligence. For such principal and superior servants may be the heads of their departments, and if so, their negligence to an employee is the negligence of the corporation itself; not the negligence of a fellow-servant.[1]

juries occasioned by the unskilful navigation of his vessel whilst under the control of a pilot whom the owner was compelled to take on board, and in whose selection he had no voice." [1]

[1] See supra, § 222, 241.

388; Gen. Steam Nav. Co. *v.* British & Colonial Steam Nav. Co., L. R. 4 Ex. 238; The Lion, L. R. 2 P. C. 525.

[1] The Halley, L. R. 2 P. C. 193, 201, 202. See The Thetis, L. R. 2 A. & E. 365.

CHAPTER VIII.

PUBLIC OFFICERS.

A Public administrative officer is liable to individuals for injuries sustained by them from his official negligence, § 285.
Rule does not apply to judges, § 286.
Special damages necessary to sustain suit, § 286 *a*.
Officers not personally liable to contractors on official bonds, § 287.
Not usually liable for neglects of official subordinates, but otherwise as to private servants, § 288.
Sheriffs, constables, tax collectors, § 289.
Receivers of public money, § 290.
Commissioners of highways, § 291.
Postmasters, § 292.
Deputies and assistants liable for their own negligence, § 295.
Mail contractors, § 296.
Clerks, prothonotaries, and registering officers, § 297.

§ 285. *A public ministerial officer is liable to individuals for injuries sustained by the latter from his negligence in the discharge of his official duties.* — As a general rule, wherever an individual has suffered injury from the negligence of an administrative officer who therein acts contrary to his official duty, an action lies on behalf of the party injured.[1] Nor is the fact that the defendant contracted faithfully to perform his duties, not to the plaintiff, but to the government, any defence, for the action is founded not on contract but on breach of duty.[2]

[1] Kent Com. 610; Story on Agency, § 320, 321. Infra, § 443. Nowell *v.* Wright, 3 Allen, 166; Bartlett *v.* Crozier, 15 Johns. 250; Robinson *v.* Chamberlain, 34 N. Y. 389; Hover *v.* Barkhoof, 44 N. Y. 113; Sawyer *v.* Corse, 17 Grat. 230; Lipscomb *v.* Cheek, Phil. L. N. C. 332; Kennard *v.* Willmore, 2 Heiskill, 619. When a magistrate acts ministerially (*e. g.* in issuing process), he is liable for negligence. Tyler *v.* Alfred, 38 Me. 530; Noxen *v.* Hill, 2 Allen, 215; Smith *v.* Trawl, 1 Root, 165; Briggs *v.* Wardwell, 10 Mass. 356; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 73.

[2] Winterbottom *v.* Wright, 10 M. & W. 109; Burnett *v.* Lynch, 5 B. & C. 589; Farrant *v.* Barnes, 11 C. B. (N. S.) 553; Marshall *v.* York, 11 C. B. R. 655.

The cases are thus lucidly classified by Earl, C. J., in Hover *v.* Barkhoof, 44 N. Y. 113: "The first and most pointed is the case of Adsit *v.* Brady, 4 Hill, 630. That was an action against the defendant, a canal superintendent, to recover damages sustained by the plaintiff from collision with a sunken boat which it was alleged the defendant had negligently permitted to remain in the canal, and it was held that the plaintiff could recover. That was an action for *nonfeasance* against

§ 286. *Rule does not apply to judicial officers.* — Judges, however, are, from the policy of the law, not liable for suits for negligence in the performance of their judicial duties.[1]

a public officer, receiving his compensation from the public and not from the individuals damaged, and in principle is precisely in point in favor of the plaintiff in this case. Judge Bronson, writing the opinion, lays down the broad proposition, that when an individual sustains an injury by the *misfeasance* or *nonfeasance* of a public officer, who acts, or omits to act, contrary to his duty, the law gives redress to the injured party by action adapted to the nature of the case. While that case has been criticised in several cases, it has never been overruled. It was approved by Judge Mason, in Hutson *v.* The Mayor, &c. 9 N. Y. 169; by Judges Peckham and Hunt, in Robinson *v.* Chamberlain, 34 N. Y. 389, and in various other cases that have fallen under my observation. It has stood, as the law, for twenty-seven years; and unless it can be clearly shown to be unsound in principle, it should be recognized as authority. It laid down no new principle; for nearly fifty years ago, Chief Justice Best, in Henly *v.* The Mayor of Lyme, 5 Bing. 91, said: 'I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances are so numerous that it would be a waste of time to refer to them.' And still earlier, Chief Justice Spencer, in Bartlett *v.* Crozier, 15 John. 250, said: 'It is a general principle of law, that whenever an individual has sustained an injury by the *nonfeasance* or *misfeasance* of an officer who acts, or omits to act, contrary to his duty, the law affords redress by an action on the case adapted to the injury.' And these eminent judges were preceded by Chief Justice Holt, who more than a century earlier laid down the rule in Lane *v.* Cotten, 1 Salk. 17, that in every case where an office is intrusted by the common law or by statute, an action lies against him for a neglect of the duty of his office.

"The case of Robinson *v.* Chamberlain was an action against a canal repair contractor, to recover damages which the plaintiff had sustained, because he had not discharged the duty imposed upon him by his contract, by permitting lock-gates to be out of repair. It was held, that while the defendant had entered into contract with the state only, and received his compensation from the state, he was a *quasi* public officer, owing duties to the public, and, as such, was liable to every individual who sustained damage by his neglect of his duties. Judge Peckham, likening the canals to a public highway, says: 'A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage.' This case was followed in Fulton Fire Insurance Company *v.* Baldwin, 37 N. Y. 648. And in harmony with these cases in Shearman & Redfield on Neg. 198, the authors, adverting to the distinc-

[1] Bacon's Max. 17; Floyd *v.* Barker, 12 Rep. 23; Barnardistone *v.* Soane, 6 How. St. Tr. 1093; Ely *v.* Thompson, 3 A. K. Mars. 76; Mostyn *v.* Fabrigas,

§ 286 *a*. *Special damage to an individual necessary to sustain a suit for negligence in discharge of a public duty.* — An individual cannot, for his own benefit, and in his own name, sustain a suit against another for negligence in discharge of a public duty, when the damage is solely to the public.[1] The technical reason given for this in the English books is the inconvenience which would be produced if a person violating a general duty could be sued by each person in the community. A better reason is, that as the right infringed belongs to the sovereign, as representing the public at large, so the correlative duty is one for which the sovereign alone can sue.[2]

But at the same time wherever an indictment would lie for negligent discharge of a public duty, then an action for negligence can be maintained by any party specially injured by such negligence. This principle has been applied to suits against a municipal corporation for neglect in repairing certain banks and

tion sought by some judges to be made between the liability of public officers, who receive a compensation from the public, and those who receive a compensation from individuals, deny that there is, in principle, any such distinction where public officers are charged with personal misconduct or negligence, and say: 'A sheriff who is paid for particular services by individuals, is no less a public officer than a postmaster who receives a salary from the government. The contract of each, usually confirmed by an oath, is with the government, to faithfully discharge the duties of his office. An individual who deposits a letter for transmission with a postmaster has as much right to insist upon the latter performing his duty in respect to his letter as he has to insist that a sheriff, to whom he directs a writ, shall faithfully execute and return it. The duty of each is under the law: the sheriff's on certain prescribed terms; the postmaster's absolutely and unconditionally. It is now settled in New York, that, so far as concerns the question of remedy, there is no distinction between these two classes of public officers.' They further indorse the rule laid down by Judge Bronson, in Adsit *v.* Brady, that a public officer, not judicial, who, in his office, acts carelessly and negligently, or who, contrary to his duty, omits to act, or otherwise abuses his office, is answerable in damages to any one who is specially injured thereby."

[1] 1 Bla. Com. 220. Loss of mere contingent probable profits not enough. Butler *v.* King, 19 Johns. 223; Bank *v.* Mott, 17 Wend. 556.

[2] Ashby *v.* White, Ld. Raym. 938.

Cowp. 161; Evans *v.* Foster, 1 N. H. 374; Tracy *v.* Williams, 2 Conn. 113; Taafe *v.* Downes, 3 Mood. P. C. 36. n.; Ryalls *v.* R. 11 Q. B. 796; Houlsen *v.* Smith, 14 Q. B. 841; Yates *v.* Lansing, 5 Johns. 282; Pratt *v.* Gardiner, 2 Cush. 68; Colman *v.* Anderson, 10 Mass. 356; Young *v.* Herbert, 2 Nott & Mc. 168; Cunningham *v.* Bucklin, 8 Cow. 178. Even private arbitrators are protected. Pappa *v.* Rose, L. R. 7 C. P. 32, 525; Tharsis *v.* Loftus, L. R. 8 C. P. 1.

sea-shore, which it was obliged to do by charter, whereupon special damage occurred to the plaintiff.[1]

§ 287. *Officers not personally liable to contractors on official bonds.* — It is held in England that a public officer of the crown, contracting in his official capacity, is not personally liable on the contracts so entered into; in such cases, therefore, the rule of *respondeat superior* does not apply, such exceptions to it resulting from motives of public policy; for no prudent person would accept a public situation at the hazard of exposing himself to a multiplicity of suits by parties thinking themselves aggrieved.[2] And such, as will be seen, is the law in the United States.[3]

[1] Henley *v.* Mayor of Lyme Regis, 5 Bing. 91, 3 B. & Ald. 77; 2 Cl. & Fin. 331.

"There is no doubt of the truth of the general rule, that where an indictment can be maintained against an individual or a corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the ordinary case of a nuisance in the highway, by a person digging a trench across it, or by the default of the person bound to repair *ratione tenurae*. Upon this ground the corporation of Lyme Regis was held to be bound to compensate an individual for the loss sustained by non-repair of sea-walls in a case which was decided by the court of common pleas." Hartwell *v.* Ryde Commis. 3 B. & S. 361.

[2] Per Dallas, C. J., Gidley *v.* Lord Palmerston, 3 B. & B. 286, 287; per Ashhurst, J., Macbeath *v.* Haldiman, 1 T. R. 181, 182.

[3] "On a similar principle," says Mr. Campbell (Negligence, § 20), "is based the liability of certain public officers intrusted by the state with duties for which fees are exigible, and on the exact performance of which the security of private right depends.

"The most familiar instance in this country is the liability of the sheriff for failure in the due execution and return of process, and for an escape. In the latter case, it has been said that nothing but the act of God or the queen's enemies will excuse; that is to say, he warrants the exact performance of the duty. Atkinson on the office of a sheriff, § 10; Allen *v.* Carter, L. R. 5 C. P. 414; cf. Loyd *v.* Harrison, L. R. 1 Q. B. 502. This high degree of responsibility only applies between the sheriff and the person who employs him. For instance, his liability to the owners of goods seized under an execution is only that of an ordinary bailee intrusted with goods for sale.

"In Scotland the duty of executing all the queen's writs, inclusive of the summons which in England may be served by anybody, belongs to messengers-at-arms. The liability of these officers in Scotland is substantially on a par with the liability of the sheriff in England. In the inferior courts in Scotland the execution of writs belongs to sheriff-officers, who are not mere servants of the sheriff, but are themselves responsible public officers. The *rationale* of the liability of these officers is well considered in the case of Brock *v.* Kemp, Feb. 20, 1844, Court of Session, 6 D. 709, where it is in effect held that the officer warrants the due execution of the writ."

§ 288. *Public officer not ordinarily liable for negligence of official subordinates, but liable, in cases where he would himself be liable, for negligence by his private servants.* — An official subordinate, when appointed and recognized as an independent officer by the law, must stand or fall by himself; and to him, unless otherwise provided by statute, the maxim *respondeat superior* does not apply.[1] "With regard to the responsibility of a public officer for the misconduct or negligence of those employed by or under him, the distinction generally turns upon the question whether the persons employed are his servants, employed voluntarily or privately, and paid by him and responsible to him, or whether they are his official subordinates, nominated perhaps by him, but officers of the government; in other words, whether the situation of the inferior is a public officer or private service. In the former case, the official superior is not liable for the inferior's acts; in the latter he is." [2]

"The exemptions of public officers from responsibility for the acts and defaults of those employed by or under them in the discharge of their public duties," says Jaynes, J., in a case where the question was ably discussed in Virginia,[3] "is allowed, in a great measure, from considerations of public policy. From like considerations it has been extended to the case of persons acting in the capacity of public agents, engaged in the service of the public, and acting solely for the public benefit, though not strictly filling the character of officers or agents of the government." [4]

In England the practice is to exempt the private property of certain officers from liability, in which case such officers, if sued in their corporate capacity, are bound by the official acts of their subordinates.[5]

§ 289. *Sheriffs, constables, tax collectors.* — So far as concerns

[1] Hall *v.* Smith, 2 Bing. 156; Findlater *v.* Duncan 6 C. & F. 903; Nicholson *v.* Morrissey, 15 East, 384; McMillen *v.* Eastman, 4 Mass. 378; Franklin *v.* Low, 1 John. R. 396; Holliday *v.* St. Leonards, 11 C. B. (N. S.) 192; Lane *v.* Cotton, 1 Ld. Raym. 646; Whitfield *v.* Le Despencer, Cowp. 754; Dunlop *v.* Munroe, 7 Cranch, 242; Wriggins *v.* Hathaway, 6 Barb. S. C. 632; Schroyer *v.* Lynch, 8 Watts, 453.

[2] American Leading Cases (3d ed.), 621.

[3] Sawyer *v.* Corse, 17 Grat. 230.

[4] Citing Hall *v.* Smith, 2 Bingh. R. 156 (9 Eng. C. L. R. 357); Holliday *v.* St. Leonards, Com. B. (N. S.) R. 192 (103 Eng. C. L. R. 192.) . . . . See also Cornwell *v.* Vorhees, 13 Ohio R. 523; Hutchins *v.* Brackett, 2 Foster, 252.

[5] Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93; 11 H. L. 686.

the due execution of process, the sheriff is liable to persons injured by his neglect in exercising due diligence in the service. The burden is on the defendant to prove such diligence.[1] A sheriff, from the necessity of the case, is liable for the negligence of his deputies.[2] So far as concerns the owner of goods taken in execution, he is liable only for the diligence of an ordinary bailee for hire; *i. e.* for the diligence that a good business man would under similar circumstances show.[3] This rule is applied in the Roman law to the tax collector who seizes cattle in satisfaction of taxes, and injures them, when holding them in pound, from neglecting to give them due food.[4] But there is no liability for loss by fire, or force, when no negligence exists.[5]

Escape, being a topic belonging more properly to books of procedure, will not be here discussed.

§ 290. *Receivers of public money.* — At common law, irrespective of statutes, and of the limitations of official bonds, receivers of public money are liable for *culpa*, both *lata* and *levis;* for they are required to employ not merely the *diligentia* of an ordinary person, seeing what every person sees, but the *diligentia diligentis*, the diligence of an intelligent and faithful business man in his specialty, — a man sufficient, skilful, and judicious, able to undertake the specialty, and employing in undertaking it the diligence which a skilful and judicious expert would in such case employ.[6] But where he executes a bond, making his liability absolute and unconditioned, or where his liability is made absolute by statute, then he is bound to restore the value of money deposited with him, though it should appear that he lost the

[1] Wolfe *v.* Dorr, 24 Me. 104; Kittredge *v.* Fellows, 7 N. H. 399; Pierce *v.* Partridge, 3 Metc. 44; Barnard *v.* Ward, 9 Mass. 269; Dorrance *v.* Com. 3 Penn. St. 160; Dunlop *v.* Knapp, 14 Ohio St. 64; Robinson *v.* Chamberlain, 34 N. Y. 389; Ransom *v.* Hulcott, 18 Barb. 56. See Allen *v.* Carter, L. R. 5 C. P. 414; Lloyd *v.* Harrison, L. R. 1 Q. B. 502; Lipscomb *v.* Cheek, Phil. L. N. C. 332; Kennard *v.* Willmore, 2 Heiskill, 619; Brock *v.* Kemp, 6 D. (Scotch) R. 709, cited Campbell on Neg. § 20; Osgood *v.* Clark, 6 Foster, 307; Ferry *v.* Bass, 15 N. H. 222; Tucker *v.* Bradley, 15 Conn. 46.

[2] Campbell *v.* Phelps, 17 Mass. 244, and cases there cited; McIntyre *v.* Trumbull, 7 Johns. 35.

[3] Browning *v.* Hanford, 5 Hill. 588; Moore *v.* Westervelt, 27 N. Y. 234.

[4] L. 2. § 20. vi bon. rapt. 47. 8.

[5] Bridges *v.* Perry, 14 Vt. 262; Browning *v.* Hanford, 5 Hill. 588.

[6] Lane *v.* Cotton, Ld. Ray. 646; Supervisors of Albany *v.* Dorr, 25 Wend. 440; *S. C.* on App. 7 Hill, 783. Supra, § 32.

amount by pure accident, or was robbed of moneys paid over to him, to the amount sued for, by superior force, without his fault.[1] Thus in a late case in the supreme court of the United States,[2] it was said by Strong, J., "It was the duty of Bevans to pay over the money in his hands, in large part, more than a year before any obstacle came in the way of his payment. Had he performed his duty, all of it would have been paid into the treasury by the 1st of April, 1861. He was, therefore, a defaulter when the alleged seizure was made, and it was his default which concurred with the acts of the public enemy, and contributed to, or facilitated, the wrong which was perpetrated, or, at least, rendered it possible. Since then his bond had become absolute by his failure to perform its conditions, and since the evidence offered tended to show at most an excuse for non-performance after May 6, 1861, it is manifest that it presented an insufficient defence to the action. Seeking relief, which in its nature was equitable, as the receiver did, it was incumbent upon him to come with clean hands, and to place the obligees in the bond in as good a situation as they would have held had he made no default. It is not to be overlooked that Bevans was not an ordinary bailee of the government. Bailee he was, undoubtedly, but by his bond he had insured the safe keeping and prompt payment of the public money which came to his hands. His obligation was, therefore, not less stringent than that of a common carrier, and in some respects it was greater. In United States *v.* Prescott,[3] it was said by this court: 'Public policy requires that every depositary of public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which came to his hands. Any relaxation of this condition would open the door for frauds which might be practised with impunity.' These observations apply in full force to the present case. It cannot be allowed that a depositary of public money, who has not only assumed the common obligations of a bailee, but has given bond to keep safely the money in his hands, and to pay it

[1] Boyden *v.* U. S. 13 Wall. 17; Bevans *v.* U. S. 13 Wall. 56; Com. *v.* Comly, 3 Penn. St. 372; Muzzy *v.* Shattuck, 1 Denio, 133; U. S. *v.* Prescott, 3 Howard, 578; U. S. *v.* Dashiel, 9 Howard, 578; State *v.* Harper, 6 Ohio St. 607.

[2] Bevans *v.* United States, 13 Wall. 61.

[3] 3 Howard, 588.

over promptly, as required by law, may, by making a default, throw upon the government the risk of loss of the money by the intervention of a public enemy. We are, therefore, of opinion that the evidence offered by the defendants in the court below tended to show no sufficient defence to the claim of the plaintiffs, and that it was properly rejected."

§ 291. *Commissioners of highways.* — It being the duty, under the New York statute, of commissioners of highways to repair defective highways or bridges, after notice of their condition, with reasonable and ordinary care and diligence, if they have sufficient funds in their hands, or authority to procure such funds, neglect of this duty renders them liable in a civil action to any person specially injured thereby. Actual notice of the defective condition of a highway is not necessary, where the circumstances are such that ignorance on the part of the commissioners is, in itself, negligence.[1] For the general discussion of this subject, however, the reader is referred to another chapter.[2]

§ 292. *Postmasters.* — Neither postmasters-general nor local postmasters are liable, on the principles hereinbefore stated, for the negligence of their official subalterns. The leading case on this subject[3] is a suit brought against Cotton and Frankland, who were together the postmaster-general of England, to recover the value of exchequer bills belonging to the plaintiff, which were abstracted from a letter deposited by him in the London post-office to be transmitted by post. The letter was delivered at the office to one Breese, who was appointed by the defendants to receive letters, who was removable by them, but who received his salary from the receiver-general out of the revenues of the post-office. In the opinion of the judges, it was assumed that the bills were abstracted by Breese, though it was found by the special verdict that they were abstracted by a person unknown. Three of the judges held that the defendants were not liable. The decision rested, in part, upon the ground that the post-office establishment was an instrument of government established for public convenience, under the management and control of the defendants as officers of the government, and that Breese was himself an officer under the government, and liable as such for his own acts, and that he was not the agent or servant of the defend-

[1] Hover *v.* Barkhoof, 44 N. Y. 113.

[2] Infra § 956.

[3] Lane *v.* Cotton, 1 Ld. Ray. 646.

ants. Lord Holt dissented, but chiefly on the question of Breese's agency for the defendants.

Subsequently, under Lord Mansfield, on an action brought against the postmaster-general to recover the amount of a bank note stolen out of a letter by one of the sorters of letters, the same doctrine was reaffirmed.[1] "The ground of Lord Holt's opinion in that case," said Lord Mansfield, "is founded upon comparing the situation of the postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier, or the master of a ship, seems to me to hold in no particular whatever. The postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the post-office is a branch of revenue and a branch of police, created by act of parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public arising from the fund. As a branch of police, it puts the whole correspondence of the country (for the exceptions are very trifling) under government, and intrusts the management and direction of it to the crown, and the officers appointed by the crown. There is no analogy, therefore, between the case of the postmaster and a common carrier."[2] "In truth," says Judge Story, when commenting on the above, "in England and in America, the postmasters are mere public officers, appointed by, and responsible to, the government; and the contracts made by them officially are public contracts, and not private contracts, and are binding on the government, and not on themselves personally.[3] And this rule has been applied to the case of a deputy or local postmaster, and his assistants duly appointed and qualified, the latter being regarded as agents and servants of the government, who are liable for their own acts and defaults, and not as agents and servants of the postmaster, for whose acts and defaults he is to answer.[4]

[1] Whitfield *v.* Despencer, Cowp. 754.

[2] Ibid.

[3] Story on Bailments, § 462; Dunlap *v.* Monroe, 7 Cranch, 242; 2 Kent Comm. Lect. 40, p. 610, 4th ed.; Story on Agency, § 302–307.

[4] Schroyer *v.* Lynch, 8 Watts R. 453; Wiggins *v.* Hathaway, 6 Barb. S. C. R. 632; Dunlop *v.* Munroe, 7 Cranch's R. 242; Bolan *v.* Williamson, 1 Brevard's R. 181; Franklin *v.* Low & al. 1 John. R. 396; Maxwell *v.* McIlvoy, 2 Bibb's R. 211; Jones on Bailments, 109.

§ 293. But this has not been universally accepted. Thus it has been said,[1] that "if an action should be properly framed for the purpose of charging the deputy postmaster with the default of the clerks or servants in office under him, it seems that his liability in such an action will depend upon the question, whether he has in fact been guilty of any negligence, in not properly superintending them in the discharge of their duties in his office.[2] For it has been held, that a deputy postmaster is responsible only for the neglect of ordinary diligence in the duties of his office, which consists in the want of proper attention to his duties in person, or by his assistants, if he has any, or in the want of that care which a man of common prudence would take of his own affairs.[3] He is not, therefore, responsible for any losses occasioned by the negligence, or delinquencies, or embezzlements of his official assistants, if he exercises a due and reasonable superintendence over their official conduct, and he has no reason to suspect them guilty of any negligence or malconduct.[4] In short, such assistants are not treated as strictly his private servants; but, in some sort, as public officers, although appointed by him." [5]

§ 294. It is clear that a deputy postmaster who employed an assistant without having him sworn to the faithful discharge of his duties, as required by law, is liable for such assistant's negligence in refusing to deliver a letter.[6]

§ 295. *Deputies and assistants liable for their own negligence.* — From the principle just stated, it may be inferred that deputy and assistant postmasters are personally liable for all losses and injuries occasioned by their own respective defaults in office.[7]

§ 296. *Mail contractors.* — More difficulty arises as to the liability of mail contractors for their subalterns. It has in some cases

[1] Story on Bailments, § 463.

[2] Dunlap *v.* Monroe, 7 Cranch, 242, 269; *S. C.* 2 Peters's Cond. 484; 2 Kent Comm. Lect. 40, p. 610, 611, 4th ed.

[3] Schroyer *v.* Lynch, 8 Watts, 453; Wiggins *v.* Hathaway, 6 Barbour, 632.

[4] Ibid.

[5] Ibid.

[6] Bishop *v.* Williamson, 2 Fairf. 495. And see Ford & Parker, 4 Ohio St. 576.

[7] Rowning *v.* Goodchild, 3 Wilson, 443; Whitfield *v.* Despencer, Cowp. 754; 2 Kent Comm. Lect. 40, p. 610, 611, 4th ed.; Stock *v.* Harris, 5 Burr. 2709; 1 Bell Comm. p. 468, 5th ed.; Christy *v.* Smith, 23 Vt. 633; Maxwell *v.* M'Ilvoy, 2 Bibb, 211; Bolan *v.* Williamson, 2 Bay, 551; Story on Bailments, § 463.

been broadly asserted, though for reasons by no means consistent, that these officers are not liable for money lost through the carelessness of their agents who carry the mail.[1] On the other hand, this has been disputed in a Virginia case, distinguished for the ability with which it was argued by the learned judge who gave the opinion.[2] In that case it was held that a mail carrier is not an officer of the government, but is the private agent of the contractor for carrying the mail, and the contractor is liable to third persons for any injury sustained through the negligence or default of such agent in the performance of his duties. It was further determined (and this may enable us to reconcile this case with those elsewhere cited), that the Act of Congress of March 3, 1825,[3] requires that mail carriers shall be sworn, and it is the duty of the contractor to see that this is done. If the carrier is not sworn he is the private agent of the contractor, for whose defaults the contractor is liable to third persons, even if on being sworn the contractor would not be liable for his acts. And it is sufficient that the mail carrier took the oath when acting for a former contractor.

"It is well settled," said Jaynes, J., "that a public officer, or other person who takes upon himself a public employment, is liable to third persons in an action on the case, for any injury occasioned by his own personal negligence or default in the discharge of his duties. So that if the facts of this case establish that the loss of the letter was occasioned by the negligence or default of Sawyer himself, he is liable, even though he should be considered as holding the position of a public officer or public agent, and whatever may be the legal character of his relation to Fleming.[1] . . . . Indeed, the principle which exempts a public officer from liability for the acts and defaults of his official subordinates appears to have been long recognized, and to be one of general application."[5]

"The second count alleges that the loss was occasioned by the negligence of Fleming, as the agent and servant of Sawyer, em-

[1] Conwell *v.* Voorhees, 13 Ohio, 523; Hutchins *v.* Brackett, 2 Foster, 252.

[2] Sawyer *v.* Corse, 17 Gratt. 230.

[3] Brightley's Dig. p. 759, § 2.

[4] 2 Kent, 610; Story on Agency, § 320, 321.

[5] Doctor & Student, Dialogue 2, chap. 42; Nicholson *v.* Morrissey, 15 East's R. 384; Viscount Canterbury *v.* Attorney General, 1 Phillips R. 306.

ployed by him to carry the mail, according to his contract with the post-office department. And here again it is clear, that if Fleming was merely the private agent and servant of Sawyer, Sawyer is liable to third persons for injury occasioned by his negligence in the performance of his duty, according to the maxim *respondeat superior*. And it is equally clear that the fact that Sawyer's obligation to carry the mail arose under a contract with the government, and that he made no contract with Corse, is no answer to the present action, which is not founded on the contract, but on the breach of duty." [1]

. . . . "Two cases have been cited as expressly sustaining the proposition that a mail contractor is not responsible for the loss of a mail through the misfeasance or negligence of a carrier. The first of them is Conwell *v.* Voorhees, 13 Ohio R. 523. The court stated the question to be whether the contractor was a common carrier or a public agent, although the declaration, in all the counts, set forth misfeasance and negligence, and not the liability of a common carrier, as the ground of action. The court held that he was a public agent, on the ground that he was engaged in the performance of a public service, under a contract with the government, and was therefore not responsible for the misfeasance or negligence of those employed by and under him. For the reasons already given, I do not think that this decision can be supported. The editor of American Leading Cases, vol. 1, p. 621, intimates the opinion that the case cannot be sustained on the ground upon which it was placed by the court, and that if it can be sustained at all, which he evidently doubts, it must be on the ground that the carrier holds an official situation, and is really in the employment of the post-office department. The other case relied upon is Hutchins *v.* Brackett, 2 Foster's R. 252. That case, though put upon the authority of Conwell *v.* Voorhees, was really decided upon a ground not relied upon, or even mentioned by the court in that case, to wit: that the carrier was a public agent, engaged in the performance of a public duty, and not the mere servant of the contractor. It will be observed that in Conwell *v.* Voorhees the judge uses "mail carrier" in the sense of

[1] Winterbottom *v.* Wright, 10 Mees. & Welsb. 109; Burnett *v.* Lynch, 5 Barn. & Cres. 589 (12 Eng. C. L. R. 327); Farrant *v.* Barnes, 11 Com. B. R. N. S. 553 (103 Eng. C. L. R.); Marshall *v.* York Railway Co. 11 Com. B. R. 655 (73 Eng. C. L. R.).

"mail contractor" (p. 542, line 15), and that the judge in Hutchins *v.* Brackett misquotes the opinion by substituting "mail carrier" for "mail contractor," where it occurs in the 24th line of p. 542. Thus the court in Conwell *v.* Voorhees is represented as holding that a mail *carrier* is a public agent, when, in point of fact, they held only that a mail *contractor* is such. It thus appears that Hutchins *v.* Brackett affords no support to Conwell *v.* Voorhees, and I think it clear that Hutchins *v.* Brackett cannot be sustained on the ground upon which it was put. But however that may be, that ground, as I have shown, is not applicable to this case, in consequence of the fact that the carrier had not been duly sworn, and in consequence of the special stipulations of the contract between the contractor and the department."

§ 297. *Clerks, prothonotaries, and registering officers.* — Whenever a particular officer is charged by law with the duty of making specific entries in dockets, records, or registries, he is liable to any person whom he may injure by his negligence.[1] And a prothonotary or clerk is liable for negligence in entry of or recording of bonds.[2] The same liability extends to negligent certificates.[3]

[1] Williams *v.* Hart, 17 Ala. (N. S.) 102; Lyman *v.* Edgerton, 29 Vt. 305; Morange *v.* Mix, 44 N. Y. 315; infra, § 528.

[2] Bevins *v.* Ramsey, 15 How. U. S. 179; State *v.* Sloane, 20 Ohio, 327; McNutt *v.* Livingston, 7 S. & M. 641.

[3] McCaraher *v.* Com. 5 W. & S. 21; Zeigler *v.* Com. 12 Penn. St. 227; Barnes *v.* Smith, 3 Hump. 82; Kimball *v.* Conolly, 3 Keyes, 57.

CHAPTER IX.

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I. GENERAL PRINCIPLES.

§ 300. *Plaintiff negligently exposing himself to a negligent injury cannot recover.* — That a person who by his negligence has exposed himself to injury cannot recover damages for the injury thus received, is a principle affirmed by the Roman law, and is thus stated by Pomponius: *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire.*[1] The same view is taken concretely in several distinct passages in the Digest,[2] and repeatedly reaffirmed in Anglo-American jurisprudence.[3] As has been

[1] L. 203. de R. J. (50. 17.)

[2] L. 3. § 3. D. de eo, per quem f. e. (2. 10); L. 4. L. 5. proem. ad L. A. (9. 2); L. 45. § 1. D. de art. E. V. (19. 1); Wening-Ingenheim, § 32.

[3] Aurora Branch R. R. *v.* Grimes, 13 Ill. 585; Dyer *v.* Talcott, 16 Ill. 300; C. B. & Q. R. R. *v.* George, 19 Ill. 510; Ill. Cent. R. R. *v.* Baches, 55 Ill. 379; Butterfield *v.* Forrester, 11 East, 60; Sill *v.* Brown, 9 C. & P. 601; Vanderplank *v.* Miller, 1 M. & M. 169; Lygo *v.* Newbold, 9 Exch. 302; Great N. R. *v.* Harrison, 10 Exch. 376; Caswell *v.* Worth, 5 E. & B. 549; Griffiths *v.* Gidlow, 3 H. & N. 648; Kennard *v.* Burton, 25 Me. 49; Webb *v.* Portland R. R. 57 Me. 117; State *v.* Manches. & L. R. R. 52 N. H. 528; Robinson *v.* Cone, 22 Vt. 213; Gahagan *v.* Bost. & L. R. R. 1 Allen, 187; Adams *v.* Carlisle, 21 Pick. 146; Lucas *v.* T. & N. B. R. R. 6 Gray, 64; Garrett *v.* M. & L. R. R. 16 Gray; Todd *v.* O. C. R. R. 3 Allen, 18; Warren *v.* Fitchburg R. R. 8 Allen, 227; Birge *v.* Gardiner, 19 Conn. 507; Hackey *v.* Bost. & L. R. R. 14 Allen, 429; Murphy *v.* Deane, 101 Mass. 455; Wheelock *v.* Bost. & A. R. R. 105 Mass. 403; Rathbun *v.* Payne, 19 Wend. 399; Brand *v.* Troy & S. R. R. 8 Barb. 368; Wilds *v.* Hudson River R. R. 24 N. Y. 430; Grippen *v.* N. Y. Cent. R. R. 40 N. Y. 34; Silliman *v.* Lewis, 49 N. Y. (4 Sickels) 255; Blakeley *v.* Le Due, 19 Minn. 187; Van Schaick *v.* Hud-

already observed, the doctrine of contributory negligence cannot be rested, as is sometimes claimed, on the maxim *volenti non fit*

son River R. R. 43 N. Y. 527; Dougan *v.* Champ. Trans. Co. 6 Lansing, 430; Hackford *v.* N. Y. Cent. R. R. 6 Lansing, 381; Hewell *v.* N. Y. Cent. R. R. 3 Lans. 83; Keating *v.* N. Y. Cent. R. R. 3 Lans. 469; Pitts., F. W. & C. R. R. *v.* Methven, 21 Ohio St. 583; Moore *v.* Central R. R. 4 Zabr. 284; Simpson *v.* Hand, 6 Wharton, 311; Oh. & Miss. R. R. *v.* Gullett, 15 Ind. 487; Evansville, &c. R. R. *v.* Lowderville, 15 Ind. 120; Lofton *v.* Vogles, 17 Ind. 105; Evansville R. R. *v.* Hiatt, 17 Ind. 102; Indianapolis, &c. R. R. *v.* Rutherford, 29 Ind. 82; Harper *v.* Erie R. R. 3 Vroom, 88; Morris. & E. R. R. *v.* Haslan, 33 N. J. 4 Vroom, 147; New Jersey Ex. Co. *v.* Nichols, 33 N. J. (4 Vroom) 434; Runyan *v.* Cent. R. R. 1 Dutch. 556; Ogle *v.* Phil., W. & B. R. R. 3 Houston, 267; Culbreth *v.* Phil., W. & B. R. R. 3 Houston, 392; Penn. Can. Co. *v.* Bentley, 66 Penn. St. 30; Penn. R. R. *v.* Goodman, 62 Penn. St. 329; B. & O. R. R. *v.* Fitzpatrick, 35 Md. 32; Kelly *v.* Hendrie, 26 Mich. 255; Gay *v.* Winter, 34 Cal. 153; Needham *v.* San Francisco R. R. 37 Cal. 400; Flynn *v.* San Francisco R. R. 40 Cal. 44; Baird *v.* Morford, 29 Iowa, 531; Wheeler *v.* Westport, 30 Wisc. 392; Macon & West. R. R. Co. *v.* Baber, 42 Geo. 300; Central R. R. *v.* Dixon, 42 Ga. 327; Morrison *v.* Cornelius, 63 N. C. 346; Dufur *v.* Culley, 3 Oregon, 377; Kahn *v.* Love, 3 Oregon, 206; Union Steam, &c. Co. *v.* Nottingham, 17 Gratt. 115; Kline *v.* Cent. Pac. R. R. Ibid. 400; Lake Shore R. R. *v.* Miller, 25 Mich. 274; Walsh *v.* Miss. Valley Tr. Co. 52 Mo. 434; Strahlendorf *v.* Rosenthal, 30 Wisc. 675; Kentucky Cent. R. R. *v.* Dills, 4 Bush, 593; Fleytas *v.* Pontchartrain R. R. 18 La. 339; Hugh *v.* Carrolton R. R. 6 La. An. 496; Hill *v.* Opelousas R. R. 11 La. An. 292; Myers *v.* Perey, 1 La. An. 374; Knight *v.* Pontchartrain R. R. 23 La. An. 462; De Armand *v.* N. O. &c. R. R. 23 La. An. 264. So if the negligence of the plaintiff's servant contributed to the disaster, the plaintiff cannot recover. Toledo & Wab. R. R. *v.* Goddard, 25 Ind. 185. See also § 156.

The following cases are interesting illustrations of the principle: —

Plaintiff, who was a manufacturer of photographic goods, purchased of defendants 'hyposulphate of soda,' and they by mistake delivered to him 'sulphate of iron,' which, being used by his servant in the preparation of photographic views, caused damage. In a suit by him to recover for the loss thereby occasioned, it appeared by evidence given in his own behalf, that hyposulphate of soda is white or gray, while sulphate of iron is green, and the two could be readily distinguished, and that the plaintiff's servant who used the sulphate of iron, whereby the loss occurred, could by mere inspection have detected the mistake, and thereby prevented the accident. It was held in New York that the failure to make such inspection was contributory negligence on the part of the plaintiff which barred his recovery, and he should have been nonsuited. Van Lien *v.* The Scoville Manuf'g Co. 4 Daly, 554. Reported in full in 14 Abb. Pr. N. S. 91.

In an action against a ferryman, on his contract for the transportation of a team of mules which fell off the ferry boat and were drowned, through his alleged carelessness in not furnishing the boat with a barrier where they fell, a refusal of a ruling that, if

injuria. A person whose negligence causes an injury cannot be spoken of as "willing" a particular object, for negligence

the loss was occasioned wholly by the fault of the mules, the defendant was not liable, affords him no ground of exception, if the only sense in which the ruling was applicable to the evidence was, that the defendant was not liable if the mules started back and forced themselves into the water without any known or apparent cause. Lewis *v.* Smith, 107 Mass. 334.

In a Massachusetts case (Ince *v.* East Boston Ferry Co. 106 Mass. 149), it appeared that the distance between two ferry slips on opposite sides of Boston harbor was from a quarter to three eighths of a mile, and a steam ferry boat left each slip for the other ferry every five or six minutes, consuming nearly that time in the passage. Two men, one a sailor, and both of them used to manage sail boats, and familiar with the harbor and the times and manner of running the ferry boats, were navigating a sail boat at right angles across the track of the ferry, about midway between the slips, one of them being forward and the other aft, when a ferry boat ran into them and upset their boat. There was nothing between them and this ferry boat to obstruct their view of it during the whole of its approach from the slip, and the one aft saw it when it left the slip, but from that time till an instant before the collision neither of them saw it or looked towards it, and the one forward did not think of the fact that they were in the usual track of the ferry boats, although during part of the interval they were engaged in luffing to avoid collision with the other ferry boat, which both of them had seen approach from the other slip. It was held by the supreme court, in an action brought by the one forward against the proprietors of the ferry to recover for his injuries in the collision as caused by their negligence, that he and his companion were guilty of contributory negligence, and he could not recover.

In a leading English case, some bricklayers, employed by the defendants, had laid several barrows full of rubbish before the defendant's door, and, whilst the plaintiff was passing in a one-horse chaise, the wind raised a cloud of dust from the lime rubbish, which frightened the horse, although usually very quiet; he, consequently, started on one side, and would have run against a wagon which was meeting them, but the plaintiff pulled him round, and the horse then ran over a lime heap lying before another man's door; by the shock the shaft was broken, and the horse, being still more frightened, ran away, and the chaise being upset, the plaintiff was thrown out and hurt; it was held that as the immediate and proximate cause of the injury was the unskilfulness of the driver, the action could not be maintained.[1]

The question for the jury, it is said by a learned English judge, is "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed

[1] Flower *v.* Adam, 2 Taunt. 314. See Schloss *v.* Heriot, 14 C. B. N. S. 59; Burrows *v.* March Gas, &c. Co. L. R. 5 Ex. 67; Fordham *v.* London, Brighton & South Coast R. C., L. R. 4 C. P. 619; Coleman *v.* South Eastern R. C. 4 H. & C. 699; Adams *v.* Lancashire & Yorkshire R. C., L. R. 4 C. P. 739; Skelton *v.* London & North Western R. C., L. R. 2 C. P. 631; Mangan *v.* Atterton, L. R. 1 Ex. 239; Hughes *v.* Macfie; Adams *v.* Same, 2 H. & C. 744.

negatives an exercise of the will, and only exists when the will, as to the particular condition, is inactive. The true ground for the doctrine is that by the interposition of the plaintiff's independent will the causal connection between the defendant's negligence and the injury is broken.[1]

§ 301. The principle, however, must be accepted with the following qualifications: —

There must be a causal connection between the plaintiff's negligence and the injury.

The plaintiff, as a rule, must be a person to whom the alleged contributory negligence is imputable; excluding, therefore —

Persons distracted by sudden terror.

Persons of unsound mind and drunkards.

Persons deprived of their senses.

Infants.

If the defendant is guilty of gross negligence, he cannot set up a trifling negligence or inadvertence of the plaintiff as a defence.

§ 302. *Causal connection necessary between the plaintiff's neglect and the injury.* — The doctrine of causal connection has been already largely discussed, and it has been shown that to make the act of a moral agent the juridical cause of an event, the act in

to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened.

"In the first case the plaintiff would be entitled to recover; in the latter not, as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that but for that negligence or want of ordinary care or caution the misfortune could not have happened, nor if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff."[1]

See supra, § 130.

[1] See supra, § 130–133.

[1] Per Wightman, J., Tuff *v.* Warman, 5 C. B. N. S. 585; Wetherly *v.* Regent's Canal Co. 12 C. B. N. S. 2, 8; Ellis *v.* London & South Western R. C. 2 H. & N. 424; Martin *v.* Great Northern R. C. 16 C. B. 179; Bridge *v.* Grand Junction R. C. 3 M. & W. 244; recognized in Davies *v.* Mann, 10 M. & W. 546; cited and explained per Lord Campbell, C. J., Dowell *v.* Steam Nav. Co. 5 E. & B. 195; Holden *v.* Liverpool New Gas & Coke Co. 3 C. B. 1; Caswell *v.* Worth, 5 E. & B. 849; Clayards *v.* Dethick, 12 Q. B. 439; cited per Blackburn, J., Wyatt *v.* Great Western R. C. 6 B. & S. 720; Wise *v.* Great Western R. C. 1 H. & N. 63; Marriott *v.* Stanley, 1 Scott N. R. 392; Goldthorpe *v.* Hardmans, 13 M. & W. 377; Pardington *v.* South Wales R. C. 11 Exch. 392; Dakin *v.* Brown, 8 C. B. 92; Thorogood *v.* Bryan, 8 C. B. 115, as to which see per Williams, J., Tuff *v.* Warman, 2 C. B. N. S. 750; Waite *v.* North Eastern R. C., E. B. & E. 719, 727; The Milan, 1 Lush. Adm. R. 388, 403.

question must be of such a character that, if not interrupted by causes independent of the actor's will, or by the intervention of other persons, it will, under ordinary circumstances, produce the event in question.[1] Thus, applying this test to the question of contributory negligence: An express train is dashing along a road at full speed. A traveller drives his horse and wagon listlessly along a cross road, neither looking up or down, though there is abundant warning in the shape of sign boards, and though the usual cautions are given, on nearing the cross road, on the part of those directing the train. Such negligence on the part of the traveller, at a given period of time, will be the cause of a collision, unless such collision be avoided by the skill of the engineer. Supposing the engineer not capable, except at the risk of greater damage, of avoiding the collision, then the traveller's negligence is the juridical cause of the disaster, and this is equivalent to saying that it is the proximate cause.

§ 303. It is therefore necessary, in such a question, to distinguish between juridical causes and conditions; or, as they are called in the scholastic jurisprudence, between proximate causes, and remote causes.[2] Regarding juridical cause as here convertible with proximate cause, and condition as convertible with remote cause, the distinction may be stated as follows: A traveller leaves home in the morning for a distant point, in reaching which by the nearest line he must cross a railroad on a level, though by making a *detour* of a mile he could cross it on a bridge. In attempting the level crossing he is struck by a locomotive engine. His leaving home in the morning is a *condition* of this collision, but it is not its juridical cause. So his taking the level crossing is another condition of the collision, but is not its juridical cause, if the level crossing is on a public road usually travelled. Or, to take another illustration, a merchant selling kerosene is the condition, but not the cause of this fluid igniting in a railway train in which it is forwarded to a distant market. But if this merchant packs this inflammable fluid so negligently that, unless peculiar care is given to it by the carrier, it will, under certain circumstances, explode, and then sends the package to the carrier without notice of its contents, then this act of the merchant is the juridical cause of the subsequent explosion, and

[1] Supra, §§ 73, 87; infra, § 323.

[2] See supra, § 85.

the merchant (independently of the question of his own liability in a suit against himself) cannot recover from the carrier, in a suit against the latter, for nonperformance of the latter's duty of carriage. Hence may we state as a general principle that, in order to defeat recovery of damages arising from the defendant's negligence, the plaintiff's negligence must have been the proximate and not the remote cause of the injury; in other words, must be its juridical cause, and not merely one of its conditions.[1]

§ 304. *The plaintiff, as a rule, must be one to whom the alleged contributory negligence is imputable, including herein,* (1) *persons who, in a sudden emergency, are paralyzed by terror, or confused by the immediate necessity of choosing between two perilous alternatives.* — Suppose a traveller, not negligently on a railway track, suddenly finds a train rushing towards him, and in seeking in his terror to escape it takes refuge on another track, where he is struck by a train which he had not been in a position to notice? Is he chargeable with negligence in not reasoning coolly and wisely in the terror of an emergency for which he is in no way responsible? The answer is, he is not; and hence, if the colliding train is chargeable with negligence, it cannot defend itself on the ground that the plaintiff contributed to the result. He did not, for that which he did when thus confused or paralyzed cannot be imputed to him as a fault.[2] So in injuries occurring to a passenger who jumps in terror from a coach or car when suddenly told of peril. If this terror was caused by the defendant, the defendant cannot set up the plaintiff's imprudence as a defence.[3] As a rule, therefore, we may say that a person is not chargeable with contributory negligence, who, when unwarned peril comes on him, suddenly acts wildly and madly.[4] For persons in great peril are not required to exercise all the presence of mind and care of a prudent, careful man; the law makes

[1] Supra, § 85; Freedham *v.* San Francisco R. R. 37 Cal.; Kline *v.* Cent. Pac. R. R. Co. Ibid. 400; Flynn *v.* San Francisco R. R. 40 Cal. 14; Murphy *v.* Deane, 101 Mass. 466; Trow *v.* Vt. Cent. R. R. 24 Vt. 487; Birge *v.* Gardiner, 19 Connect. 507; Johnson *v.* Hudson Riv. R. R. Co. 20 N. Y. 65.

[2] Indianapolis, &c. R. R. *v.* Carr, 35 Ind. 510, and cases cited supra, § 89, 93, 94, 95, and infra, § 377.

[3] Frink *v.* Potter, 17 Ill. 406; R. *v.* Pitts, C. & M. 284; Whart. Crim. Law, 7th ed. § 941 *a*. See supra, § 93, for other cases.

[4] Stokes *v.* Saltonstall, 13 Peters, 181; Buel *v.* N. Y. C. R. R. 31 N. Y. 314.

allowances for them, and leaves the circumstances of their conduct to the jury.[1]

§ 305. Yet, it must be remembered, that as to cases such as these, the question may still arise whether the plaintiff's distracted action may not in some degree modify the case on the merits, though not operating to defeat, by way of a constructive estoppel, the plaintiff's claim *in toto*. It is clear, for instance, that in a case such as that just put, the traveller struck by the second train, while he was seeking to avoid the first, is not chargeable with contributory negligence. Yet at the same time, recollecting how sudden must have been his appearance in front of the colliding train, is the latter chargeable with negligence in not avoiding him? We must keep firmly in mind that this is not a question of contributory negligence, and that to class such a case under the head of contributory negligence is a mistake calculated to mislead. But though the doctrine of contributory negligence is here in no case involved, we are not to fall into the opposite extreme of disregarding the principle that the liability of the colliding train, under such circumstances, is determinable by the test so often heretofore announced, — that of the diligent and skilful business man. What would a diligent and skilful engineer do under such circumstances? Would he, in the surprise of the moment, be able to arrest the train without risking its safety? It will be seen, therefore, that while the traveller's wildness or confusion of action is not imputable to him as negligence, it is an important fact in determining the negligence of the railroad. An engineer not having notice of the

[1] G. & C. U. R. R. Co. *v.* Yarwood, 17 Ill. 509; Johnson *v.* W., C. & P. R. R. 70 Pa. St. 357.

In Coulter *v.* Am. Un. Exp. Co. 5 Lansing, 67, the plaintiff, while walking upon the sidewalk, was alarmed by the rapid driving of the defendant's express wagon upon the sidewalk behind her, so near as to give her reason for a belief that she was in danger, and, in springing on one side, struck and injured herself against a side wall. It was held that the jury might award her damages against the defendant, and even although she in fact would have received no injury from remaining in her position on the walk.

Mullin, P. J.: "If the defendant's driver drove on to the sidewalk, on which the plaintiff was walking, in a rapid manner, and near enough to give her reason to deem herself in danger, and if, under this belief, she instinctively jumped against the wall and injured herself, the defendant is liable, and the plaintiff was not chargeable with negligence." Buel *v.* N. Y. Central R. R. 31 N. Y. 314. . . . . See infra, § 377.

plaintiff's mental state may reasonably expect him to avoid the track; and under such circumstances the engineer may not be liable for the collision.

§ 306. *Persons of unsound mind, and drunkards.* — What has just been said applies equally to persons of unsound mind.[1] Negligence is not imputable to them, and the law intervenes to protect them, at least as tenderly as it does persons capable of taking care of themselves. *Pati quis injuriam*, so humanely speaks Ulpian, *etiamsi non sentiat, potest*,[2] and under this head this great jurist enumerates, among other cases, that of the *furiosus*, or person of deranged mind. Yet if this mental disturbance is caused by the sufferer's own fault, there may be circumstances in which such disturbance may be viewed as the juridical cause of the casualty.[3] But here, as in the case just mentioned of the traveller distracted by sudden terror, the fact of such distraction, with the sudden incoherence of action in which it exhibits itself, is a circumstance to be considered in determining the negligence of the defendant. And again, an engineer, seeing a man ahead of him apparently *compos mentis*, may reasonably expect him to avoid the track, and hence may not be guilty of negligence if a collision occur. On the other hand, an engineer who sees a helpless person incapable of moving on the track, is guilty of negligence if he does not make all prudent efforts to avoid the collision.[4]

§ 307. *Persons deprived of their senses.* — The same reasoning applies to persons deprived of their senses, *e. g.* those who are deaf or blind.[5] Whether, in this view of the law, a blind man is guilty of negligence in attempting to cross a bridge, which was defective for want of a rail, without a guide, is a question for the jury.[6] At the same time there are cases in which a person knowing his incapacity is chargeable with negligence should he put himself in a position in which danger is probable, without means on his part to avert it. Thus it has been held to be negligence for a deaf person to drive an unmanageable horse across a railroad track when a train is approaching. It is his duty, it was

[1] See Chic. & A. R. R. *v.* Gregory, 58 Ill. 226. See supra, § 87, for other cases.

[2] L. 3. § 1–4. D. de injur. 47. 10.

[3] Thorp *v.* Brookfield, 36 Connect. 320; Toledo, P. & W. R. R. *v.* Riley, 47 Ill. 514.

[4] Telfer *v.* Northern R. R. 30 N. J. 188; Schieshold *v.* R. R. 40 Cal. 447; infra, § 389 *a*.

[5] See Illinois Cent. R. R. *v.* Buckner, 28 Ill. 299; Ch. & R. I. R. R. *v.* McKean, 40 Ill. 218.

[6] Sleeper *v.* Sandown, 52 N. H. 244. See infra, § 389 *a*.

said, to keep a look-out and avoid the danger: and it is no excuse that the horse, in crossing, turned and ran up the track ahead of the engine, or was driven there to avoid it.[1] And so a drunken man, who drives recklessly, cannot defend his reckless driving by setting up drunkenness.[2]

§ 308. *Persons acting under superior duty.* — A person acting under a sense of duty of such a high and absorbing nature as to make him for the time unconscious as to danger, may in like manner cease to be so juridically responsible as to be capable of contributory negligence. Of this we have an interesting illustration in a New York case, where the evidence was that the plaintiffs' intestate, seeing a little child on the track of the defendants' railroad, and a train swiftly approaching, so that the child would be almost instantly crushed unless an immediate effort was made to save it, thereupon, in the sudden exigency of the occasion, rushed in to save the child, and succeeding in that, lost his own life by being run over by the train. It was held by the appellate court, that his voluntarily exposing himself to danger, for the purpose of saving the child's life, was not, as matter of law, negligence on his part precluding a recovery.[3]

§ 309. *Infants.* — At the first glance it would seem that infants, so far as they are incapable of discretion, fall, in this respect, within the same category as insane and distracted persons, and persons who are deaf or blind. So, indeed, Ulpian expressly declares, in the celebrated passage from which an extract has been already given: "Sane sunt quidam qui facere non possunt: ut puta *furiosus, et impubes qui doli capax non est*; namque hi pati injuriam solent, non facere, cum enim injuria ex affectu facientis consistat, consequens erit dicere, hos, sive pulsent, sive convicium dicent, injuriam fecisse non videri. Itaque pati quis injuriam, etiam si non sentiat, potest."[4] Nor, if the law is that a lunatic, who by his guardian's negligence is suffered to wander the streets, cannot be run over negligently without redress, can we understand why the same protection should not be extended to a child. Children are to an eminent degree both the present wards and the future guardians of the State; and the policy of the law re-

[1] Illinois Central R. R. Co. *v.* Buckner, 28 Ill. 299.

[2] See infra, § 332, 402.

[3] Eckert *v.* L. I. R. R. Co. 43 N. Y. 502. See infra, § 314, for opinion of court.

[4] L. 1. 2. § 3. D. de injur. 47. 10.

quires that peculiar tenderness should be exercised in extending to them civil protection.[1] So clearly is this view recognized on the criminal side of the law, that so far from the neglect of parents or guardians being a reason why a child should be neglected by others with impunity, it has been held that such neglect, causing injury to foundlings and outcasts, is an offence to which the severest scrutiny will be applied.[2]

§ 310. *Cases of children straying on a thoroughfare.* — A distinction, however, here strikes us, which it is important to keep in mind. Suppose a driver on a thoroughfare is guilty of negligence, and by this negligence two persons are injured; one an adult, and the other a child who has strayed from its parents. Can we say, "the negligent running down of the adult shall be the subject of a suit; the negligent running down of a child shall not be the subject of a suit?" Even supposing such a discrimination to be permissible, can it be applied? An adult and a child abandoned by its parents are in the same ship and are lost by the same collision. How, in such a case, can we say that the colliding act was negligent as to the adult, but non-negligent as to the child? How can we, to go back a step further, transfer in such cases the negligence from the defendant to the plaintiff without postponing the proximate to the remote cause? But, putting aside these mere technical objections, again the question meets us, could the defendant, discharging his duties carefully and diligently, have avoided injuring the child? If so, no amount of negligence by the child's parents is a defence. And such is the view taken by several authoritative American courts.[3]

[1] See this fully argued in Wharton's Cr. Law, 7th ed. § 2508; and see also supra, § 88, 216.

[2] See R. *v.* Friend, R. & R. 20; R. *v.* Squire, 1 Russ. C. & M. 80, 678; R. *v.* Bubb, 4 Cox C. C. 455; R. *v.* Smith, L. & C. 607; 10 Cox C. C. 82; Whart. C. L. § 2529.

[3] Berge *v.* Gardiner, 19 Conn. 507; Daley *v.* Norwich R. R. 26 Conn. 598; Bronson *v.* Southbury, 37 Connect. 199; City *v.* Kirby, 8 Minn. 169; Boland *v.* Miss. R. R. 36 Mo. 490; Whirley *v.* Whittemore, 1 Head. 620; Robinson *v.* Cone, 22 Vt. 213; Penn. R. R. *v.* Kelly, 7 Penn. St. 372; Rauch *v.* Lloyd, 31 Penn. St. 358; Penn. R. R. *v.* Spearen, 47 Penn. St. 300; Glassey *v.* Hestonville, 57 Penn. St. 172; N. P. R. R. *v.* Mahoney, 57 Penn. St. 187; Bellefontaine & I. R. R. *v.* Snyder, 18 Ohio St. 399. See the same view held in Gardner *v.* Grace, 1 F. & F. 359.

In Pennsylvania, however, while on a suit *by the child* the doctrine of non-imputability continues to be (though somewhat hesitatingly) maintained, it is held, and properly, that *when the parent sues* for loss of ser-

§ 311. On the other hand, by the courts of England, Maine, Massachusetts, New York, and Indiana, it is held that even if

vices, then the parents' contributory negligence may be a bar. Thus in 1872, it was ruled that when a child eighteen months old had usually been under charge of a sister thirteen years old, who was away from the child for a short time, and escaped from the house whilst the mother, to enable her to scrub the floor, had removed a barrier against the child's escape; and within a few minutes the child was run over by a car and killed; that in an action by the parents, the question of contributory negligence by the parents was for the jury. Pittsburg, &c. R. R. *v.* Pearson, 72 Penn. (22 P. F. Smith) 169. A verdict being had for the plaintiffs, the defendants took a writ of error, upon which the opinion of the court was delivered by Sharswood, J.: —

"The only question raised by these assignments of error, which it is deemed necessary to discuss, is, whether, under the evidence, the plaintiffs below — the parents of the child who was run over and killed by the railroad car of the defendants — were guilty of culpable negligence in permitting him to run abroad in the street without a competent protector. It was undoubtedly settled very properly in Glassey *v.* Hestonville Passenger Railway Co. 7 P. F. Smith, 172, that if the parents permit a child of tender years to run at large *without a protector* in a city traversed constantly by cars and other vehicles, they fail in the performance of their duties, and are guilty of such negligence as precludes them from a recovery of damages for any injury resulting therefrom. If the case is barely such, the negligence is a conclusion of law, and ought not to be submitted to the determination of the jury. But in this case there was evidence that the child was not permitted to run at large without a protector, and it was a question for the jury whether the accident was to be attributed to the negligence of the parents. These parents were careful parents. A board at the door prevented the child from leaving the house of his own accord. When abroad he was in charge of an older sister between twelve and thirteen years of age. It so happened, however, that the board was removed temporarily for the purpose of scrubbing the floor. The child watched his opportunity and escaped. He was immediately missed, and his brother at once sent after him. He returned and said that he was playing in the alley with Lizzie Orr, a little girl of the neighborhood, between seven and eight years old, who was in the habit of playing with him. The parents were satisfied that he was safe with her. In the caprice of childhood the little boy ran away from her — down the alley to Rebecca Street, where the railway was — ran across the track, and in the course of a very few minutes was run over. Now, whether Lizzie Orr was a competent protector, whether the parents ought to have been satisfied when informed that he was with her, were questions for the jury. Children of that age — more especially girls — are often sufficiently prudent and thoughtful to be intrusted with the care of young children. Persons in the condition of life of these parents cannot afford to employ servants to look after their children. Their necessary domestic duties prevent them from being constantly on the watch themselves. We agree that 'to say it is negligence to permit a child to go out and play

negligence productive of injury be proved in such case, a child cannot be permitted to recover for such injury if it be shown

without it is accompanied by a *grown* attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendance, and would amount to a denial of these blessings to the poor.' O'Flaherty *v.* Union R. R. Co. 5 Am. Law Times, 42. Mr. Justice Agnew has made a similar observation in Kay *v.* The Pennsylvania Railroad Co. 15 P. F. Smith, 277: 'Here a mother, toiling for daily bread, and having done the best she could, in the midst of her necessary employment, loses sight of her child for an instant, and it strays upon the track. With no means to provide a servant for her child, why should the necessities of her position in life attach to the child and cover it with blame?' *That indeed was an action by the child, in which the negligence of the parent would perhaps be no defence;* but we may ask with equal propriety, why should the necessities of the parents' position cover them with blame if they have done all in their circumstances they could do?"

See also Kay *v.* Penn. R. R. 65 Penn. St. (15 P. F. Smith) 369.

In 1874, in Phil. & Reading R. R. *v.* Long (reported in the Legal Int. for March 6, 1874), Judge Agnew thus speaks: —

"There can be no just complaint against that part of the charge recited in the fourth assignment. It does not contradict the answer to the defendant's fourth point. The learned judge affirmed all his points, including the fourth, stating that it is negligence and would prevent a recovery for parents to suffer an infant less than two years and two months old to wander upon a railroad track when trains are constantly passing. In that part of the charge recited in the fourth assignment the judge said, 'that the fact that the child is found in the street affords a strong presumption of negligence on the part of the plaintiffs. You will therefore consider whether the mother took *reasonable care* of the child; if she did not, it was negligence.' To *suffer* a child to wander on the street has the sense of *permit*. If such permission or sufferance exist it is negligence. This is the assertion of a principle. But whether the mother did suffer the child so to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be *reasonable* care, dependent on the circumstances. This is a fact for the jury. If she did not exercise this care she was negligent. What more than this can be demanded of her. When a railroad runs through a populous city has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds otherwise it is negligence? Is it negligence for the poor who congregate these crowded streets, unless even in the summer's heat they live shut up in the noisome vapors of their closed tenements, without a breath of healthy air? Is this the life they must lead, or be adjudged to be negligent? This mother gave her child a piece of bread to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil-cloth on the floor, and before her labor was finished, and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more

that his parents, by negligently suffering him to run at large, put him in the way of being thus harmed.[1]

favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say this was negligence *per se*, and that she *suffered* her child to wander into the street? What sort of justice is that which tells the mother agonizing over her dying child, *Your* negligence caused this. *You* suffered your child to run into the jaws of death. We cannot perceive any fault in the railroad company. A speed of eight miles an hour along this populous thoroughfare was all right. We can indorse no such cruel doctrine; but we must say, as was said in Kay *v.* Railroad Company, the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. 15 P. F. Smith, 276."

In B. & I. R. R. Co. *v.* Snyder, 18 O. St. 414, Welch, J., said: "But the most important case to be considered is that of the R. R. Co. *v.* Mahoney, 57 Penn. St. 187. It is important, because it is elaborately argued and considered, and because it is almost identical with the case at bar. The plaintiff was a child of four years, who had been run over by an engine and tender passing, with the tender in front, slowly through a street in the vicinity of several schools. The child was unattended, but its aunt, in attempting its rescue, was guilty of negligence which contributed to the accident, resulting in her death and the injury to the child. The fault of the railroad company consisted in so piling the wood upon the tender as to obstruct the engineer's view ahead, and in the engineer's failing to look out, as he might have done through a window, upon the track, or to place a sentinel on the tender. The court held the plaintiff entitled to recover. In delivering the opinion, the district court, among other things, says: 'If, however, this was an action by the father to recover damages for the death of the child, a very different question would be presented. It would probably be held that it was negligence to suffer an infant to be on the streets without a care-taker, and he could not hold the defendants responsible, whether he had appointed a care-taker who was negligent, or left the child to roam at large without one. *To a child of plaintiff's years no contributory negligence can be imputed. . . . . She is not precluded from recovery against one joint tort-feasor, by showing that others have borne a share in it.*' This opinion was fully approved, and the judgment affirmed in the supreme court.

"The foregoing are all the leading authorities on the subject. Upon careful review of them, we are inclined to follow those where the principle of imputed negligence has been denied. It follows, of course, that there is no error in this judgment. Indeed, it seems to us the same result must be reached in the present case, whether the principle contended for be adopted or rejected. The injury here was within the ordinary and probable sequence of events, a result of the defendant's negligence. It might reasonably have been *anticipated*. There was *danger* of its happening, such as an ordinarily careful and prudent person might have apprehended, and would be *likely* to apprehend, as a possible result of any relaxation of vigilance and care."

[1] Singleton *v.* E. C. R. R. 7 C. B. (N. S.) 287; Waite *v.* N. E. R. R. 2 B. & E. 719; Mangan *v.* Atherton, L.

§ 312. The English law on this point presents an extraordinary contrast. On the one side it is held that the negligence of

R. 1 Exch. 239; Holly *v.* Gas Co. 8 Gray, 123; Callahan *v.* Bean, 9 Allen, 401; Wright *v.* Street R. R. 4 Allen, 283 (though see Lynch *v.* Smith, 104 Mass. 52); Hartfield *v.* Roper, 21 Wend. 615; Lehman *v.* Brooklyn, 29 Barb. 234; Mangum *v.* Brooklyn City R. R. 36 Barb. 529; Bank *v.* Broadway R. R. 49 Barb. 529; Flynn *v.* Hatton, 4 Daly, 552; *S. C.* 43 How. Pr. 333; Ross *v.* Innis, 26 Ill. 259; Chicago *v.* Starr, 42 Ill. 174 (though see Pitts., F. W. & C. R. R. *v.* Bumstead, 48 Ill. 221); Pitts., F. W. & C. R. R. *v.* Vining, 27 Ind. 513; L. & I. R. R. *v.* Huffman, 28 Ind. 287; Jeffersonville R. R. *v.* Bowen, 40 Ind. 545. The Scotch law is declared to coincide with the above by Mr. Campbell, in his work on Negligence, § 81. But this may be because he fails to take in the distinction, noticed in the text, between a straying child injured by the negligence of a heedless driver, and a meddlesome child playing with machinery which is not negligently exposed.

In Brown *v.* E. & N. A. R. R. 58 Me. 384, Appleton, C. J., said: —

. . . . "If a child is of too tender an age to be permitted to go in the streets without the attendance and supervision of those having him in charge, their negligence and want of due care will have the same effect in preventing the maintenance of an action for an injury occasioned by the neglect of another as would the plaintiff's want of care, if he were an adult." As will be seen, however, the case was decided on another point.

The following decisions will serve to illustrate the summary in the text: In an action by an infant, to recover for injuries caused by being run over by the defendant in a street in Boston, evidence offered by the plaintiff tended to show that the plaintiff, three and a half years old, was sent by his mother, with his brother, nine years old, a short distance from home for some wood; that the plaintiff took some wood on his arm, and the brother took some in a basket; that they started across a street, the plaintiff being about ten feet in front of his brother; and that, while thus crossing, the plaintiff was negligently run over by the defendant. Held, that a ruling that this evidence disclosed such negligence on the part of the plaintiff's mother and brother as to prevent the plaintiff's recovery against the defendant, was incorrect. Mulligan *v.* Curtis, 100 Mass. 512.

In an action against a hackman for negligently driving horses over a child four years and seven months old, and of the average ability and intelligence of children of the age of five years attending the public schools, who was crossing a street on his way home from school at the time of the accident, the question whether the child's parents were negligent in permitting him to return from school alone, and in so doing to cross the street at the time when and place where he was injured, is for the jury. Lynch *v.* Smith, 104 Mass. 52.

In this case it was further ruled, that on the issue whether a child four years and seven months old, and "as intelligent as the average of children in his school five years of age, but rather small for that age," who in crossing a street on his way home from school suffered an injury by the negligence of another traveller, was using due care when he was injured, the opinion of his school-teacher as to

a person having charge of a young child is the negligence of the child, and imputable to the child, and that there is no redress if his capacity to exercise such care is inadmissible in evidence.

It was said that if the parents of a child were not negligent in permitting him to cross a street alone, and while crossing he was injured by the negligence of another traveller, it is sufficient to entitle him to recover for the injury, if he was using that degree of care of which he was capable, though a less degree than would be appropriate for an adult to use under like circumstances; and, even if his parents were negligent in permitting him to cross the street alone, their negligence was not contributory, and he may recover, if in crossing he did no act which prudence would have forbidden, and omitted no act which prudence would have dictated, whatever was his physical or intellectual capacity.

Chapman, C. J., said: —

"If the jury find that the plaintiff was of such capacity that he was in the street without negligence, either on the part of himself or his parents, then the question arises, what degree of care he was bound to exercise. In Mulligan *v.* Curtis, 100 Mass. 512, it was held to be a question for the jury, whether a boy three and a half years old might not without negligence be trusted to go across the street, accompanied by his brother nine years old. Certainly the jury could not find that a boy nine years old must exercise the capacity of an adult. But it was implied that, if it was proper for him to be there, it was only necessary for him to exercise such capacity as he had. School-children who are properly sent to school unattended must use such reasonable care as school-children can. It must be reasonable care, adapted to the circumstances, or, in other words, the ordinary care of school-children.

"It does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be remote. But if the child has not acted as reasonable care adapted to the circumstances of the case would dictate, and the parent has also negligently suffered him to be there, both these facts concurring constitute negligence which directly and immediately contributes to the injury, for which the defendant ought not to be required to make compensation.

"This principle was illustrated in Munn *v.* Reed, 4 Allen, 431. The plaintiff, a small child, was bitten by a dog. It is true that the liability of the owner was by statute. Gen. Sts. c. 88, § 59. But the question of negligence arose, and it was held that, if the mother of the child was not guilty of negligence in permitting the child to play with the dog, and if the child was bitten while using such care as is usual with children of its age, the action might be maintained. But this principle is inconsistent with the idea that the child must use the discretion of an adult. The instructions which were given to the jury in this case required a higher degree of care than the decided cases sanction; and regard is also to be had to the question whether the negligence of the plaintiff

the child is negligently run over.[1] On the other side it is held that though oysters are negligently placed in a river bed, it is an

contributed to the injury. If the negligence of the child contributed to his being in the way of the defendant's horses, it contributed to the injury; but negligence which had no such effect would be immaterial." Steele *v.* Burkhardt, 104 Mass. 59.

In a New York case, the plaintiff, who was ten years old, paid ferriage from New York to H., where she was safely carried by the defendant's ferry boat. She remained on board during the return trip to New York and back to H., and no additional ferriage was paid by her, or asked from her. It was held, that the plaintiff could recover for injuries received while entering the ferry slip at H. the second time, and caused by the defendant's negligence. Doran *v.* E. R. Ferry Co. 3 Lansing, 105.

So, in another case in the same state, the plaintiff, an infant twelve years of age, travelling with his mother upon defendant's cars, being unable to find a seat in the car with her, by her permission went into another, and there remained until the train reached a station: when, in the effort to leave the car and return to his mother, he received an injury, it was held by the appellate court, that it was not *per se* a negligent act on the part of the mother to permit him to go from one car to another under the circumstances. Downs *v.* N. Y. C. R. R. Co. 47 N. Y. 83.

Ihl *v.* The 42d St. &c. R. R. Co. 47 N. Y. 317, was an action brought to recover damages for the death of a child three years old, under the provisions of chapter 450, Laws of 1847, as amended by chapter 256, Laws of 1849. It appeared that the child killed was sent across defendant's track unattended save by a child nine and one half years old; and was then struck by defendant's car. It was held, by the appellate court, that this was not *per se* such negligence as would defeat a recovery.

If the deceased child, it was ruled, exercised due care, and the injury was caused solely by the negligence of defendant's driver, the defendant was liable, without regard to the question whether it was negligence in the parents to let the child go with so young an attendant. And it was further said: Nor would negligence upon the part of so young a child as the deceased, when there was no negligence upon the part of the parents or the attendant, absolve the defendant from liability. "We are of opinion," said Rapallo, J., "that the refusal so to charge was not error, and that the judge properly left it to the jury to say whether it was negligent 'to permit the little daughter between nine and ten years of age to take the little boy to the drug store in the way she started to go.' The competency of the little girl to act as attendant of the deceased was matter of judgment. There is no positive law by which it can be determined. She was not of such an extremely tender age as to place it beyond a doubt that she was incompetent, and therefore it was proper to leave the question to the jury. See Mangum *v.* Brooklyn R. R. Co. 38 N. Y. 455, 459, and Drew *v.* Sixth Ave. R. R. Co. 26 N. Y. 49, where it was held not as a matter of law negligent in a parent to send a child of the age of eight years to school without an attendant. The third and fourth re-

[1] Waite *v.* N. E. R. C., E., B. & E. 719.

injury redressible by damages for a vessel to negligently disturb them.[1] The child, were he an oyster, would be protected: but

quests to charge were fully covered by the charge as given, and the refusal of the judge was to charge otherwise than he had already charged. He had fully presented and submitted to the jury the questions of the negligence of the defendant and of the negligence of the parents of the deceased, and the grounds upon which negligence was sought to be imputed to them, and had instructed the jury that if they found either of those questions in favor of the defendant, they must render a verdict for the defendant. A refusal to repeat these instructions was not error."

In remarkable conflict is Lannen *v.* Albany Gas Light Co. 46 Barb. 264, where it was said, that there is "no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when, if he were an adult, he would escape it. This would be . . . . 'visiting the sins of the fathers upon the children' to an extent not contemplated in the Decalogue, or in the more imperfect digests of human law."

In Illinois there has been some fluctuation. In an early case (City *v.* Major, 18 Ill. 360, hereafter cited), the doctrine of imputability seems to be admitted and then avoided. So subsequently, where a child four years old being left temporarily by its mother with its sister, fourteen years of age, strayed a short distance on a private road used by the public, near a railway track, and while there an express train collided with a push car on the track, shattering the car into pieces, a fragment of which struck and injured the child. It was here held that the railroad company were liable. P., Ft. W. & C. R. R. Co. *v.* Bumstead, 48 Ill. 221.

Still later, in Chicago & A. R. R. 58 Illinois, 226, the evidence was that a child not quite five years old, and of diseased intellect, strayed to a railroad track, which was near the residence of its parents, in the village of Brighton, and was seriously injured by a train of cars which passed through the village with great speed, and without stopping. The mother of the child had left the house but a few minutes before the accident, to perform a necessary household duty, leaving the child in the care of his sister, eight years of age, and on her return discovered that he had strayed to the track, and before she could recover him he was struck by the train and seriously hurt. In an action against the company, it was ruled by the supreme court that there was no negligence on the part of either the mother or the injured child; but that the company was chargeable with great negligence, in permitting one of its fastest trains to run with unabated speed through the town, where persons are liable at all times to be on the open track, and should be held responsible. It was further held, that negligence cannot be imputed to a child under five years of age, especially to one of less than ordinary mental capacity. And it was further argued that in such cases it cannot be said that the parent failed to exercise reasonable care. The same rule should not be applied

[1] Mayor of Colchester *v.* Brooke, 7 Q. B. 377; Vennell *v.* Garner, 1 Cr. & Mee. 21.

Hartfield *v.* Roper, 21 Wend. 615, the leading American authority for this kind of imputability, is ably criticised in an article in the American Law Review for April, 1870 (Vol. IV. p. 405).

as a child, under analogous circumstances of neglect, he is without redress.

§ 313. It is true that by the courts holding to the imputability of the guardian's negligence to the child, the doctrine is often so construed as greatly to reduce its practical scope. Thus it has been held not to be contributory negligence to permit a child of six years old to go out by himself in a quiet street;[1] nor to permit a child of five years old to cross without an attendant a thoroughfare in which there is a horse railroad.[2] And it has been conceded by the courts in question, that as to children capable of observing and avoiding danger, no rule of law can be laid down which interferes with the jury judging each case on its own

to persons dependent for support upon their labor, and to those whose means enable the parent to give a constant personal attention to the care of children, or employ a person for that purpose.

In California, the rule is thus stated in Karr *v.* Parks, 40 Cal. 193 — Temple, J.: . . . . "Whether it is negligence in a parent or guardian to allow a child to go unattended in the street depends greatly upon the amount of travel in and the use made of the street as affecting the danger to which one is exposed in being there. Unless there is some unusual exposure to danger, however, we do not apprehend that it could be seriously contended that there is any negligence whatever in allowing a child between ten and eleven years, ordinarily active and intelligent, to be in the street. Except where the exercise of judgment or strength is required, such children are perhaps as able to save themselves from danger as grown people. In a street comparatively unfrequented, as in this case, we certainly should not hold it evidence of negligence even in children of more tender years; and if the injury had been done to the younger sister instead of the elder, while walking in the street in the daytime, within sixty feet of her father's house, when there was no particular reason to apprehend danger, and in a street almost entirely unused, we should not be prepared to say, as matter of law, that it was negligence on the part of the parent. Such a rule would be harsh and unreasonable, especially to the poor, in every town and city. The evidence does not satisfy us that there was even bad judgment in the plaintiff's attempting to escape to the corral for protection rather than to the house; but it would be absurd to hold that even an adult person, in time of imminent danger, is negligent, unless he takes every precaution that a careful calculation afterward will show he might have taken. She had no time to measure and compare distances, or to calculate whether she would gain time by retreating in one direction rather than another, even though, as a mathematical problem, it was very easy of solution. Upon the question of contributory negligence we see no reason to doubt the correctness of the verdict."

[1] Cosgrove *v.* Ogden, 49 N. Y. (4 Sickels) 255. See Karr *v.* Parks, 40 Cal. 188.

[2] Barksdull *v.* N. O. & O. R. R. 23 La. An. 189.

merits.[1] But this still leaves the conflict of principle the more sharp. Is a person who is incapable of observing and avoiding danger without protection from the negligence of others if he is exposed to such negligence by the negligence of his immediate custodian? Would not this abandon the helpless to the cruelest ill-treatment without any opportunity of redress? Would it not then be enough for an underling nurse at a hospital who goes to sleep instead of watching, to say that the patient, incapable of caring for himself, was sent to the hospital through the negligence of his friends? And can we say that the rash and brutal driving over of a child of six years, which is one of the cases just cited, and for which a horse-car company was held liable because the child was comparatively discreet, would have been without redress had the person driven over been a child two years of age, or a lunatic escaped from a negligent guardian? Is not this equivalent to saying that the negligence which we punish when it injures a person who is capable of helping himself, we will not punish when it injures a person who is helpless? Does not the doctrine here excepted to amount in the concrete to this, that if a wandering child is under six he may be run down with impunity; but that if over six he may have redress? Observe, that on this issue of imputability the question is not whether, in consequence of the incapacity of the child or lunatic, a collision ensued which a prudent driver could not avoid. In such cases it is agreed on all sides that the driver is irresponsible. The question is, negligent driving being assumed, whether the driver is to be exonerated whenever the victim of his negligence is a child or a lunatic whose guardian has negligently permitted him to escape. No doubt that if the guardian sues the driver for damages for loss of the child's services, the answer may correctly be, "You cannot recover for yourself remuneration for your own misconduct."[2] But if the party injured has not himself been negligent, not only is there no principle of law preventing him from obtaining redress, but the first sanctions of humanity require that redress should be exacted. The protection of the helpless from spoliation is one of the cardinal duties of Christian

[1] Lovett *v.* Salem R. R. Co. 9 Allen, 557; Schierfield *v.* North Beach R. R. 40 Cal. 447; Oldfield *v.* Harlaem R. R. 14 N. Y. 310; Drew *v.* Sixth Av. R. R. Co. 26 N. Y. 49.

[2] Glassey *v.* Hestonville R. R. 57 Penn. 172.

civilization; and when those so helpless are young children, this duty is aided both by the instincts of nature and the true policy of the State. And in one aspect the care to be exercised by a driver as a prudent and skilful business man is in proportion to the apparent helplessness of the object which he sees on the road before him. A prudent and skilful driver has a right to presume that a person, apparently capable of taking care of himself will avoid the track,[1] and in such a case the driver is not chargeable with negligence if a collision ensue. But a prudent and skilful driver (and this, as the doctrine heretofore so frequently vindicated, is the true test) will slacken his speed, if it can be done prudently, if he sees a helpless person on the track; and to a driver who does not attempt this, negligence is chargeable.[2]

§ 314. *Incompatibility of such imputability with the protection thrown by the law over infants in other branches of the law of negligence.* — A child, for instance, is negligently or improperly sent by his guardians or parents to work at dangerous machinery in a factory; and he is injured, when at work, through the negligence of the proprietor of the factory in not properly advising the child of the danger, and putting round him suitable guards. Is the proprietor to be exonerated because the parents or guardians of the child were negligent in thus sending the child to work? The supreme court of Massachusetts has, as has been seen, sanctioned, though somewhat falteringly, the doctrine of imputation; but when the question came up of a child mangled in a factory through the sordid negligence of those controlling the works, the notion of the imputability of the disaster to the child's parents was not even entertained.[3] And in a touching New York case, already cited, the humanity, as well as the strong juridical sense of the judges of the appellate court, broke through the trammels of imputation by which in other issues they had been bound.[4] A little child was on the track of a railroad, with a train approaching, and the child would have the next moment been killed had not the deceased rushed in and lost his life in saving that of the child. "The important question in this case," said Grover, J., "arises upon the exception taken by the defend-

[1] Phil. & Read. R. R. *v.* Spearen, 47 Penn. St. 300; Telfer *v.* North. R. R. 30 N. J. 188.

[2] See supra, § 306–7; infra, § 389 *a*.

[3] Coombs *v.* New Bedf. Cord. Co. 102 Mass. 572. See other cases cited supra, § 216.

[4] Eckert *v.* R. R. 43 N. Y. 502.

ant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. *The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.* For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received: but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was

running, requires no discussion." It was properly held, therefore, that a railroad is to be held liable for running over one who seeks to save a little child on its track whom it is about negligently to strike. Independently of the technical ground that liability for negligence to one thus intervening to save a wandering child involves liability for negligence towards the child itself, we reach here the broad principle that the life even of a "little" child, as the child in this case is described, is regarded so tenderly by the State that those who expose themselves for its safety will be protected and their injuries redressed. The test given above by Judge Grover is fit for general application. The duty of those directing a train is, when they see a young child on the path, to use every effort to save the child's life, unless in so doing they must take measures which "constitute rashness in the judgment of prudent persons." And this brings us back to the doctrine of the text. There is no imputability of the parents' negligence to the child. Whether the child was personally negligent, is to be determined by its own capacity.[1] And those directing the train are to be held negligent if they could have avoided the collision without jeopardy to the safety of their passengers. To little children on the track they are to exercise far greater caution than to persons apparently *sui juris*. The latter may be expected to move off the track; not so the former. And hence we may cordially accept the doctrine laid down by the supreme court of the United States, that the care to be exerted to avoid collision with an infant is to be greater than that in respect to an adult. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child, a matter to be determined in each case by the circumstances of the case.[2] This view is approximated in a late case in the supreme court of New York, where a charge to the jury that a child is *sui juris* bound to exercise the same degree of caution, in approaching and crossing a railroad track, to prevent injury from an approaching train, that an adult is

[1] See supra, § 88; and see particularly R. R. *v.* Stout, 17 Wall. 657; Gray *v.* Scott, 66 Pa. St. 345.

[2] Railroad Company *v.* Gladmore, 15 Wall. 401. See also R. R. *v.* Stout, 17 Wall. 657. Infra, § 389 *a*.

bound to exercise, was held to be erroneous. It was ruled that the jury might in this view, upon the evidence, find that a child, seven years of age, injured while attempting to cross a railroad track, is not chargeable with negligence that contributed to produce the injury.[1] So in Pennsylvania it has been held negligence in a company suddenly and without notice to shoot a car over a passage way where a boy was playing, though he had been frequently warned of the danger.[2]

§ 315. *Cases where a child mischievously meddles with a machine or other dangerous agency, or with structures in public streets.* — Here another phase of facts presents itself, and a result is reached which, though differing superficially from that last stated, accords with it in principle. In the cases just mentioned, the railroad engineer, or the driver of a carriage, is held liable if by the exercise of due diligence he could have avoided running over the child. Supposing, however, a well is left open, or machinery is exposed, and a child is thereby damaged? Again we say, notwithstanding the high authority to the contrary,[3] that the negligence of the child's parents has nothing to do with the issue. That issue is, was it negligence to leave the well or machinery exposed? And this issue must be determined by the test whether such an exposure is consistent with the mode of action of a prudent and skilful business man. In applying this test, we must necessarily view the community as a mass.[4] To make an instrument that would not be dangerous if tampered with by a meddlesome child, would be impossible; and therefore a good business man does not undertake to make a machine that would not be dangerous if tampered with by a meddlesome child. In other words, it is not part of the *diligentia boni et diligentis patrisfamilias* that he should not construct a machine with which a meddlesome child might injure himself; but it is part of the *diligentia boni et diligentis patrisfamilias* that he should not negligently run over a child no matter how meddlesome. And so it is part of the diligence just spoken of, not to leave a dangerous machine (which it is not negligence to place in a private

[1] Costello *v.* Syrac., B. & N. Y. R. R. 65 Barb. 92, — disapproving of Honegsberger *v.* The Second Avenue Railroad Company, 1 Keyes, 570, and Warner *v.* The N. Y. Central Railroad Co. 44 N. Y. 465. See also Reynolds *v.* Stout, 2 N. Y. Supreme Ct. 644.

[2] Gray *v.* Scott, 66 Pa. St. 345.

[3] Holly *v.* Bost. Gas Light Co. 8 Gray, 123.

[4] See supra § 88, 108, 216.

apartment) in a public street where it may be hustled by passengers or meddled with by idlers or children.[1]

§ 316. In conformity with this view, it has been correctly held in Illinois, in a case where a city negligently left an open tank in a street into which fell a young child, negligently suffered to go at large, that the city was liable.[2]

[1] See supra, § 112; infra, § 344.

[2] City of Chicago *v.* Mayor, 18 Ill. 360.

"The eighth instruction, which was refused," said Clason, J., "was this: If the jury believe that the tank in question was reasonably safe and secure for all such persons as ordinarily make use of the streets of a city, the city is not liable for an injury resulting from its insufficiency to prevent or guard against an extraordinary occurrence or accident." This instruction was asked, and, if given, would have been understood in reference to the particular facts of this case, and would have been equivalent to instructing the jury that this child had no business in the streets, and that the city was not liable for negligently leaving the tank in such a condition as to endanger the lives of such children in the streets. Such, we apprehend, is not the law, and the court properly declined so to instruct the jury. A large majority of children living in cities depend upon the daily labor of both parents for subsistence, and these parents are unable to employ nurses, who may keep a constant and vigilant eye momentarily upon their children; and we cannot hold, as a matter of law, that every time a child, four years of age, steps into the street unattended, the mother is guilty of such negligence as would authorize every reckless or careless driver to run over and trample it down with impunity, or as would authorize the city to expose traps and pit-falls in every corner of the streets, in which a child may be drowned or maimed. Such a rule of law ought to depopulate a city of all its laboring inhabitants. In this, as in all other cases, it must be left to the jury to determine whether the parents of the child have been guilty of negligence in suffering the child to be in the streets. On this point the court justly instructed the jury in the last instruction. The jury were then told that they must believe, from the evidence, that the defendant was guilty of negligence which produced the injury, in not keeping the tank in repair, and also that its parents were not guilty of negligence; and in another part of the charge they were told that the burden of proof rested on the plaintiff to show, not only negligence on the part of the city, but also that the parents were not negligent. We are satisfied that the court committed no error in its decision of the questions of law which arose on the trial." . . . .

See also Robinson *v.* Cone, 22 Vt. 213.

So also where it appeared the defendant had placed upon the sidewalk a number of barrels and counters, in a tottering condition, occupying a considerable portion of the walk, and interfering with a safe passage after night. One of the counters was eighteen or twenty feet long, and a boy of twelve years, in going from his work to dinner, in passing put his hands upon this counter, apparently making a motion to jump on it, when it fell on him, fracturing his leg. It was ruled, that the negligence of the

§ 317. In an English case,[1] where the defendants placed the shutter of their cellar against the wall of a public street, and the dress of a child who was playing in the street and jumping off the shutter, caught the corner of the shutter which fell upon and injured him, it was ruled that the defendants were not liable to an action by the child; the ground of the decision being that the leaning of a shutter against a wall on a public street is not in itself negligence.[2]

§ 318. So, in a case in Connecticut,[3] where the defendant set up a gate on his own land, by the side of a lane, through which the plaintiff, a child between six and seven years of age, with other children in the same neighborhood, were accustomed to pass from their places of residence to the highway and *vice versa;* the plaintiff in passing along such lane, without the permission of any one put his hands on the gate and shook it, in consequence of which it fell on him and broke his leg; in an action for this injury, the court instructed the jury that if the defendant was guilty of negligence, he was liable for the injury, unless the plaintiff in doing what he did was guilty of negligence or misbehavior, or of the want of proper care and caution; and in determining this question they were to take into consideration the age and condition of the plaintiff, and whether his conduct was not the result of childish instinct and thoughtlessness. After a verdict for the plaintiff, it was held that the charge was unexceptionable. The result is to be sustained on the hypothesis that the jury found that the gate, in view of the fact that it fenced a road where children were constantly passing, was not built with sufficient care.

§ 319. On the other hand, in a case in Maine,[4] where the

defendant in placing the obstructions on the sidewalk, and permitting them to remain there for several weeks, was much greater than the carelessness of the boy. Kerr *v.* Forgue, 54 Ill. 482.

[1] Abbott *v.* Macfie, and Hughes *v.* Macfie, 33 L. J. Ex. 177.

[2] A similar case is reported in Illinois, where it was held that the negligence of parents in suffering a child to stray away from home, whereby it was killed by the fall of a counter leaning against a fence, was, under the circumstances of this case, to be greater than that of the city in reference to the counter. City of Chicago *v.* Starr, 42 Ill. 174. Similar in principle: City of Chester *v.* Porter, 47 Ill. 66. The decision is right, though the reason wrong.

[3] Birge *v.* Gardiner, 19 Conn. 507.

[4] Brown *v.* E. & N. A. R. R. Co. 58 Me. 384.

evidence was that a child of nine years, in the daytime, jumped from a sidewalk, lawfully constructed by a railroad company on the side of its railway bridge, upon a properly constructed draw, when the same was being lawfully closed, that no liability attached to the road. And the conclusion is correct on the principle above expressed. If the railroad company, in view of the kind of travel likely to pass on the walk, exercised due prudence in its construction, no liability for negligence could arise. "The plaintiff," said Appleton, C. J., "was nine years old. If of age to be permitted to go in the streets without parental or other supervision, he must be held responsible for a degree of care and prudence proportionate to his age. He was passing the railroad bridge. The draw had been opened. When he reached there it was closing. The defendants were in the exercise of their indisputable right to open and close. The plaintiff saw that every second rendered his passage less dangerous, and that if he would but wait, it would be accomplished without risk, or even the possibility of danger. The defendants were in no respect negligent. They were making as rapidly as they could the passage each moment the safer, and were not bound to anticipate the folly or the rashness of others. If they had stopped the motion of the draw, the danger of the plaintiff, if he attempted to leap, would have been increased. The defendants were not required by the statute to have a flag or flag-man stationed at the draw to give notice. If they had done so, neither the flag nor the flag-man could have given him greater information or clearer warning than his own vision gave him. It was in the daytime. And notice was unnecessary when all was known without notice. His companions leaped upon the approaching draw. He followed, and, failing in his attempt, was caught in the draw and injured. While the grave injury the plaintiff received may be regretted, no reason is perceived why the defendants should be called upon to afford compensation therefor, when they were without fault and in the due exercise of their chartered rights."

§ 320. The same reasoning prevents us from accepting as authoritative an English case,[1] where the evidence was that the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which when in motion was dangerous. The

[1] Mangan *v.* Atterton, L. R. 1 Ex. 239.

plaintiff, a boy four years old, by direction of his brother, seven years old, placed his fingers in the machine, while another boy was setting it in motion, and the fingers were crushed. It was held that the plaintiff could not maintain an action. But why? Was it not negligence to leave a dangerous machine in a public place, exposed to the usual throng of visitors and passengers? Certainly the rule is that a person so exposing in such a place anything likely to prove dangerous if touched or jostled, even by children, is liable for the consequences.[1]

§ 321. So, also, we must refuse assent to a New York case, where a child three years of age was injured by falling from a piazza — a part of the private premises of the family in a tenement house, — known to the child's parents to be defective and insecure, by reason of natural decay; and where this was held a case of contributory negligence on the part of the parents in charge of a child too young to exercise discretion to avoid such a danger.[2] It may have been that the defendant was not responsible for the repair of the piazza; and if so no negligence was imputable to him. But if he owned the tenement house, filled with families, and was bound to keep it in due repair, no negligence of parents in permitting a child to run out on the piazza could protect him, if through his fault the child fell from the piazza. He knew to what use the house was to be put, and he was bound to keep it in a suitable condition for such use.[3]

§ 322. More difficulty arises, however, in respect to a much criticised Massachusetts case,[4] where it was held that a child living in her father's house could not recover from a gas company for an injury occasioned to her at night by the gas escaping from the company's pipes in the street opposite the house (over which pipes neither child nor father had any control), without proving ordinary care both on her own part and on the part of her father; and it was further held, that evidence of the father's neglect to give to the company notice of the leak seasonably, so that it could be repaired before night, was proper for the consideration

[1] See this illustrated, supra, § 112; and see R. R. *v.* Stout, 17 Wall. 657.

[2] Flynn *v.* Hatton, 4 Daly, 552; reported in full in 43 How. Pr. 333.

[3] See also Bronson *v.* Southbury, 37 Conn. 199; B. & I. R. R. *v.* Snyder, 18 Ohio (N. S.), 399; Lynch *v.* Smith, 104 Mass. 52.

[4] Holly *v.* Boston Gas Light Co. 8 Gray, 123. See comments in 4 Am. Law Rev. 405.

of the jury, as tending to show such want of care as would defeat the action. If it is the duty of a prudent gas company only to repair a leak upon notice, then there was no breach of duty by the defendant in this case, and hence no liability for injuries occurring from leakage. But this was an ordinary issue of *culpa levis*, with which the question of imputability had nothing to do.[1]

§ 323. *Where the plaintiff's negligence is remote and the defendant's proximate; or, in other words, where the plaintiff's negligence was a condition of the injury but not its juridical cause.* — Here again we must fall back on the positions already taken with regard to juridical causation.[2] A person, it has been seen, is juridically the cause of an injury, if his act (or omission), supposing that there is no intervention of disturbing independent moral agents, would be, according to the usual course of events, followed by such injury. This, as is shown by a distinguished contemporary German jurist,[3] is the true application of Aristotle's exposition of causation, which is accepted by the Roman jurists, and is equivalent to the distinction between proximate and remote causation, as expressed by Anglo-American law. It is not enough to say, to apply this definition to negligence, that if the injury would not have occurred had it not been for the plaintiff's negligence, then the plaintiff's negligence is to be regarded as the cause of the injury. Of multitudes of antecedents can it be truly said, that if they had not existed the injury would not have occurred; yet of how few of such antecedents can it be said that they juridically caused the injury. A gas company, to take one of the cases which the present discussion presents, neglects to close a leaking pipe, and in consequence of the leakage the plaintiff is injured. Had the plaintiff not been in the town at the time, — had the plaintiff never been born, — had there been no gas in the particular pipe, — had there been no gas company in the particular town, — had gas never been invented, — then the injury would not have occurred. That the plaintiff was in the town at the time, — that the plaintiff existed, — that there was gas in the leaking pipe, — that there was gas in the town, — that there was gas anywhere, — all these are *conditions*

[1] See supra, § 45.

[2] See supra, § 73.

[3] Bar, Lehre von Causalzusammenhange, Leipzig, 1871. See supra, § 302.

of the plaintiff's injury, without which it would not have existed; but no one of these is a juridical cause of the injury. To constitute a juridical cause, therefore, it is not sufficient to say that it is enough that without the existence of the condition in question the injury would not have taken place.

§ 324. Nor, advancing a step further, can we say, as has already been shown,[1] that a condition involving negligence on part of the defendant is to be regarded as a juridical cause of the injury. The negligence, to make it a juridical cause, must be such that by the usual course of events it would result, unless independent disturbing moral agencies intervene, in the particular injury. It may be negligence in me to cross a railroad on a level when by going a mile round I could cross on a bridge. Yet this negligence, in case I am struck by a train, is not the juridical cause of the collision, if I keep a good look-out when I reach the road. I may negligently leave my goods in a warehouse; but this is not the juridical cause of their destruction, if such destruction comes, not as a natural and usual result of my negligence, but through the negligence of another who sets fire to the warehouse. In other words, to put the same doctrine into the language made familiar to us by the adoption of the terms "proximate" and "remote," my "remote" negligence will not protect a person who by "proximate" negligence does me an injury.

§ 325. The Roman law, as expressed in the Code and expounded by modern European jurists, takes this distinction: *Dolus* (and by this we may understand gross negligence as well as fraud) *culpa pejor est;* and again, to take a maxim of scholastic origin, *injuria non excusat injuriam*.[2] It is true that the Roman law recognizes certain aspects of what we call contributory negligence. A man, as has just been said, who puts himself in a place where an injury in the usual course of events will occur to him, cannot recover damages from the person through whom such injury proceeds, supposing the latter by due prudence could not have avoided inflicting the injury. So a person who knowingly contributes to a wrong cannot recover from a co-contributor. But he who is unconsciously negligent is entitled to redress for all injuries inflicted on him by another, when by the latter the inflic-

[1] Supra, § 97.

[2] See this defended in Alston v. Herring, 11 Exch. 822.

tion of such injuries could have been avoided by the exercise of the *diligentia boni et diligentis patrisfamilias.*

§ 326. From this rule the English law does not materially depart. On the one side it refuses relief in all cases where the plaintiff may be viewed as consenting to the injury.[1] On the other side, to adopt the language of a learned judge, "Although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong."[2] In other words, if the plaintiff's negligence was such as, in the ordinary process of things, by the mode of causation already stated, to have led to the injury, the plaintiff loses his right of suit.[3]

§ 327. Of the principles thus expressed the following illustrations may be selected: —

The plaintiff negligently left his donkey in a highway, tied by the fore feet. The defendant, when he could by ordinary care have avoided the donkey, drove over it in broad daylight and killed it. Had this occurred in the night-time, then such a result may be spoken of as one which in the usual course of events would have been likely to have occurred, and which a prudent driver could not have ordinarily avoided. But it is not in the ordinary course of events that a prudent driver, on a wide highway, in broad daylight, should strike down a donkey whose power of escape was thus obviously limited. And so it was held that the plaintiff's negligence in thus leaving the donkey on the highway could not be set up by the defendant as a defence.[4]

§ 328. So where oysters were negligently left in the channel of

[1] Carr *v.* Lancashire & Yorkshire Ry. Co. 7 Ex. 707; Austin *v.* Manchester, &c. Ry. Co. 10 C. B. 454; McCawley *v.* Furness, L. R. 8 Q. B. 59.

[2] Parke, B., in Bridge *v.* Grand Junction R. C. 3 M. & W. 248; cited in Broom's Com. 688; Radley *v.* London & N. W. R. R., L. R. 9 Exch. 71; Davies *v.* Mann, 10 M. & W. 548; North *v.* Smith, 10 C. B. N. S. 572; Martin *v.* Great North. R. C. 16 C. B. 179; Cornman *v.* East. Co. R. C. 4 H. & N. 781; Marriott *v.* Stanley, 1 M. & Gr. 568; Schloss *v.* Heriott, 14 C. B. N. S. 59; Senior *v.* Ward, 1 E. & E. 385; Witherly *v.* Regent's Canal Co. 12 C. B. N. S. 2; Wyatt *v.* Great West. R. C. 6 B. & S. 709, cited by Broom, p. 689; and cases cited supra, § 300.

[3] Lygo *v.* Newbold, 9 Exch. 302; Clayards *v.* Dethick, 12 Q. B. 439; Thompson *v.* N. E. R. R. 2 B. & S. 106; and cases cited supra, § 300.

[4] Davies *v.* Mann, 10 Mec. & W. 549.

a navigable river, it was held that the officers of a vessel, knowing them to be there, were not justified in running against and destroying them, when there was room to pass without so doing.[1]

§ 329. So it is no defence to a suit for damages in a collision, that the plaintiff was at the time in a place where he ought not to have been, if the collision could have been avoided by the defendant in the exercise of the ordinary prudence which belongs to a good business man in his particular sphere.[2]

§ 330. So it is no defence to an action for negligently driving against the plaintiff's wagon that the plaintiff placed his horse and wagon in a street in a city transversely to the course of the street, while loading articles which a city ordinance permits to be loaded only in vehicles placed lengthwise and as near as possible to the sidewalk.[3]

§ 331. So, generally, the fact that plaintiff, at the time he suffered injuries to his person or property from the negligence of defendant, was doing some unlawful act, will not prevent a recovery, unless the act was of such a character as would naturally tend to produce the injury. Thus, the fact that the plaintiff was driving his cattle to market on Sunday, in violation of the statute, when they were injured by the breaking down of a defective bridge which the defendant was bound to maintain, would not prevent a recovery upon due proof of defendant's negligence in constructing and maintaining such bridge.[4]

[1] Mayor of Colchester *v.* Brooke, 7 Q. B. 377.

[2] Greenland *v.* Chapin, 5 Exch. 243; Vennell *v.* Garner, 1 Cro. & Mee. 21; Tuff *v.* Warman, 2 C. B. (N. S.) 740; 5 C. B. (N. S.) 573; Inman *v.* Reeh, L. R. 2 P. C. Ap. 25.

[3] Steele *v.* Burkhardt, 104 Mass. 59.

[4] Sutton *v.* Wauwantosa, 29 Wisc. 21. (But see infra, § 381 *a*.)

Dixon, C. J.: "It is very clear that the plaintiff, in driving his cattle along the road and over the bridge, to a market, on Sunday, was at the time of the accident in the act of violating the provisions of the statute of this state, which prohibits, under a penalty not exceeding two dollars for each offence, the doing of any manner of labor, business, or work on that day, except only works of necessity or charity. R. S. c. 183, § 5. It was upon this ground the nonsuit was directed by the court below, and the point thus presented, that the unlawful act of the plaintiff was negligence, or a fault on his part contributing to the injury, and which will preclude a recovery against the town, is not a new one; nor is the law, as the court below held it to be, without some adjudications directly in its favor, and those by a judicial tribunal as eminent and much respected for its learning and ability as any in this country. Bosworth *v.* Swansey, 10 Met. 363; Jones *v.* Andover, 10 Allen, 18. A

§ 332. On the other hand, where the injury is a consequence flowing, in the usual course of events, from the plaintiff's misconduct, then the plaintiff cannot recover. Thus, an intoxicated person, or a person driving recklessly, cannot recover for an injury caused by a collision with an object negligently on the road, because in the usual course of events, a person who is drunk, or drives recklessly, precipitates himself against whatever is in his way; and as something, in any ordinary drive, will be in his way, the question of the defendant's negligence is immaterial.[1]

§ 333. So, where a train or carriage is approaching at full speed, a person who recklessly throws himself in its way cannot recover, because, in the natural course of events, the train or carriage being in that condition, its speed cannot be suddenly arrested, and a person darting unexpectedly on its path may be injured.[2] But it would be otherwise if it could be shown that the driver saw the person approaching in time to have prudently avoided a collision.

So, to anticipate a point to be hereafter discussed, a person who crosses a railroad without looking out, cannot recover in cases where the engineer, unless by the exercise of more than the ordinary care of a good and skilful engineer, could not have avoided a collision; nor is the company responsible for not taking

similar, if not the very same principle, has been maintained in other decisions of the same tribunal. Gregg *v.* Wyman, 4 Cush. 322; May *v.* Foster, 1 Allen, 408. But in others still, as we shall hereafter have occasion to observe, the same learned court has, as it appears to us, held to a different and contradictory rule in a class of cases which it would seem ought obviously to be governed by the same principle. . . . .

"In direct opposition to the above decisions are the numerous cases decided by the courts of other states, the supreme court of the United States, and the courts of Great Britain, which have been so diligently collected and ably and forcibly presented in the brief of the learned counsel for the present plaintiff. Of the cases thus cited, with some others, we make particular note of the following: Woodman *v.* Hubbard, 5 Foster, 67; Mahoney *v.* Cook, 26 Penn. 342; Norris *v.* Litchfield, 35 N. H. 271; Corey *v.* Bath, Ibid. 530; Merritt *v.* Earle, 29 N. Y. 115; Bigelow *v.* Reid, 51 Maine, 325; Hamilton *v.* Goding, 55 Ibid. 428; Baker *v.* The City of Portland, 58 Ibid. —; Kerwhacker *v.* Railway Co. 3 Ohio St. 172; Phila. &c. Railway Co. *v.* Phila. &c. Tow Boat Co. 23 How. (U. S.) 209; Bird *v.* Holbrook, 4 Bing. 628." See this point further discussed infra, § 381 *a*.

[1] Butterfield *v.* Forrester, 11 East, 60; Clayards *v.* Dethick, 12 Q. B. 446. See supra, § 307.

[2] Woolf *v.* Beard, 8 C. & P. 373.

extreme precautions not required by such ordinary care, nor by statute.[1]

§ 334. *Distinction between "comparative" and "contributive" negligence.* — It is true that a conflict of opinion has arisen which has expressed itself in the antithesis between "contributive" negligence, and "comparative" negligence. "Comparative" negligence is declared to be the test in Illinois and Georgia; "contributive" negligence is declared to be the test elsewhere.[2]

[1] Stubley *v.* London & N. W. R. R., L. R. 1 Exch. 20, and cases hereafter cited. See supra, § 212; infra, § 635.

[2] Thus in O'Keefe *v.* Chicago, R. I. &c. R. R. 32 Iowa, 467, Cole, J., thus speaks: —

. . . . "The well established law of this state is, that in an action to recover damages for the negligent act of the defendant, the plaintiff will not be entitled to recover if his own negligence contributed directly to the injury. In other words, this court recognizes and applies the doctrine of 'contributory negligence,' and not the doctrine of 'comparative negligence.' The latter doctrine obtains only in Illinois and Georgia, while the former obtains in the other states, and also in the federal courts. The modification complained of ignored the doctrine of contributory negligence, and substantially told the jury that plaintiff might recover without regard to his negligence, if the defendant could have prevented the injury with the exercise of ordinary caution. The doctrine of the modification goes even farther than that of comparative negligence; for, by the latter, a plaintiff can only recover when he shows the defendant's negligence to have been greater by comparison than his, while by the modification the plaintiff might recover if the defendant did not exercise ordinary caution, although the plaintiff's intestate may have been guilty of a much greater negligence in laying himself down, in a condition of intoxication, near to or upon the track. A similar modification was made to the second instruction. In each there was no error."

On the other hand, in C. & N. W. R. R. Co. *v.* Sweeney, 52 Ill. 330, we have the following from Breese, C. J.: . . . . "As some misapprehension seems to exist in respect to the extent this court has gone in discussing the doctrine of comparative negligence, it may not be amiss to review the several cases on that subject.

"But for that purpose it is not necessary to go back of the case of the Galena & Chicago Union Railroad Co. *v.* Jacobs, 20 Ill. 478, as in that case all the previous decisions were reviewed and commented upon.

"Jacobs's case was the first case announcing the doctrine of comparative negligence, the received rule prior thereto having been, if there was any negligence on the part of the plaintiff, he could not recover. The English cases on this point were cited and commented on.

"In Jacobs's case this court said that the question of liability did not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties, for all care or negligence is, at best, but relative, the absence of the highest possible degree of care, showing the presence of some negligence,

§ 335. *Plaintiff's prior negligence no excuse to defendant's subsequent negligence.* — Yet when we come to analyze the cases,

slight as it might be. The true doctrine, therefore, this court thought, was, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff. The degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, the plaintiff should not be deprived of his action.

"Following this case was the case of the Chicago, Burlington & Quincy Railroad Co. *v.* Dewey, 26 Ibid. 255, where it was said, it was not enough to show a railroad company guilty of negligence, but it must appear that the injured party was not also negligent and blamable. Each party must employ all reasonable means to foresee and prevent injury, and if the negligence of one party is only slight, and that of the other appears gross, a recovery may be had.

"In the case of the same railroad company against Hazzard, Ibid. 373, the ruling in Jacobs's case was commented on and approved.

"The next case in the order of time, having reference to injury to persons, is that of the Chicago, Burlington & Quincy Railroad Co. *v.* Triplett, Adm'r, 38 Ibid. 482, in which it was again said, although the plaintiff may have himself been guilty of some degree of negligence, yet if it be but slight, in comparison with that of the defendant, it should be no bar to his recovery. No inflexible rule can be laid down. Each case must depend upon its own circumstances, and the question of comparative negligence must be left to the jury, under the supervision of the court.

"The next case was Gretzner's case, before cited, 46 Ibid. 74. See also Chicago & Alton Railroad Co. *v.* Pondrom, 51 Ill. 333.

"The rule is the same in actions against railroad companies for injuries to personal property.

"The deceased was within the rule. His conduct, as compared with that of the railroad company, was, under the circumstances, reckless, — as we believe, after an attentive examination of the evidence in the record. His own conduct contributed vastly more to his death than any negligence established against the defendants. Had he used ordinary prudence, the casualty could not have happened. Having failed in this, the company ought not to be liable." . . . .

In C. & N. W. R. R. *v.* Sweeney, in which the above opinion was given, the evidence was that the deceased was a track repairer in the service of another company, with whose road the defendants' track connected at the place where the accident occurred, and with which the deceased was very familiar, having worked about it, or near it, for several years. It was a point where the tracks were numerous, and engines constantly in motion in great numbers. While cars were being pushed by an engine, the deceased stepped upon the track in front of the moving cars, with his back to them, and his cap drawn closely over his ears, not looking about to see if there was danger, which he could easily have discovered, and of which he should have been aware from his long familiarity with the place. The cars overtook him, and he was struck and killed. He was held to have been guilty of such gross negligence, and even recklessness, that there could be no recovery, unless a greater degree of negligence on the part of the company

even when ruled by courts holding to "contributive" as distinguished from "comparative" negligence, we find a result reached in general harmony with that of the Roman and English law.[1] Of this the following instances may be noticed.

§ 336. A traveller who, in meeting another, turns to the left, but causes no injury to others thereby, is held in New Hampshire to be not so negligent as to be barred from maintaining an action against the town for negligence in respect to a defective highway.[2]

§ 337. So it is said in Massachusetts to be the law that though the party injured saw an obstruction or defect in advance, this is not conclusive evidence of negligence on his part in moving forward.[3] He may be forced to choose between meeting the obstacle or defect and encountering some other evil, and he may be required to make this choice under circumstances of surprise or shock in which coolness of judgment and accuracy of perception cannot be exacted.[4] He may have reasonable cause to believe he can pass the obstruction or danger in safety, and may use reasonable care in the attempt; in which case he is not precluded from recovering by the fact that the attempt was made by him.[5]

could be shown. According to the evidence there seemed to have been no negligence on the part of the company. The switchman walked along the track about sixty feet in advance of the moving train and saw the track was clear. While doing so, the deceased stepped on the track between him and the train, with his back to the train, without noticing its approach, although it was in plain view. So soon as he was seen by the switchman, he shouted to him, but he gave no heed to the warning. The train was moving very slow, and had the usual complement of men about it, who attended to their duties, and the engine bell was ringing continuously. There was no watch upon the forward car to give warning, but there was an engineer and fireman, and a switchman and his assistant, who was in a favorable position alongside of the train to receive signals from the switchman on the track and communicate them to the engineer. But even if a man stationed on the forward car would have been more serviceable in giving warning, his not being there was held slight negligence compared with the recklessness of deceased.

For a case in which the doctrine of "comparative" negligence is maintained, see Chic., B. & Q. R. R. v. Gregory, 58 Ill. 272.

[1] See in addition to the cases hereafter cited, Louisville & N. R. R. 5 Bush, 1; Louisville, C. & L. R. R. v. Mahony, 7 Bush, 255.

[2] Gale v. Lisbon, 52 N. H. 174.

[3] Thomas v. West. Union Tel. 100 Mass. 157; Mahoney v. Met. R. R. 104 Mass. 73.

[4] See supra, § 94.

[5] Horton v. Ipswich, 12 Cush. 488; Mahoney v. Met. R. R. 104 Mass. 73.

§ 338. We have the principle of the text expressly vindicated in Massachusetts in a case, already noticed, in which it was decided that the plaintiff's negligence and lawlessness in placing his wagon crosswise instead of lengthwise in the street was no defence to a suit brought by him against a party who negligently ran into the wagon. "It is further contended," said Chapman, C. J.,[1] "that these plaintiffs are compelled to prove their own violation of law in order to establish their case, and therefore the action cannot be maintained. The substance of the ordinance referred to is, that, for loading and unloading packages weighing less than five hundred pounds, wagons shall stand lengthwise of streets, and not crosswise, under a prescribed penalty. The plaintiffs were loading packages of less weight, and their wagon was standing crosswise of the street. But proof of the weight of these packages was not necessary. In this respect the case is like that of Welch *v.* Wesson, 6 Gray, 505, where the plaintiff was injured while he was trotting his horse illegally. It is unlike the cases of Gregg *v.* Wyman, 4 Cush. 322, and Way *v.* Foster, 1 Allen, 408, which were decided in favor of the defendant, upon the ground that the plaintiff was obliged to lay the foundation of his action in his own violation of law. Even in those cases, the violation of law by the plaintiffs would not have justified an assault and battery or a false imprisonment of the plaintiffs. In this case, if the packages had weighed more than five hundred pounds, the position of the team would have been the same. In Spofford *v.* Harlow, 3 Allen, 176, it was held that, though the plaintiff's sleigh was on the wrong side of the street, in violation of law, the defendant was liable, if his servant ran into the plaintiff carelessly and recklessly, the plaintiff's negligence not contributing to the injury. And it is true generally, that, while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries wilfully or carelessly done to him, and to which his own conduct has not contributed." [2]

[1] Steele *v.* Burkhardt, 104 Mass. 59.

[2] See, as holding that where the negligence of the defendant was the proximate, and that of the deceased the remote, cause of the injury, the action is maintainable, notwithstanding the deceased may not have been entirely without fault, Lane *v.* Atlantic Works, 107 Mass. 104; Britton *v.* Inhab. 107 Mass. 347; Hibbard *v.* Thompson, 109 Mass. 288.

§ 339. So, in an interesting case in Connecticut, it appeared that the plaintiff sent her son who was between eleven and twelve years of age, with a horse and wagon, on business, a distance of six miles, the road crossing a narrow but rapid stream which was subject to sudden overflows in heavy rains. The boy was shown to be a good driver and acquainted with the road. A sudden freshet in the river had raised the water so that it flowed over the bridge, and for a little distance over the approaches to it, to the depth of about a foot. The bridge was low, and both the bridge and the approaches to it were without a railing, and the road near the bridge was narrow and difficult to turn in. In attempting to cross, the boy in some manner got into the river with the horse and wagon, and both the boy and the horse were drowned and the wagon broken. In a suit against the town to which the bridge belonged, for the damage to the horse and wagon, it was held by the supreme court, that the town was guilty of negligence in leaving the bridge and the approaches to it unprotected by a railing, and that the plaintiff was not guilty of such want of ordinary care in sending such a boy in charge of the horse and wagon upon such a road as would bar her recovery. It was further said that it was enough if the boy exercised reasonable care according to his age and capacity, although he might not have exercised the judgment of a person of mature age.[1]

[1] In giving the opinion of the court, Judge Foster said :—

"The defendants insist that, from the levels taken by their engineer, the water must have set back much farther than fifteen feet across the highway on the South Britain side of the river, and that there was much deep water to be passed through before getting within fifteen feet of the bridge, and that no one exercising ordinary prudence would have continued driving toward the bridge through such a depth of water; and the case of Fox *v.* Glastenbury, 29 Conn. 204, is pressed upon us as an authority decisive against the plaintiff's right to recover. Whether the jury considered that great changes might and probably did occur in this highway from heavy rains and freshets, happening after this accident, and before these levels were taken, or whether they chose to rely on the positive testimony of witnesses as to the extent of the water over the highway, it is not our province to determine. If there was no water to obstruct the travel, till one arrived within fifteen feet of the bridge, there would be no want of ordinary care in driving to that point. When there (and to this point, and beyond, this young lad was apparently traced by the marks of the wagon), he must either have attempted to turn round, which was so difficult from the narrowness of the way that he failed to accomplish it and was swept off by the current, or he kept on and reached the bridge, or a point

§ 340. Still more strikingly is this put by the same court in a case of earlier date. It was there said: "A remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demands this; and it is no answer for the neglect to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances — to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence. *A boy enters a dooryard to find his ball or arrow, or to look at a flower in the garden; he is bitten and lacerated by a vicious bull-dog; still he is a trespasser, and if he*

near the bridge, and there, for want of a sufficient railing, met the like melancholy fate.

"The facts in the case of Fox *v.* Glastenbury, which was well considered, and with the principles of which we are entirely satisfied, differ essentially from the case at bar. There, the persons who drove across the causeway lived in the neighborhood and were well acquainted with the way. This boy had never been here but once before, and lived at a distance. Knowing of the difficulty in the crossing at Glastenbury, the parties stopped and asked advice as to proceeding. They were told it would be dangerous unless they had a very gentle horse. This lad suspected no danger, no friendly voice gave him warning; and though one of the selectmen of the town lived on the road near the bridge, no obstruction was placed across the road to stop travellers. The parties at Glastenbury reached the bridge near the centre of the causeway in safety; and here they could have safely stopped until assistance, which was within call, came if any was needed to enable them to go back, the residue of the causeway being so entirely submerged that the line of the road was not visible. Still they went on, and as the danger increased and their horse stopped, instead of allowing him to do so and calling for help, which was still near at hand, they urged him on, and the result was the accident. For this unfortunate lad there was no safe stopping place when once in the danger, no ear to hear his cry for help, no opportunity from the character of the road to turn round and go back. That he exercised all the discretion and judgment of an adult is not to be presumed; his age forbids it. But we have already said that we find no want of ordinary care and prudence on the part of the plaintiff in sending him to perform this service, for we deem him competent for its performance." Bronson *v.* Southbury, 37 Connect. 699.

had kept away would have received no hurt. Nevertheless, is not the owner of the dog liable? A person is hunting in the woods of a stranger, or crossing a pasture of his neighbor, and is wounded by a concealed gun, or his dog is killed by some concealed instrument, or he is himself gored by an enraged bull; is he in all these cases remediless because he is there without consent? Or, an intoxicated man is lying in the travelled part of the highway, helpless, if not unconscious, must I not use care to avoid him? May I say that he has no right to incumber the highway, and therefore carelessly continue my progress, regardless of consequences? Or, if such a man has taken refuge in a field of grass or a hedge of bushes, may the owner of the field, knowing the fact, continue to mow on or fell trees as if he was not so? Or, if the intoxicated man has entered a private lane or by-way, and will be run over if the owner does not stop his team which is passing through it, must he not stop them? These are instances, I am aware, of personal rights; but what is true in relation to the person is essentially true in relation to dumb animals and other kinds of property, though perhaps the rule would be applied in the latter case with less strictness. It must be so, that an unnecessary injury negligently inflicted in these and kindred cases is wrong, and therefore unlawful. If assailed, a man may do what is necessary to defend himself against the assault, but he may not become himself the assailant. He may defend his property, but he may not, in doing it, make use of unnecessary violence and cease to use all care as to the injury which he inflicts. The duties which men owe to each other in society are mutual and reciprocal, and faulty conduct on the part of another never absolves one from their obligations, though such conduct may materially affect the application of the rule by which this duty is to be determined in the particular instance." In conclusion the court said: "It must not be supposed that we have overlooked or slightly examined the numerous respectable authorities cited by the defendant's counsel. Some of them, as we view them, only add strength and force to the views which we have expressed; some rest on principles wholly distinct from those involved in the doctrine we maintain, while others, and especially those from the New York reports, if we understand them, are at variance, as we most fully believe, not only with our own law but with the common law of England."[1]

[1] Isbell *v.* N. Y. & N. H. R. R. 27 Conn. 404.

§ 341. So also in Vermont, it is said by the supreme court: "This leads our investigation to the question whether an action can be sustained when the negligence of the plaintiff and the defendant has mutually coöperated in producing the injury for which the action is brought. On this question the following rules will be found established by the authorities: When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause' is meant negligence at the time the injury happened. In such case no action can be sustained by either, for the reason 'that as there can be no apportionment of damages, there can be no recovery.' So, where the negligence of the plaintiff is proximate, and that of the defendant is remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason of the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These principles are sustained by Hill *v.* Warren, 2 Stark. 377; 7 Met. 274; 12 Met. 415; 5 Hill, 282; 6 Hill, 592; Williams *v.* Holland, 6 C. & P. 23. *On the other hand when the negligence of the defendant is proximate and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault.* This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if at the time when the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. So in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse on the road, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train; and if for want of that care the injury arose, they are liable." [1]

§ 342. To the same effect we may consider the following observations of Depue, J.: [2] "Negligence is a relative term, depend-

[1] Trow *v.* Vermont Cent. R. R. 24 Vt. 497. A similar line is followed in Ohio: Kerwhacker *v.* The C. C. & C. R. R. Co. 3 Ohio St. 172; and in Maryland: N. C. R. R. *v.* State, 29 Md. 553; B. & O. R. R. *v.* Trainer, 33 Md. 342.

[2] New J. Exp. Co. *v.* Nichols, 3 N. J 439; *S. C.* 3 Vroom, 166.

ing upon the circumstances under which the injury was received, and the obligation which rests on the party injured to care for his personal safety. A person crossing a railroad track, though rightfully there, must be on the alert, to avoid injury from trains that may happen to be passing; so one walking along the carriage way of a public street must exercise caution, to escape being run over by vehicles; but a person walking along the sidewalk, which is appropriated exclusively to pedestrians, need not observe the same care as would be required of him in crossing the track of a railroad, or walking along the carriage way of a crowded street. If he observes as much care and circumspection as would serve to protect him from such dangers as are usually incident to walking on the sidewalks, he cannot be said to have omitted such precautions as would preclude him from maintaining an action for injuries he may receive from wagons wrongfully there, unless it appear that, being aware of the extraordinary risks to which he is exposed, he rashly places himself in the way of danger." [1]

[1] No doubt we still meet with the old terms, as the following, in Ward *v.* M. & St. P. R. R. 29 Wisc. 144, by Dixon, C. J.: . . . . "A single further observation appears to be necessary in order to correct an inaccuracy of expression found in Potter *v.* The Chicago & Northwestern Railway Co. 21 Wisc. 377, and which seems most likely to have led to the error here complained of. The closing sentence of the opinion in that case reads thus: 'Negligence, proximate or contributing to the injury, however slight, prevents recovery.' If by this is understood, as was doubtless intended, any neglect or omission, however slight, to use ordinary care, or a slight want of such care, contributing to the injury, the expression is quite right and no correction is required. But the language is not adapted to conveying this idea with accuracy. It is susceptible of a different construction, and that slight negligence, as the lowest of the three degrees defined by law, will defeat the action, which is incorrect. All this is explained in Dreher *v.* The Town of Fitchburg, 22 Wisc. 675, where it is said that the law does not attempt to measure how little or how greatly the plaintiff may have fallen short of using ordinary care, but that any failure in this respect, or a slight want of such care, contributing directly to the injury, will forbid a recovery." But if *levissima culpa* excludes recovery, in a suit for negligent injuries, there could be no recovery in such suit, for in no case can the plaintiff exclude the idea of *levissima culpa*. The same observation applies to some expressions of the supreme court of Ohio, in P. S. R. R. Co. *v.* Stallman, 21 Ohio St. 1, to the effect that it is error to charge the jury that if the plaintiff, by his own fault, has contributed to his injury, the defendant must then show that he was without fault himself; and that no man can be shown without fault, unless he has done all in his power to

§ 343. Hence, also, it is no defence to a suit for negligence in letting fall a keg from a window that the plaintiff was negligently in the street;[1] nor to a suit for destroying cattle, that the cattle were trespassers;[2] nor to a suit for leaving a dangerous machine in a place frequented by children, that a child hurt in the machine was a trespasser;[3] nor to a suit for running over a traveller, that the traveller was unlawfully on the road;[4] nor to a suit for neglecting a patient, that the patient's neglect was that which the physician neglected.[5]

avoid the injury. P. S. R. R. Co. *v.* Stallman, 22 Ohio St. 1.

So in Stiles *v.* Geesey, 71 Pa. St. 441, Read, J., says: "We have taken in brief the defendant's statement of his defence, which fairly raises the question of contributory negligence. 'It is an incontestable principle that where the injury complained of is the product of mutual or concurring negligence, no action for damages will lie. The parties being mutually in fault there can be no apportionment of the damages. The law has no scales to determine in such cases whose wrong-doing weighed most in the compound that occasioned the mischief:' per Woodward, J., 12 Harris, 469. The question presented to the court or the jury is never one of comparative negligence, as between the parties; nor does very great negligence on the part of a defendant so operate to strike a balance of negligence as to give a judgment to a plaintiff whose own negligence contributes in any degree to the injury." Wilds *v.* Hudson River Railroad Co. 24 N. Y. 432.

What Judge Woodward and Judge Reed here declare as sufficient to bar recovery is not a *prior* negligence by plaintiff, but a joinder or concurrence of plaintiff and defendant in the act by which the plaintiff was injured. The same reply may be made to the argument of Christiancy, C. J., in Lake Shore R. R. *v.* Miller, 25 Mich. 277.

[1] Corrigan *v.* Sugar Refinery, 98 Mass. 577.

[2] Corwin *v.* N. Y. & E. R. R. 13 N. Y. 42; Sheaf *v.* Utica R. R. 2 N. Y. Supreme Ct. 388; Fanning *v.* Long I. R. R. 2 N. Y. Supreme Ct. 585; and other cases cited infra, § 396.

[3] R. R. *v.* Stout, 17 Wall. 657.

[4] See infra, § 388.

[5] Hibbard *v.* Thompson, 109 Mass. 288; infra, § 787. See generally, in addition to authorities cited in succeeding sections, Davies *v.* Mann, 10 M. & W. 546; Radley *v.* London & N. W. R. R., L. R. 9 Exch. 71; Ch. & Alt. R. R. *v.* Pondrom, 51 Ill. 333; State *v.* Balt. & O. R. R. 24 Md. 84.

In New Jersey Railroad Company *v.* Palmer, 33 N. J. 90, the plaintiff was a passenger on the defendants' steam ferry and railroad from New York to Newark, by the ten o'clock P. M. boat. The boat had come up close to the bridge on the Jersey City side, and had been fastened by the chains to the bridge, and the front chains on the boat had been let down, and the plaintiff was in the act of stepping from the boat to the shore, in the immediate rear of the other passengers when his foot was caught between the boat and the bridge, and badly crushed. Held, that the plaintiff was not guilty of want of ordinary care, although at the very instant of stepping from the boat to the bridge he did not examine particularly to see

§ 344. *Distinction between injuries inflicted wantonly on a trespasser by another person, and injuries he inflicts on himself when meddling with a machine inadvertently exposed.* — An important distinction has been already observed,[1] which it is necessary to reiterate in order to avoid some confusion of juridical expression. It is negligence for me to run down even a trespasser when by proper care I could avoid him. It is otherwise, however, with regard to the meddling by strangers in my absence with my machinery or other property of such character. I can readily, in exercise of the ordinary diligence, keep myself from injuring a person meeting me on the highway, or even on my own grounds. But I cannot, by the exercise of such diligence, produce a machine or construct a building in meddling with which an intruder may not be hurt. Hence the same grade of diligence which could avoid the one injury could not avoid the other.[2]

if there was a vacant space between the boat and the bridge.

[1] See supra, §§ 112, 315.

[2] See infra, § 761.

The topic in the text is discussed in Hargrave *v.* Deacon, 25 Mich. 6, by Campbell, J. as follows: . . . . "The cases cited from 10 Allen draw the line very clearly. In Sweeney *v.* Old Colony & Newport R. R. Co. 10 Allen, 368, a railroad company was held liable to a person having occasion to cross the track on a crossing made by the company expressly to afford means of passing between two public roads, because having built the crossing and placed a flagman there for that purpose, and the flagman having assured the party injured he could cross in safety, there was more than a permission, and a distinct invitation to cross. In Elliott *v.* Pray, 10 Allen, 378, a trap-door being left open directly in the way of persons going up-stairs to premises leased by the owners to other parties, one who was thus induced to enter on his way to the upper rooms, where he had lawful occasion to go, was held entitled to an action. But in Zoebisch *v.* Tarbell, 10 Allen, 385, where a person fell down a trap-door, where he had no lawful occasion to be, he was held to have no cause of action, and the previous railroad case was referred to for the statement of doctrine to sustain the latter decision. And in Frost *v.* Grand Trunk R. W. Co. 10 Allen, 387, a person who, being informed by a stranger that he would have to look after his baggage, left the car and fell into an open cattle-guard, was held not entitled to recover for the injury. These are fair illustrations of the general course of American decisions, as shown by other cases cited as well as some not referred to, and we have selected them as decided by the same court, and indicating therefore no clashing of opinions.

"The English decisions are also quite uniform. The rapid increase in the use of dangerous machinery has made it necessary to legislate, and very stringent rules have been made in regard to fencing it. But these rules have not been regarded as applicable so as to change the common law beyond their plain purpose. They have been

§ 344 *a*. *Negligence by agents imputable to principal.* — A principal who acts through an agent is, as has been seen, liable for his agent's negligence when in the sphere of his service.[1] And this applies to the doctrine of contributory negligence.[2]

construed liberally, but they have been held to be alterations and not affirmations of the common law, which did not hold any one liable for the use of dangerous machinery, merely because it was dangerous to approach it. In Coe *v.* Platt, 5 L. & Eq. 491, affirmed in 11 L. & Eq. 556, a young woman being in a factory was injured by the machinery. The statute was passed for the safety of young people and children employed in working factories, and while extending its protection to all other persons, only covered in terms the case where the machinery was in use for manufacturing. It was held in both courts that while the mill was not so employed the statute did not apply; and as there was no common law liability for the damage, there could be no recovery.

"In Lygo *v.* Newbold, 24 L. & Eq. 507, a woman whose goods were in charge of a freight carrier was permitted by his cartman, while on the way, to get up and ride with him on the load. The cart breaking down, and an injury occurring both to her person and to the goods, it was held she could not recover for the personal injury because she had no right upon the cart beyond the driver's permission, which was no contract, as his employment was for carriage of goods only, and the act was merely permissive and of favor. Pollock, Ch. B., intimated that as her getting upon the cart without authority was a cause of the accident, she might even be liable to an action of trespass herself for the results of her act. But all agreed that she could have no recovery beyond the injury to the goods. So in Southcote *v.* Stanley, 38 L. & Eq. 295, a visitor in a house was not held entitled to recover for injuries from his opening a defective glass door; the court distinguishing between setting a pitfall with an intention to injure, and the result of a neglect whereby injury happens in such a case.

"In Stone *v.* Jackson, 32 L. & Eq. 349 (S. C. 16 C. B. 199), where a woman, going across private property from one highway to another, fell into an excavation, and the case was allowed to go to the jury on the suggestion of the judge that the way where she went might possibly be a public footway, it was held the evidence had no tendency to show any public right, and the verdict was set aside.

"The case of Lunt *v.* London & N. W. R. W. Co., L. R. 1 Q. B. 277, was somewhat like the case in 10 Allen, 368. A person in a private way on one side of the track had occasion to go into a public way on the other side, which was guarded by a gate in charge of a gate-keeper, and the keeper, who was in defendant's employ, being asked if the line was clear, said 'Yes, come on,' and opened the gate. Plaintiff drove his cart over, and it was struck by a train. It was held, the keeper, as the authorized agent for that purpose, had invited plaintiff to cross, and the company was responsible. In deciding the case, care was

[1] See supra, § 157.

[2] Schular *v.* Hudson Riv. R. R. 38 Barb. 653.

II. CONTRIBUTORY NEGLIGENCE AS TO SPECIAL CASES.

§ 345. 1. *Trespassers.* — It has just been said that there is an important distinction to be taken between the case of a trespasser who is wantonly injured when trespassing, and a trespasser who, by his own meddlesomeness in interfering with an agency comparatively innocent, brings injury on himself. This proposition will be now more fully illustrated.

§ 346. *A trespasser, notwithstanding his trespass, may have redress for negligent injuries inflicted on him.* — In such case the maxim applies, *injuria non excusat injuriam.*[1] Even though he is liable to an action for the injury which he does, he does not necessarily forfeit his right of action for an injury which he has sustained,[2] *ex. gr.* by falling into a hole newly excavated on defendant's premises, adjoining to a public way, and rendering it unsafe to persons lawfully using the way with ordinary care.[3]

§ 347. *Spring-guns.* — An illustration of this principle may be found in the case of spring-guns. The owner of open land has no right to plant in it spring-guns by which ordinary trespassers may be wounded.[4] Hence, in an English case,[5] the defendant, for the protection of his property, some of which had

taken not to decide what the consequences would have been had the gatekeeper not been acting in the line of his employment, when the duty to warn might, as intimated, have been one of humanity and not of agency."

[1] Alston *v.* Herring, 11 Exch. 822; Dimes *v.* Petley, 15 Q. B. 276; Roberts *v.* Rose, L. R. 1 Ex. 82; Davies *v.* Mann, 10 M. & W. 546; Augusta, &c. R. R. *v.* McElmurray, 24 Georg. 75; R. R. *v.* Stout, 17 Wall. 659; Reynolds *v.* Stout, 2 N. Y. Supr. Ct. 644; Hott *v.* Wilkes, 3 B. & A. 304; Birge *v.* Gardiner, 19 Conn. 507; Morrissy *v.* Wiggins Ferry Co. 43 Mo. 380. Thus a passenger who insisted on riding on the outside of a coach, though requested by the driver to take his seat inside, was held entitled to recover for injuries caused by the negligence of the driver, the position of the plaintiff not having contributed to the accident. Keith *v.* Pinkham, 43 Me. 501. See other cases cited supra, § 323 *et seq.* and infra, § 354, 388.

[2] Degg *v.* Midland R. R. 1 H. & N. 780.

[3] Barnes *v.* Ward, 9 C. B. 392, 420; In re Williams *v.* Groucott, 4 B. & S. 149, 157; Binks *v.* South Yorkshire R. C. 3 B. & S. 244; Hounsell *v.* Smyth, 7 C. B. N. S. 731; Hardcastle *v.* South Yorkshire R. C. 4 H. & N. 67. With Barnes *v.* Ward, supra, compare Stone *v.* Jackson, 16 C. B. 199; Holmes *v.* North Eastern R. C. L. R. 4 Ex. 254; Indermaur *v.* Dames, L. R. 1 C. P. 274; R. R. *v.* Stout, 17 Wall. 657.

[4] State *v.* Moore, 31 Conn. 479; Gray *v.* Coombs, 7 J. J. Marsh. 478.

[5] Bird *v.* Holbrook, 4 Bing. 628, cited 1 Q. B. 37; Wootton *v.* Dawkins, 2 C. B. N. S. 412. See also Judgm., Mayor *v.* Brooke, 7 Q. B. 339.

been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot, the defendant was held liable in damages. It is true that in a subsequent case this decision was doubted,[1] because it proceeded on the ground, that setting spring-guns without notice was, independently of the statute then in force, an unlawful act; though the earlier English cases indicate that even at common law, before the statute, persons without notice could recover for damages thus received.[2] In this country, while a house may be thus protected from burglars, no man has a right to place on his land any instruments to injure persons merely straying on such land.[3]

§ 348. *Application of other dangerous agencies, such as fire and steam.* — The same rule exists, as will soon be abundantly shown, as to the application of dangerous agencies, such as fire and steam, to trespassers. It is no defence to the reckless running down of cattle that the cattle were trespassing on the road;[4] nor to the reckless striking of a traveller by a locomotive, that the traveller was loitering on the track;[5] nor to the negligent injury of a passenger, that he was trespassing in a car.[6] In other words, where the defendant has been guilty of a breach of duty — public or private — producing the damage complained of, he cannot excuse himself on the ground of a prior negligence of the plaintiff.[7]

[1] Judgm., Jordin *v.* Crump, 8 M. & W. 789, where the court agree in opinion with Gibbs, C. J., in Deane *v.* Clayton, 7 Taunt. 489, which was an action for killing plaintiff's dog by a spike placed by defendant *with notice*.

[2] See Jay *v.* Whitefield, cited 3 B. & A. 308; Townsend *v.* Wathen, 9 East. 277.

[3] See supra, § 340; State *v.* Moore, supra; Gray *v.* Coombs, supra; Johnson *v.* Patterson, 14 Conn. 1.

[4] See infra, § 397 *et seq.*

[5] See infra, § 388.

[6] See infra, § 354.

[7] See Collis *v.* Selden, L. R. 3 C. P. 495; Seymour *v.* Maddox, 16 Q. B. 326; Southcote *v.* Stanley, 1 H. & N. 247; Corby *v.* Hill, 4 C. B. N. S. 565; Chapman *v.* Rothwell, E., B. & E. 168, 170; Bolch *v.* Smith, 7 H. & N. 736; Wilkinson *v.* Fairrie, 1 H. & C. 633; White *v.* Phillips, 15 C. B. N. S. 245; Brass *v.* Maitland, 6 E. & B. 470, 484; Farrant *v.* Barnes, 11 C. B. N. S. 553; Hutchinson *v.* Guion, 5 C. B. N. S. 149; R. R. *v.* Stout, 17 Wall. 657; Balt. & O. R. R. *v.* Boteler, 38 Md. 568.

The cases on this point are thus ably classified in the opinion by Sargent, J., in State *v.* Manch. & L. R. R. 52 N. H. 528: —

"In Scott *v.* Dublin & Wicklow R. Co. 11 Irish Com. Law, 377, it was held that the plaintiff cannot recover unless the injury was caused by the negligence of the defendant, nor even

§ 349. *Distinction between invitation and license.* — "Being on the premises by invitation of the occupier," says Mr. Camp-

then, if he has so far contributed to the accident, by want of ordinary care, that but for that the accident would not have happened; but strictly, even in that case, the plaintiff is not precluded from a recovery, if the defendant might, by ordinary care, have avoided the consequences of the plaintiff's neglect. This is said by Judge Redfield, in his Law of Railways (5th ed.), vol. 2, p. 256 (*236), to be a full and correct statement of the law deducible from the cases.

"This doctrine has been held to be law, though not perhaps to the full extent, in Massachusetts, in Spofford *v.* Harlow, 3 Allen, 176, where it is said, by Chapman, J., that a party may be acting in violation of some particular statute, and still be under the general protection of the law. A third person has no right, merely because he is thus in fault, to run into him and injure him carelessly and recklessly; and see Parker *v.* Adams, 12 Met. 415, 419; Lovett *v.* Railroad Co. 9 Allen, 557, 562; Welch *v.* Wesson, 6 Gray, 505; Fisk *v.* Wait, 104 Mass. 71; Kearns *v.* Sowden, Ibid. 63, note; Steele *v.* Burkhardt, Ibid. 59; and also, to a certain extent, in New Hampshire, in Norris *v.* Litchfield, 35 N. H. 271, where it is held that 'the fact that the plaintiff is a trespasser or violator of the law does not of itself discharge another from the observance of due and proper care towards him; neither will it necessarily preclude him from a recovery against a party guilty of negligence;' and see Corey *v.* Bath, 35 N. H. 530; and Gale *v.* Lisbon, 52 N. H. 174.

"In Connecticut, it is held that the negligence of a party, which precludes his right to recover for an injury suffered through the negligence of another, must be a direct and actual, and not merely a constructive, wrong; and this wrong must be the proximate cause of the injury, and not merely the remote and incidental cause of it. Isbell *v.* Railroad Company, 27 Conn. 393; 2 Redf. on Railways, 255 (*235). This is a leading and well considered case.

"It is said, on page 404, Ellsworth, J., delivering the opinion, that 'a remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this, and it is no answer for the neglect of it, to say that the complainant was first in the wrong, since inattention and accidents are, to a greater or less extent, incident to human affairs. Preventive remedies must, therefore, always be proportioned to the case in its peculiar circumstances — to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it.' . . . .

"So, in Vermont, it is held that if the negligence of the defendant is proximate, and that of the plaintiff remote, the plaintiff may recover for the injury; and that 'if the plaintiff were guilty of negligence, or even of positive wrong, ... the corporation are yet bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train, and if for the want of that care the injury arose, they are liable.' Trow *v.* Railroad Company, 24 Vt. 487; Robinson *v.* Cone, 22 Vt. 213.

"In Ohio, the same doctrine is

bell, in his Treatise on Negligence,[1] "is distinguished from being there by his mere license, in which case the occupier is liable, like any other person whom the licensee may meet upon his premises, for ordinary negligence only. And such negligence would be inferred if there were anything in the nature of a *trap* upon the premises known to the owner, and of which he failed to warn the person who obtained his permission to go there.[2] It is not, perhaps, easy in all cases to distinguish the circumstances which imply an *invitation* from those which imply a mere license; and the only guide on this point will be a close study of the decided cases.[3]

held: Kerwhacker *v.* C. C. & C. Railroad Co. 3 Ohio St. 172, before cited. See also Railroad Co. *v.* Elliott, 4 Ohio St. 475. And in Indiana: Wright *v.* Brown, 4 Ind. 95; Railroad Co. *v.* Caldwell, 9 Ind. 397; and Railroad Co. *v.* Adams, 26 Ind. 76; and in Illinois: Railroad Co. *v.* Still, 19 Ill. 499; and in Kentucky: Railroad Co. *v.* Collins, 2 Duvall, 114; and in Missouri: Morrissey *v.* Wiggins Ferry Co. 43 Mo. 380; Brown *v.* Railroad Co. 50 Mo. 461, where it is held, Wagner, J., delivering the opinion, that railroad companies are under the same obligations with other persons to use their own property so as not to hurt or injure others; and though a person be injured while unlawfully on their track, or contribute to the injury by his own carelessness or negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, they are liable for damages for the injury.

"So, in Alabama: Foster *v.* Holly, 38 Ala. (N. S.) 76; and also in Maryland: Railroad Co. *v.* The State, 36 Md. 366, where it is held, Bowie, J., delivering the opinion, that 'where a person walking on a railroad track is run over and killed by an engine belonging to the railroad company, the company is responsible in damages for such killing, though the deceased was guilty of a want of ordinary care and prudence in so walking on the track, provided it appear that the accident would not have occurred if the agents of the railroad company had used, in running the engine which occasioned the killing, ordinary prudence and care in giving reasonable and usual signals of its approach, and in keeping a reasonable look-out.' And in that case the negligence of the plaintiff was held to be the remote cause, while that of the defendant was the proximate and immediate cause of the injury. 1 Redf. on Railways (5th ed.), 571, 572." . . . .

[1] London, 1871, § 32.

[2] Southcote *v.* Stanley, 1 H. & N. 247.

[3] "Of those in which *invitation* has been inferred, I shall instance Nicholson *v.* Lancashire & Yorkshire Ry. Co. 34 L. J. Ex. 84; Indermaur *v.* Dames, L. R. 1 C. P. 274, and 2 C. P. 311; Smith *v.* London & St. Katherine Docks Co., L. R. 3 C. P. 326; Holmes *v.* N. E. Ry. Co., L. R. 4 Ex. 254; Chapman *v.* Rothwell, El., Bl. & El. 168. [This was a case on demurrer. Declaration stated that deceased fell through a trap-door negligently left open, &c. in a passage. In the case of Paddock *v.* N. E. Ry. Co. 18 L. T. N. S. 60, a person coming on business to a railway goods' depot, and

"The principle appears to be that *invitation* is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it. A case where the common interest is not at first obvious, but yet was held sufficient to infer invitation, was that of Smith *v.* London & St. Katherine Dock Co.,[1] where the damage occurred by reason of a gangway, provided by the company for access to a ship lying in the dock, being left in an insecure condition. The sufferer had come on board at the invitation of one of the ship's officers. The ground of decision was that the providing of access to the ships for the crews and all who had business on board was within the undertaking of the company, for which they received consideration in the dues authorized to be taken from the ship-owners. *Invitation*, therefore, in the technical sense of the word, as employed in this class of cases, differs from invitation in the ordinary sense — implying the relation between host and guest. In the case of host and guest, it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by business relations. The guest must take the premises as he finds them, with any risk owing to their disrepair; although the host is bound to warn his guest of any concealed danger upon the premises known to himself."[2]

§ 350. *But a trespasser who meddles with an instrument not in itself dangerous cannot recover damages for the injuries his meddlesomeness has brought on himself.* — On this point it is now

following in the dark as nearly as possible the directions of a servant of the company, fell into a coal receiver, a deep place occupying the width between the rails where coal-wagons were standing. The exchequer chamber held that there was a case for a jury. But in a very similar case to the last, where the plaintiff in the dark fell down an ordinary staircase, he was nonsuited. Wilkinson *v.* Fairrie, 1 Hurlst. & C. 633.] In the case of Axford *v.* Prior, C. P. 14 W. R. 611, a person coming to see a friend at a public-house fell through a hole in the parlor, which was being repaired. There seems to have been contradictory evidence whether he was warned or not. He was held, after verdict, entitled to damages. In the above cases, except Fairrie's case, there seems to be present both the elements of invitation and of something like a trap." In the following a mere license has been inferred: Bolch *v.* Smith, 7 H. & N. 736; 31 L. J. Ex. 201; Sullivan *v.* Waters, Irish C. L. R. 460; Gautret *v.* Egerton, L. R. 2 C. P. 371.

[1] L. R. 3 C. P. 326.

[2] Southcote *v.* Stanley, 1 H. & N. 247.

necessary only to refer to prior sections where the position as just stated is vindicated at length.[1]

§ 351. *Owner of premises not liable for damages caused by incidental imperfections of paths or buildings on which trespassers intrude.* — No man can be expected to make his house or grounds a thoroughfare; and hence there is no liability on my part for damages which an intruder may sustain from decayed floors, or defective paths on which he may stumble when trespassing within my inclosure.[2] Nor does the fact that his mission was innocent make any difference. Hence it has been correctly held, where the clerk of a retail merchant went down into a cellar that was being excavated by the landlord of the merchant, to recover a lady customer's hat, that for an injury to him by a falling wall he could not recover from the party doing the work, nor from the landlord.[3]

§ 352. *Visitors entering or leaving premises by passages other than those allowed.* — A person visiting another's premises must go by the way such other designates. To attempt to approach or leave by any other way than that designated makes the visitor, if there be anything to indicate that such other way is not intended to be used, a trespasser; and in case he is injured by the imperfection of such passage, he cannot recover damages from the owner.[4]

§ 353. 2. *Passengers on railways. Reciprocal relations of carrier and passenger.* — It will be hereafter seen that the element of insurance, which by Anglo-American law enters into contracts by common carriers for the transport of goods, does not touch such contracts for the transport of passengers. It will also be shown that the duty of the common carrier of passengers is that of the *bonus et diligens paterfamilias*, in other words, as has been seen,[5] it is the duty of a good business man skilled in the particular duty he has in charge. The duty of the passenger is reciprocal. He must conform to the rules the carrier prescribes for the safety of the common enterprise. He must do

[1] See supra, § 109, 110, 112, 315, 340, 344.

[2] Infra, § 824–5. See Gautrat *v.* Egerton, L. R. 2 C. P. 371.

[3] Lamparter *v.* Wallbaum, 45 Ill. 444.

[4] Chapman *v.* Rothwell, E., B. & E. 168; Hounsel *v.* Smith, 7 C. B. (N. S.) 738; Elliott *v.* Pray, 10 Allen, 378; Zoebisch *v.* Tarbell, 10 Allen, 385; Sweeney *v.* R. R. 10 Allen, 368; Bancroft *v.* R. R. 97 Mass. 275. See Stratton *v.* Staples, 59 Me. 94.

[5] Supra, § 31.

nothing, and neglect nothing, which is incumbent on him so far as concerns the maintenance of such safety. For any neglect on his part which may injure the carrier or fellow-passengers, to come to the subject immediately before us, he is liable; and for injuries to himself, caused by his own neglect, he cannot recover from the carrier.[1] When we come, however, to the question how such neglect, or "contributory negligence," is to be defined, a series of subordinate distinctions arrest us, which will now be considered.

§ 354. *Trespassers.* — Is a trespasser in a carriage subject to a different rule in this respect from a pay passenger? No doubt there is authority for maintaining that he is.[2] Certainly if a trespasser, instead of taking his seat within the carriage, in such a way that he can be seen by the carrier, secretes himself in some part of the carriage not intended for passengers, he cannot, if he be injured when in such a position, claim damages from the carrier. A carrier, in undertaking to carry passengers safely, undertakes to carry them safely if they place themselves under his direction in particular places prescribed for the purpose; and he will not be held liable for damages accruing to an interloper, who, unnoticed by him, hides in the crevices of a locomotive or in the hold of a ship. But if a trespasser take his seat openly in a carriage, in the place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser, supposing him to continue such, is not withdrawn from the protection of that law which requires that no man shall negligently injure another,[3] the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier has a right to expel the trespasser at once from the carriage. If the carrier omits to do this, and if the person in question remains voluntarily with the carrier's assent, then the trespass passes into a *quantum meruit* contract of carriage. On the one side, the person so entering the carriage is bound to the carrier for reasonable pay for the carriage. On the other side, the carrier is bound, from the time he assents thus to carry such

[1] Sullivan *v.* Phil. & Read. R. R. 6 Casey, 234; Penn. R. R. *v.* Zebe, 33 Penn. St. 525; McDonald *v.* Chic. & N. W. R. R. 26 Iowa, 124.

[2] Lygo *v.* Newbold, 9 Exch. 302. But see supra, § 345.

[3] See supra, § 345.

person, to exercise towards him the diligence, prudence, and skill of a good carrier in that particular kind of transport; in other words, the particular kind of diligence, prudence, and skill which the carrier is bound to exercise towards all other passengers. Nor can any other rule be adopted without great practical inconveniences. Who is a trespasser? Is a person a trespasser who, in neglect of the rules of the company, postpones buying his ticket in the ticket-office? Is a person a trespasser who, relying on the supposed good-will of the company, takes his seat hoping to slide through without paying fare? Is it a trespass to enter and remain in a car expecting to pay when required? If not, who can decide whether such expectation may not have been in the breast of every one who takes his seat without paying in the car?[1] Because, therefore, (*a*) no one can, without liability, injure by his negligence those specifically and with notice to himself under his charge, no matter how ill may be their deserts; (*b*) the carrier, who, instead of expelling a trespasser, permits him to remain in the carriage, enters into a contract of common carriage with such person; and (*c*) there is no test by which we can distinguish the trespasser thus taking a seat in the carriage from the *bonâ fide* traveller who expects to pay when required, we must hold that in such case the trespasser, whom the carrier does not expel from the carriage, stands, so far as concerns protection from neglect, on the same footing as the ordinary passenger.[2]

§ 355. *Free passengers.* — Is a free passenger to be placed in a different position, so far as concerns his rights to protection from neglect, from a pay passenger? This question, also, was at one time answered in the affirmative; the courts being led astray by the mistaken view of mandates which will be hereafter pointed out.[3] But there is now an almost uniform acquiescence

[1] For instance, it cannot be questioned that a person who by mistake gets on a passenger car other than the one he intended to take passage in, is a passenger on the car he is in, and is entitled to the protection the law gives to other passengers. The company is entitled to recover for the distance it carries him, and is bound to treat him with the same care as other passengers. When he is put out at his own request, the same care is to be used in putting him out as in putting out any other passenger. Col., Chic. & Ind. Cent. R. R. *v.* Powell, 40 Ind. 37.

[2] See Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 468; Wilton *v.* Middlesex R. R. 107 Mass. 108; and cases cited infra, § 641.

[3] See infra, § 485, 501, 641.

in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention, — the *diligentia* of the *bonus et diligens paterfamilias*, — in the performance of the service, even though there is no consideration for such undertaking.[1] Or, as the question is elsewhere put, the confidence accepted is an adequate consideration to support the duty.[2] Eminently is this the case with what are called "free" passengers on the great lines of common carriage. As has been already observed, there is, in such cases, not merely confidence tendered and accepted, but some sort of business consideration, though this be a mere courteous interchange of accommodations. For these and other reasons noticed under the last head, the carrier is bound to exhibit the same diligence and skill towards passengers of this class as he is to passengers who pay money for their tickets.[3]

§ 356. Even supposing that the passenger is passed "free" by mistake, he is entitled, in case of injury by negligence, to recover. In England, for instance, railroads are by statute required to carry, in certain trains, children under three years of age without

[1] See remarks of Ames, J., in Gill *v.* Middleton, 105 Mass. 479; citing Benden *v.* Manning, 2 N. H. 289; Thorne *v.* Deas, 4 Johns. R. 84; Elsee *v.* Gatwood, 5 T. R. 143; Shields *v.* Blackburne, 1 H. Bl. 158.

[2] Smith's Leading Cases, 6th ed. 193, adopted in Broom's Com. 680; infra, § 438, 641.

[3] Infra, § 436–37: Collett *v.* L. & N. W. R. R. 16 Q. B. 989; Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 468; New World *v.* King, 16 How. (U. S.) 464; Wilton *v.* Middlesex R. R. 107 Mass. 108; Nolton *v.* West. R. R. 15 N. Y. 444; Gillenwater *v.* M. & I. R. R. 5 Ind. 540; Ohio & Miss. R. R. *v.* Muhling, 30 Ill. 23. A drover, travelling with a free pass, for the purpose of taking care of his stock, has been by the supreme court of the United States expressly ruled to be a passenger for hire. N. Y. C. R. R. *v.* Lockwood, 17 Wall. 357; 1 Am. Law T. R. (N. S.) 21; so also Penn. R. R. *v.* Henderson, 51 Penn. St. 315. Union Pac. R. R. *v.* Nichols, 8 Kansas, 505, can only be sustained on the ground that the alleged "free" passenger was a servant of the company. In that case, where the company was transporting freight and messengers for an express company, and a person not in the employ of the express company went into the baggage car with the regular express messenger, not as a passenger, but for the purpose of learning the route, and assisted the regular express messenger along the route, and the conductor of the train not knowing the facts, but supposing such person to be an express messenger in the employ of the express company, allowed him to ride without paying his fare, and the baggage car turned over and the person in question was injured; it was held in an action by such person against the railway company for damages for such injuries, that the plaintiff was not a passenger, nor entitled to the rights of a passenger.

charge, and are entitled to half the fare charged for an adult in respect of all children between three and twelve years of age. The plaintiff's mother, carrying in her arms the plaintiff, a child of three years and two months old, took a ticket for herself by one of these trains on the defendants' railway, but did not take a ticket for the plaintiff; in the course of the journey an accident occurred through the negligence of the defendants, and the plaintiff was injured. At the time the plaintiff's mother took her ticket no question was asked by the defendants' servants as to the age of the child, and there was no intention on the part of the mother to defraud the company: it was held by the queen's bench that the plaintiff was entitled to recover against the defendants for the injury he had received.[1]

§ 357. *Agreement to save carrier harmless.* — It has been ruled that a passenger who receives a free passage, on a contract that he will himself assume all risks of accident, and that the company will not be liable for injuries to him occurring through negligence of itself or its servants, cannot recover damages from the company for injuries sustained by him through its servant's negligence.[2] In Pennsylvania it has been held that such a contract is no defence to an action for injuries to the person caused by negligence. The contract, however, before the court, was not gratuitous, the injured person having a drover's ticket, which the court held was given for a valuable consideration.[3] But on the general policy of the law, it is hard to see how such contracts can be sustained. It would be barbarous to say that because a passenger agreed to be neglected, a railroad company would be justified in applying to him otherwise than carefully the tremendous agency of steam.[4]

§ 358. A passenger standing with due care on the platform of a horse car, invited there by the driver and without paying fare, may recover from the company for injuries caused by the driver's negligence.[5]

[1] Austin *v.* Great W. R. R., Law Rep. 2 Q. B. 442.

[2] Kinney *v.* Central R. R. 34 N. J. (5 Vroom), 513; *S. C.* 3 Vroom, 407; Wells *v.* N. Y. Cent. R. R. 24 N. Y. 181; Perkins *v.* N. Y. C. R. 24 N. Y. 208; Welles *v.* N. Y. C. R. 26 Barb. 641; Indiana Cent. R. R. *v.* Mundy, 21 Ind. 48; Illinois Cent. R. R. *v.* Reed, 37 Ill. 484.

[3] Penn. R. R. *v.* Henderson, 51 Penn. St. 315.

[4] See cases cited infra, § 588, 641; Jacobus *v.* R. R. (S. C. Minn.) Cent. L. J. July 30, 1874.

[5] Wilton *v.* Middlesex R. R. 107 Mass. 108.

§ 359. *Passenger not chargeable with remote negligence.* — This topic, in its general relations, has been already discussed,[1] and it has been shown that he who negligently injures another to whom he owes a specific duty, cannot defend himself on the ground that the party so injured came negligently within the range of such duty. This doctrine is peculiarly applicable to the engagements of a common carrier, and as to these it may be generally declared that when the proximate cause of the injury to the plaintiff is the carrier's neglect of duty to the plaintiff, the carrier cannot defend himself by setting up such antecedent negligence of the plaintiff as is not a direct and immediate cause of the injury.[2]

§ 360. *Passenger leaning out of a carriage window.* — Is a passenger who is injured when leaning out of the window of a railroad carriage chargeable with such contributory negligence as precludes him from recovery? In other words, by so leaning out of the window does he expose himself to risks which the carrier does not undertake to cover? Certainly, in view of the closeness with which cars on double tracks and switches must necessarily pass to each other, as well as of the contingency of other objects being closely grazed, the carrier cannot be viewed as undertaking to protect the passenger from collisions except in the space occupied by the car. It is true that for a carrier to permit his road to be so constructed that his carriage passes within only an inch or two of a tunnel wall, or of trains on a parallel track, may be such negligence as will make him liable for damages to a passenger who, leaning perhaps an inch out of the window, is injured by striking against the object within whose close proximity the car is thus brought.[3] It may in such case be well argued that no

[1] See supra, § 130, 134, 335.

[2] See § 335 *et. seq.*; Chic., B. & Q. R. R. *v.* Paine, 59 Ill. 534; C. & A. R. R. Co. *v.* Pondron, 51 Ill. 333; Louisville & N. R. R. *v.* Yandall, 17 B. Mon. 586; Louisville & N. R. R. *v.* Sickings, 5 Bush, 1; Same *v.* Collins, 2 Duvall, 114; Same *v.* Robinson, 4 Bush, 507; Louisville, C. & L. R. R. *v.* Mahony, 7 Bush, 235.

[3] In accordance with this view, it has been held in Illinois, that where a passenger allows his arm, which is resting on the sill of a car window, to slightly project outside, and thereby has his arm broken in passing a freight train, that negligence of such person is remote, compared with the negligence of the company in permitting its freight cars to stand so near the track of its passenger train; and that a recovery may be had for the injury sustained. C. & A. R. R. Co. *v.* Pondron, 51 Ill. 333.

carrier, dealing with so powerful an element as steam, has a right to take such high risks. But supposing there is a foot distance between the carriage and such colliding object, can a passenger, who thrusts out his arm to this distance from the car window, recover from the company for the injury, supposing the collision to have been otherwise negligently produced by the company?

§ 361. In a leading case on this point this question is discussed as follows: "When a passenger on a railroad purchases his ticket, it entitles him to a seat in the cars. In the seat no part of his body is exposed to obstacles outside the car. He is secure there ordinarily from any contact with them. When he is thus provided with a seat, safe and secure, in the absence of accident to the train, and the carrier has a safe and convenient car, well conducted and skilfully managed, his duty is performed towards the passenger. . . . . The duty of the latter on entering the car arises, namely: that he will conform to all reasonable rules and regulations of the company of occupying, using, and leaving the cars; and, after so doing, if injury befall him by the negligence of the carrier, they must answer; if he do not so conform, but is guilty of negligence therein, and if injured, although there may be negligence on the part of the carriers, their servants, or agents, he cannot recover. . . . . A passenger, on entering a railroad car, is presumed to know the use of a seat and the use of a window: that the former is to sit in, and the latter to admit light and air. Each has its separate use. The seat he may occupy in any manner most comfortable to himself; *the window he has a right to enjoy, but not to occupy.*[1] Its use is for the benefit of all, not for the comfort of him alone who by accident has got nearest to it. If, therefore, he sits with his elbow in it, he does so without authority; and if he allows it to protrude out and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there, nor misled as to the fact that it is no part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is therefore without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken, without his ability to know whether there is danger or not approach-

[1] See as to use of windows, Gee *v.* Metropolitan R. R., L. R. 8 Q. B. 165, quoted under next head.

ing. In a case, therefore, where negligence stands confessed, or is proved to have resulted from the position voluntarily and thoughtlessly taken in a window, by contact with outside obstacles or forces, it cannot be otherwise characterized than as negligence, and so pronounced by the court. . . . . In conclusion, we have simply to reassert, that when a traveller puts his elbow or arm out of a car window voluntarily, without any qualifying circumstances impelling him to it, it must be regarded as negligence *in se ;* and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law."[1] The same view has been sustained by other courts of high authority.[2]

§ 362. No doubt, in each of the cases where such contributory negligence of the passenger has been held to prevent the passenger's recovery, the facts were such as to show that the passenger thrust out his arm to a distance which a railroad company, in pursuance of its duties as such, is not bound to keep clear. But suppose the company so lays its tracks, or builds its tunnels, or plants its posts, that passing cars will be struck if swerving an inch or two from their prescribed track? Suppose a passenger, whose arm projects this single inch from the car window, is thereby struck and injured? Can there be any question that for a railroad company to run its lines so closely is, in view of the perilousness of the dangers to be encountered, a lack of that prudence, — the *diligentia boni et diligentis patrisfamilias*, — which each business man must show in a degree proportioned to the importance and risks of the duty he undertakes? If the permitting of such close grazing of car against post, tunnel, or car on parallel line is negligence *per se ;* then the fact that the plaintiff, by the far remoter and less palpable negligence, if it be

[1] Laing *v.* Colder, 8 Penn. St. 479.

[2] See Todd *v.* Old Colony Railroad Company, 3 Allen, 18, and 7 Allen, 207; Holbrook *v.* Utica & Schenectady Railroad Company, 12 N. Y. 236; Ohio & Miss. R. R. *v.* Schiebe, 44 Ill. 460; Lafayette & Indianapolis Railroad Company *v.* Huffman, 27 Ind. Rep. 288; Indianapolis & Cincinnati Railroad Company *v.* Rutherford, 29 Ind. Rep. 82; Telfer *v.* Northern Railroad Company, 30 N. J. Law Rep. 190; Louisville & N. R. R. *v.* Sickings, 5 Bush, 5.

In N. J. R. *v.* Kennard, 21 Penn. St. 203, it was held to be the duty of the company to put wire screens to windows wherever there was risk of grazing; and that in default of this the company was liable for injuries produced by such grazing. But this was overruled in P. & C. R. R. *v.* McClurg, 56 Penn. St. 294.

such, of leaning an inch out of the window, is not precluded from recovery.[1]

§ 363. *Pressing against or meddling with door or window.* — A traveller shuts the open door of a car, when the conductor might have been called to do so, and in so doing is injured through the negligence of the company. Is the company liable for his injury? This has been answered in the negative in England, for the reason that the plaintiff had no right, in order to escape a slight inconvenience, to run any risk.[2]

[1] As illustrating this, I refer to an interesting case (Chic., Burl. & Q. R. R. *v.* Gregory, 58 Ill. 272) hereafter discussed. The deceased was a fireman on a locomotive belonging to the defendants, and while passing a station in the night-time, he was struck and killed. The circumstances showed that he was acting in the line of his duty, looking out for signals, and while so doing, and in the exercise of due care and caution, he was struck by a "mail-catcher," which had been placed near the track by the company. Two other accidents had previously occurred from the same cause, of which the company had notice. Held, the company was guilty of gross negligence in having omitted to place the "mail-catcher" a safe distance from the track.

[2] Adams *v.* Yorkshire R. R., Law Rep. 4 C. P. 739. Here the facts in detail were that the door of a carriage, in which the plaintiff was being carried as a passenger, on the defendants' railway, flew open several times through the negligence of the defendants. There was room in the carriage for the plaintiff to sit away from the door, and the train would have stopped at a station in three minutes. The plaintiff shut the door three times. The door opened a fourth time, and in endeavoring to shut it again the plaintiff fell out and was hurt. The train stopped at three stations between the time when the door first opened and the occurrence of the accident. It was ruled by the common pleas, in a view afterwards, as will be seen, sustained by the queen's bench, that, as the inconvenience that the plaintiff would have suffered if he had not shut the door was slight, and the peril incurred in his attempt to shut it considerable, the injury he suffered was not the necessary or natural result of the company's negligence, and that they were therefore not liable for such injury. In giving judgment Byles, J., said: "I am of opinion that the rule must be made absolute. I quite agree that there is a distinction between this case and that of Siner *v.* Great Western Railway Company,[1] because it cannot be doubted in this case that the defendants were negligent, and that but for their negligence the accident would not have happened. Their negligence, however, was neither the immediate nor the efficient cause of the accident; that cause was the act of the plaintiff, in trying to shut the door and resting a part of his body against it. Did, then, the defendants' prior negligence necessitate this act of the plaintiff? It has been suggested that he might have got out of the compartment, but it is at any rate plain that he might have changed his seat to another part of the compartment, or held the door

[1] Law Rep. 4 Ex. 117.

But suppose, in order to look out of a window at a coming station, the passenger presses against the door of which the window

without attempting to fasten it, and the more so as he knew by experience that the door would not remain shut. Neither of these acts would have been attended with any serious inconvenience, as he had only to wait for three minutes, by which time the train would have stopped again, and I think he had no right, therefore, to run the risk of attempting to shut the door, and the defendants are not liable for the consequences of this act. On this ground, I think that a nonsuit should be entered; but my brother Brett did right in leaving the question to the jury, so that the amount of damages might be ascertained, in case the court should decide otherwise."

In a case decided at the same period, Fordham *v.* London, Brighton & S. C. R. R., L. R. 4 C. P. 619, the evidence was that the plaintiff, a passenger by the defendants' railway, in getting into a railway carriage at a station, placed his left hand on the back of the open door to aid him in mounting the step. There was conflicting evidence as to whether there was a proper handle affixed to the carriage, to the right hand of the door. The night was dark, and the plaintiff did not see any handle. He had a parcel in his right hand. Before he had completely entered the carriage, the guard, without any previous warning, closed the door, and crushed his hand between the back of the door and the doorpost. In an action for the injury thus sustained, it was held by the court of exchequer — affirming the judgment of the majority of the court of common pleas — that there was evidence of negligence on the part of the company's servant, and no evidence of such contributory negligence on the part of the plaintiff as to entitle the defendants to a nonsuit. In giving the judgment Kelly, C. B., said: "We think the judgment of the court of common pleas in this case should be affirmed.

"The first question is whether there was negligence on the part of the defendants. The facts are short and simple. The plaintiff was getting into a railway carriage, when the guard came, and without any warning closed the door so as to throw him forward, and jammed his finger between the back of the door and the frame of the carriage. To say that that was no evidence of negligence on the part of the company's servant would be to exclude evidence which would in many cases be conclusive. Suppose the time had arrived for closing the door, the guard should have done as was done in Richardson *v.* Metropolitan Railway Company,[1] viz. give warning before closing it. Here, no warning was given, but the door was slammed to without looking to see if there was anything in the way. Upon this point the court below were unanimous; and we think they were right. Upon the second point, whether the plaintiff contributed to the accident by his own negligence, we do not say that there was not a strong case of contributory negligence. The plaintiff, no doubt, was guilty of much want of caution. Having a parcel in his right hand, he attempts to get into the carriage by placing his left hand on the back part of the door. But we must look at the whole of the evidence together. It was proved to be dark, so that the plaintiff could not see well about him. Whether there was a han-

[1] Law Rep. 3 C. P. 374, n.

dow is part, and the door, being negligently fastened, flies open, causing injury to the passenger: can the passenger recover from the company? That he can recover has been determined in England, on reasoning which cannot easily be disregarded.[1]

§ 364. *Standing on platform of car.* — What has just been said applies to standing on the platform of a car. It may no doubt be said to be negligence, viewing the term in its remotest and vaguest sense, for a passenger to stand on the platform of a car. But while there standing, if a collision occur through the company's negligence, the company cannot, as a rule, defend itself on the ground that he was standing on the platform, unless it appear that after being warned specifically of danger he recklessly persisted in staying, and unless it also appear that the injury he suffered was one which fell on him because he was in that particular position.[2]

§ 365. Of course, the special risks, which are distinctively encountered by persons standing on platforms vary with the character of the road, the probability of collision, and the speed of the train. Horse-cars passing through cities are peculiarly liable to be struck by passing wagons; yet even as to horse-cars it has been ruled that standing on the platform is not such negligence as to preclude recovery. Thus in California, it is held that the fact that the plaintiff was standing on the rear platform of a street car, with his hand on the railing, at the time his hand was injured by the negligent driving against it of the defendant's dray, is not such contributory negligence as defeats the plaintiff's right to recover.[3] So in Missouri, it has been ruled

dle or not was left in doubt. The plaintiff could not be expected to feel to the right and to the left for a handle. He placed his hand where he best could to assist himself in. We are far from saying there was not a case for the jury; but we are called upon to say, not whether there was evidence for the jury of contributory negligence on the part of the plaintiff, but whether there was such evidence as to call upon the learned judge to stop the case. We think there was not. My brother Byles, when he left the case to the jury upon the facts, evidently thought there was evidence for them. Under all the circumstances, we see no reason for disturbing the verdict. The judgment of the court below will therefore be affirmed."

[1] Gee *v.* Metropolitan Railway Co., L. R. 8 Q. B. 165. See infra, § 629.

[2] Messel *v.* Lynn R. R. 8 Allen 234. See Lambeth *v.* N. C. R. R. 66 N. C. 494; Zemp *v.* W. & M. R. R. 9 Rich. 84.

[3] Seigel *v.* Eisen, 41 Cal. 109. See R. R. *v.* Hassard, Cent. L. J. July 30, 1874; Leg. Int. June 19, 1874.

that at common law the fact that a street railway passenger voluntarily puts himself on the front platform of the car, when there is room inside, will not relieve the company from liability for injuries there received by him through the company's negligence.[1] So, in Massachusetts, it was declared, in a case already more fully cited, that for a passenger to stand on the platform of a horse-car is not negligence, when invited or permitted by the driver, even though the passage be free.[2]

§ 366. At the same time it must be remembered that to occupy exposed positions which have not been intended or designed for such occupation may be contributory negligence.[3] It becomes

[1] Burns *v.* Bellefont R. R. 50 Mo. 139. Adams, Judge, delivered the opinion of the court: . . . . "The only material question is whether, as a matter of law, the fact that the plaintiff voluntarily put himself on the front platform, when there was room inside the car, absolved the defendant from liability. This question is presented by the refused instructions asked by the defendant. The question of negligence is for a jury to decide from the facts and circumstances detailed in evidence. Whether the front platform was a more dangerous place than inside the car is not a question of law, but of fact for a jury. If it be conceded that the front platform was more dangerous, yet the plaintiff was there without any objection by the defendant or its agent. The defendant had the right to carry passengers on the platform, and passengers might stand there by the consent of defendant's agent. In this case there was no objection at all by defendant's agent to the plaintiff standing on the platform.

"In the case of McKeon *v.* Citizens' Railway Co. 42 Mo. 79, a special act of the legislature, entitled 'An act concerning street railroads in the city of St. Louis,' approved January 16, 1860, was set up as a defence in the answer, and relied on as exempting the railroad company from liability. This act provided that said 'railroad companies shall not be liable for injuries occasioned by the getting off or on the cars at the front or forward end of the car.' Under this act, if the party complaining received the injury by getting on or off at the front end, then as a matter of law, under this act, he was prevented from recovering. This railway company is not one of the street railroads referred to in that act, and is not protected by its provisions. The defendant does not plead exemption by virtue of this act, or any other act of the legislature, but looks to the common law as affording the same protection, and asks the court to declare, as a matter of law, that contributive negligence on the part of the plaintiff is to be presumed from his getting off at the front end of the car. This is not the law applicable to this case."

[2] Wilton *v.* Middlesex R. R. 107 Mass. 108.

[3] Todd *v.* Old Col. & F. R. R. R. 3 Allen, 18; 7 Allen, 207; Galena & Chicago R. R. *v.* Yorwood, 15 Ill. 468; Penn. R. R. *v.* Zebe, 23 Penn. St. 318; Jacobus *v.* R. R., Cent. L. J. July 30, 1874; Alb. L. J. Aug. 8, 1874.

therefore, in such a case, a question of fact, how far the position taken by the plaintiff was thus exposed.[1]

§ 367. In New York, by statute, a plaintiff who stands on a platform in disobedience of express notices, and unless forced to by the crowding of the cars, cannot recover for injuries sustained by the negligence of the company. It has been held, that this statute does not apply to a passenger to whom the conductor had not assigned a seat in the car, although there were seats remote from the place where he entered.[2]

In an Illinois case, the evidence was that the plaintiff, who was one of a funeral party who took passage upon a train to go a distance of twelve miles, was standing upon the steps of the platform of one of the cars, holding on to the railing, when the conductor came along collecting fare. In making change for a bank note which the passenger paid for his fare, the wind carried away the paper as it was passing from the hand of the conductor to that of the passenger. The latter, in attempting to regain it, when standing on the edge of the platform or step, lost his foothold and fell against an embankment, and was thrown back under the cars and killed. The cars were quite full, but there was standing room in all of them. It was rightly held the company was not liable.[3]

§ 368. *Passing from car to car when in motion.* — This, if followed by an injury distinctively attaching itself to the plaintiff in consequence of such exposure, bars his recovery. Yet if with the permission of the conductor he thus passes from car to car, on some proper errand, this may be regarded as an incidental risk of the duty of common carriage assumed by the carrier.[4]

§ 369. *Getting on or off a train negligently.* — To get on a train when in motion, without invitation and without necessity caused by the company, is negligence which precludes a person from recovering from the company damages for injuries sustained by him in the attempt.[5] If, however, the officers of the train

[1] Johnson *v.* W., C. & R. R. R. Co. 70 Penn. St. 357.

[2] Willis *v.* Long Island R. R. 34 N. Y. 670.

[3] Quinn *v.* I. C. R. R. Co. 51 Ill. 495.

[4] McIntyre *v.* N. Y. C. R. R. 43 Barb. 532. See Marquette *v.* Chic. & N. W. R. R. 33 Iowa, 563; Galena *v.* Chic. R. R. 15 Ill. 468.

[5] Knight *v.* Ponchartrain R. R. 23 La. An. 462; Hubener *v.* N. O. &c. R. R. 23 L. An. 492; Johnson *v.* W.,

invite a passenger to board the train when in motion, the negligence is to be imputed to them.[1]

§ 370. Negligence in getting off a train may be viewed in a variety of aspects, some of which will be now noticed. As a general rule it is negligence for a passenger to alight in a time and way not prescribed by the company.[2]

§ 371. If a passenger attempts to alight from a horse-car without any notice of his intention to the servants of the railroad company in charge of the car, and without their knowledge or being negligent in not knowing that he is doing so, the company, it is held in Massachusetts, is not liable for injuries received by him through a fall occasioned by the sudden starting of the car during his attempt.[3]

§ 372. So, where the evidence was that a steam train, upon which the deceased was a passenger, had stopped at a station and remained a sufficient length of time to enable passengers to leave it in safety, but the deceased, not availing of that opportunity, waited until the train was again in motion, and then, without the interference or suggestion of any of the employees of the company, attempted to leave the train, and, while doing so, was thrown under the cars and received injuries of which he died, it was ruled in Illinois, that there appearing to have been no mis-

C. & R. R. Co. 70 Pa. St. 357; Lewis *v.* Balt. & O. R. R. 38 Md. 588.

In Phillips *v.* Rensselaer & Saratoga R. R. 41 N. Y. 177, the plaintiff attempted to get upon one of defendants' cars, while slowly passing a station where he had bought a ticket. The platform and steps of the car were full, so that he could only get upon the lower step. A jerk of the cars threw him off, but he held on to the iron rod and ran along by the car, striving to recover his position upon the step, although the speed of the train was increasing, when he was struck by a platform near the track, and injured. It was held, on appeal, that there was such contributory negligence upon his part as justified a nonsuit; and that the facts that some one upon the train called out the station, that others were also getting upon the train, and that plaintiff himself and others had got on and off at this station when the trains were in motion, did not justify plaintiff's persistence in getting on the car when thrown from the step, without regarding objects near the track (Church, Ch. J., dissenting).

[1] Phillips *v.* Rens. & S. R. R. 57 Barb. 644.

[2] Bridges *v.* North London R. R. Co., Law Rep. 6 Q. B. 392; Ohio & M. R. R. *v.* Schiebe, 44 Ill. 460; Keokuk Packet Co. *v.* Henry, 50 Ill. 460; Ill. Cent. R. R. *v.* Able, 59 Ill. 264; Frost *v.* Grand Trunk R. R. 10 Allen, 387; Penn. R. R. *v.* Zebe, 33 Penn. St. 318.

[3] Nichols *v.* Middlesex R. R. 106 Mass. 463.

management of the train on the part of the company, it was not liable.[1]

§ 373. So, in a Massachusetts case, it appeared that the plaintiff was a passenger on the defendants' cars, and alighted from the cars at night, at a station of the defendants, on one of two platforms extending along each side of the track to a highway (which, as the plaintiff knew, crossed the railroad), and having a step at the end next the highway; that, instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and when he stepped off fell into a cattle guard dug across the track, and was injured; that the night was so dark that he felt with his feet to find the edge of the platform; and that he did nothing to ascertain what he would meet on stepping from the platform. It was held by the supreme court he was not in the exercise of due care, and could not recover.[2]

§ 374. It should be remembered, however, that although it is

[1] Ill. C. R. R. Co. *v.* Slatton, 54 Ill. 133. See also New Orleans, Jackson & Great Northern Railroad Company *v.* Statham, 42 Miss. 607, where it is held that if a passenger is sick, unable to walk, and requires assistance to get from the car, and longer delay at the station is necessary for him to be safely removed, he should give timely notice of the same to the conductor. It is further said that sick persons, and persons unable to take care of themselves, should provide for themselves proper assistance while travelling in railroad cars; it is not the duty of railroad companies to supply such assistance. (See supra, § 307). It is not, it was further said, the duty of conductors to see to the debarkation of passengers; they should have the stations announced, and stop long enough for passengers to get off.

[2] Forsyth *v.* Bost. & Me. R. R. 103 Mass. 511.

Gray, J.: . . . . "The cases of Warren *v.* Fitchburg Railroad Co. 8 Allen, 227; Caswell *v.* Boston & Worcester Railroad Co. 98 Mass. 194; and Gaynor *v.* Old Colony & Newport Railway Co. 100 Mass. 208, on which the plaintiff principally relies, are quite distinguishable from this. In each of them the injury was not occasioned by anything in the track itself, upon which the plaintiff stepped, but by being struck by an engine in motion. In the first and second cases, the acts of the defendants' agents and servants conduced to lead the plaintiff into the place of danger. And in the third case, the plaintiff had alighted upon a narrow platform, provided by the defendants for the purpose, between two tracks, one of which he must necessarily cross; and he testified that before stepping off he looked up and down the track and saw nothing approaching. But in this case there is no evidence tending to show that the defendants held out any inducement to him to cross the track in the direction in which he did, or that he took any precaution whatever."

negligence for a passenger, when a railroad has provided platforms and other conveniences for alighting, to step off at other places where the train happens to stop, yet when the company is in the habit of receiving and discharging passengers at the latter places, it cannot charge a person descending at such a place, when the train stops, with negligence.[1]

§ 375. *Alighting hastily when beyond platform.* — So when a train runs beyond its platform, on reaching a place of disembarkation, and a passenger is compelled to alight on the ground, suffering injury as a consequence, the company is liable; nor can it defend itself on the ground that the plaintiff, in the nervous hurry of the moment, descended awkwardly, and with greater circumspection and coolness might have escaped without harm. At the same time if the passenger, heedlessly and without notice, throws himself out of the car, the company cannot be made liable for his precipitancy.[2]

[1] Keating *v.* New Y. Cent. R. R. 49 N. Y. (4 Sick.) 673; Delamartyr *v.* M. & P. R. R. 24 Wisc. 578.

[2] See supra, § 93–5, 304, as to mistakes made under fright and excitement.

The authorities on this point are well grouped by Tarbell, J., in Memphis & Charleston R. R. Co. *v.* Whitfield, 44 Miss. 486.

Tarbell, J.: . . . . "Although the record presents to us a case wherein the railroad company is presumptively guilty of negligence in running past the station, in stopping at an unusual place, and in permitting a passenger to alight without assistance, under the circumstances detailed in the record; yet, if the plaintiff, in getting out, failed to observe ordinary care and prudence, in consequence of which he received the injury, he is not entitled to recover, unless the negligence of defendants was such that the accident happened, notwithstanding the care and prudence of the plaintiff. Such is the doctrine of the authorities. Angell, 559–561; 2 Redfield, § 177, p. 191; Pierce, 475; Sedgwick, 539, and cases therein cited; S. & R. 318, 320; Heil *v.* Glanding, 42 Penn. 493; 41 Miss. 131.

"The conduct of both plaintiff and defendants on that occasion, whether the latter discharged all their obligations to their passenger, or were guilty of neglect, and the character or degree of that neglect, and, also, whether the passenger acted with ordinary prudence and care, should have been distinctly, as they were substantially, submitted to the consideration of the jury, who have virtually passed upon these questions. *Vide* The E. & C. R. R. Co. *v.* Lowdermilk, 15 Ind. 120.

"Siner *v.* G. W. R. R. Co. [Law Reports for June 1, 1868, part VI.] 3 Exch. 150, is distinguishable from the case at bar in several respects. That was an excursion train, and too long for the platform. No directions were given to passengers to alight, nor was any demand made to back the cars. The passengers in the cars which overshot the platform, without de-

§ 376. In an English case, the evidence was that the plaintiff was a traveller on the defendants' line of railway by a train which arrived at night at the station for which the plaintiff was bound. The part of the platform at that station at which passengers could alight was of sufficient length for the whole train to have been drawn up alongside of it, but in addition to that part the platform extended some distance, gradually receding from the rails. When the train drew up the body of it was alongside the platform, but the last carriage, in which the plaintiff rode, was opposite the receding part of the platform and about four feet from it. The night was very dark, and the place where the last carriage stopped was not lighted, though the rest of the station was well lighted with gas. There was no express invitation given to the plaintiff by the company's servants to alight, but the train had been brought to a final stand-still and did not move on again until it started on its onward journey. No warning was given to the

manding the train to be backed, voluntarily alighted, and in doing so the plaintiff was injured. The court of exchequer held that there was no evidence for the jury of negligence in defendants, and that the accident was entirely the result of the plaintiff's own voluntary acts.

"So also is the E. & C. R. R. Co. *v.* Duncan, 28 Ind. 442, wherein the plaintiff leaped from the cars, though warned that she was leaping in a dangerous place; and the plaintiff herself testified that she voluntarily made what she regarded as a dangerous leap. It was on the 4th of July; there was a large crowd; a long excursion train, and much haste and excitement. Provision had been made for safe descent upon one side of the car in which plaintiff was, but without observing it, the plaintiff jumped from the opposite side, alighting upon a cross-tie. Held, she was not entitled to recover.

"In Jeffersonville R. R. Co. *v.* Hendricks, 26 Ind. 228, the plaintiff voluntarily leaped from the cars, while in motion, not to escape apprehended danger, but to avoid being carried further. So, in Penn. R. R. Co. *v.* Aspell, 23 Penn. 147, the courts of last resort in those cases held that the plaintiff could not recover.

"In Foy *v.* London, Brighton *et al.* Railroad Co. 18 C. B. N. S. 225, the train being longer than the platform, the plaintiff, a lady passenger, jumped from the rear car, on the advice of a porter. The court refused to set aside a verdict in her favor, for injuries thus received. *Vide* also S. & R. § 281, 283; Angell, § 547, 548."

See also Columb. & I. R. R. *v.* Farrell, 31 Ind. 408, to same effect; and see Siner *v.* Great W. R. R., Law Rep. 3 Exch. 150, 4 Exch. 117, where it was ruled that where a train overshot the platform, and the plaintiff, on alighting, having to make a descent of three feet, was hurt, the overshooting was not such negligence as to charge the defendants. See this case criticised, supra, § 363, note 2; and also in the next note. See also article in Alb. L. J., Aug. 1, 1874, p. 72.

plaintiff that the carriage was not close to the platform, or that care would be necessary in alighting. The plaintiff opened the carriage door, and, stepping out, fell into the space between the carriage and the platform, and sustained injuries, for which she brought an action against the company. It was ruled by the court of exchequer that there was evidence of negligence on the part of the defendants' servants to go to the jury. It was further declared that bringing a railway carriage to a stand-still at a place which is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, in the absence of contributory negligence on the part of the passenger, an action may be maintained.[1]

[1] Cockle *v.* London & S. E. R. R., L. R. 7 C. P. 321; following Praeger *v.* R. R. 24 L. T. N. S. 321, and qualifying Siner *v.* R. R., L. R. 4 Ex. 117; Bridges *v.* R. R., L. R. 6 Q. B. 377.

"The question," said Cockburn, C. J. (in Cockle *v.* R. R.), "is, whether these facts afford evidence to go to the jury of negligence on the part of the company's servants. We are of opinion that they do. It is difficult to reconcile all the cases on this subject. Each must, of course, very much turn on its own particular facts; but there is a recent case decided in this court which is analogous to the case now before us, and the principle of which appears to us applicable to it. The case to which we refer, Praeger *v.* Bristol & Exeter Ry. Co., though an important one, has not found its way into the regular reports. It is, however, to be found in the 24th volume of the Law Times Reports, new series, p. 105, where it is very fully and ably reported. In that case a train, in which the plaintiff was a passenger, arrived at a terminus, and was stopped fifteen or twenty feet short of the fixed buffers placed at the extreme limit to which it might have gone. The platform of the station at the end which was first reached by the train, instead of having its edge parallel with the line of rails used by the arriving trains, was levelled off into a curve, so as to allow space for a siding which there joined that line of rails. The plaintiff sat in the last compartment of the last carriage, which was drawn up opposite the curved part of the platform, so that a space of eighteen inches or two feet was left between them. A guard opened the door, but said nothing. It was a dark evening, and the station was dimly lighted. The plaintiff stepped out expecting to alight on the platform, and fell between the carriage and the platform, thereby sustaining injuries, in respect of which he brought his action against the company. Upon these facts, in the court of exchequer, Kelly, C. B. and Pigott, B., Martin, B., *dissentiunti*, held that there was no evidence of negligence to go to the jury. But the court of exchequer chamber, consisting of seven judges, were unanimously of opinion that there was evidence of negligence, and reversed the decision. As the case in question has not been

§ 377. *Passenger suddenly put to an election and leaping from car.* — If a railroad train, by negligence, alarms a passen-

more generally reported, it may be desirable to repeat the judgments pronounced on the occasion in question. Cockburn, C. J., says as follows: "I adopt most readily the formula which has been suggested as applicable to these cases, viz., that the company are bound to use reasonable care in providing accommodation for passengers, and that the passengers also are bound to use reasonable care in availing themselves of the accommodation provided for them. Therefore I agree that a passenger is bound to use reasonable care in alighting on the platform or elsewhere, when it becomes necessary for him to alight; and if this case had been referred to us on the ground of want of reasonable care in the plaintiff, it would have been an answer to say that he had not used it. The question is, whether there was a want of reasonable care on the part of the company, and I think there was not only evidence but abundant evidence of this. It appears that the construction of the railway and platform is such that a train coming to the station has to pass by a curve of the platform, and that if the carriage is stopped alongside a certain portion of the platform a considerable space is left between them, and if there were three or four carriages, probably only those near the engine could be brought up flush with the platform.

"It has been said that it is not always possible to bring up carriages to the platform at stations, and one's own experience tells us that this is true. The train may sometimes stop short of the platform, or shoot beyond it, and the passengers may, in consequence, have to alight elsewhere than on the platform. Still, the purpose always is to bring all the carriages, if possible, to a level with the platform, and therefore a railway traveller is entitled to expect that when he steps out he will step on to the platform. But I agree that if it be daylight, a man being bound to use his eyesight, if the passenger sees that the carriage is not in the ordinary position with reference to the platform, he must not complain if, there being no actual danger, he has to use a little more care than usual in getting out. If the position be such that there is some extraordinary difficulty or danger, he must consider what he will do. He may call to the servants of the company to bring the carriage into its proper position; but there may be circumstances in which it is impossible to make such an application, or he may have no opportunity of making it, or the application may be refused. It is possible that from urgent natural necessity he may be obliged to alight. Under such circumstances as these, I am far from saying that he might not have a right of action if he suffered injury while so alighting. But these considerations are not involved in the present case. The state of things here was, that whereas the carriage in which the plaintiff was would have been brought up to the platform if the train had moved further, the plaintiff got out, believing he was going to step on to the platform. Instead of that he fell between the carriage and the platform. He got out on the invitation of the guard, who opened the door, which implied an invitation to alight, and I think, also, to alight with safety. Under such circumstances a person would be justified in expecting to step on to the platform, and it was incumbent on the guard if he intended the passengers to get out,

ger, who leaps in fright from the car, the company is liable for

to warn them of the position of the platform. He gave no such warning, and the omission seems to me to amount to negligence, which is the whole question." Willes, Keating, and Brett, JJ., were of the same opinion. Mellor, J., said: "There was not sufficient light at the station to enable a person in the situation of the plaintiff to alight without exercising an unusual degree of care." M. Smith, J., said: "Whilst adhering to the case of Siner *v.* Great Western Ry. Co.,[1] I consider that case distinguishable from the present on two grounds: first, because here there was a clear invitation to alight by the guard opening the door; and, secondly, because here the danger to be incurred was not apparent. The negligence of the company consisted in drawing up the train as it was drawn up, and inviting the passengers to alight without giving them any warning of the state of the platform, there being also evidence of a want of sufficient light." Lush, J., said: "I consider that the company did not do what they might have done under the circumstances. The train was drawn up so that part of it was short of the proper platform, and an unusual space was left between the compartment in which the plaintiff travelled and the platform. The guard opened the door without giving any caution. Looking also at the time of day and the state of the light, it seems to me that it was for the jury to say whether the injury to the plaintiff was caused by the company's negligence or by other causes."

"The foregoing case appears to us in point to the present, as establishing that an invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence. It is true that, in the case before us, there was not the invitation to alight which is implied in the opening of the carriage door, as occurred in the case of Praeger *v.* Bristol & Exeter Ry. Co.[2] But it appears to us that the bringing up of a train to a final standstill, for the purpose of the passengers' alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended that he should get out if he purposes to alight at the particular station. It is not necessary here, any more than in Praeger *v.* Bristol & Exeter Ry. Co.,[2] to say what would be the effect if a passenger should alight when the danger was visible and apparent; as where a passenger gets out in broad day, trusting to his ability to overcome the difficulty. In the case before us the place where the plaintiff was left to get out was not lighted, and she could not see, and was not aware of the interval which separated the carriage from the platform, and got out believing she was about to step on to the platform. We think that the leaving a carriage which has been brought up to a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may therefore do so with safety, without any warning of his danger, amounts to negligence on the part of the company, for which, at least in the absence of contributory negligence on

[1] Law Rep. 4 Ex. 117.

[2] 24 L. T. (N. S.) 105.

the consequences.[1] And this has been extended to cases where the train negligently passes a station where a passenger is due,

the part of the passenger, an action may be maintained. The case is distinguishable from that of Bridges *v.* North London Ry. Co.,[1] on the ground that in the latter the carriage from which the passenger alighted had been drawn up in a tunnel in the vicinity of the station. In that case there was no evidence that the train had come to a final stand-still, or, in other words, arrived at the spot where the company's servants intended the passengers to alight. The question, therefore, was, whether there was evidence of anything done by the company's servants which induced the passenger to believe it had so arrived, and act on that belief. But in the present case the evidence of the conduct of the company's servants was such as to warrant the jury in finding that the train had really come to the final stand-still, and the company's servants meant the passengers to get out there or be carried on. Of course, *a multo fortiori*, the jury might find that that conduct was such as to induce the plaintiff to think so, and to act upon that belief. We are, therefore, of opinion that the rule nisi to enter the verdict for the defendants was properly discharged by the court of common pleas."

In Bridges *v.* North London R. R., L. R. 6 Q. B., above referred to, the evidence was that B. was a passenger by the defendants' railway from London to Highbury. He was a season-ticket holder, and travelled to and fro every day; he was very shortsighted. The train consisted of six carriages. B. rode in the middle compartment of the last carriage. On approaching Highbury Station from London the railway passes through a tunnel. At the farther end of the station is a broad platform, far exceeding the length of the train; then a narrow platform, about twelve feet of which is within the tunnel; then a slope of ten feet from the platform to the level of the rails; and beyond this a heap of hard rubbish extending some way into the tunnel, about a foot lower than the platform. The train stopped at the station, the last two carriages being still in the tunnel, and the carriage in which B. rode being opposite the heap. A passenger who rode in the next carriage, as the train stopped, heard "Highbury" called out at the far end of the platform; he got out, and then heard a groan in the tunnel; and on going back he found B. lying on the heap with his legs between the wheels of the carriage, but they had not passed over him. The passenger also heard, "Keep your seats," called out, and the train then moved farther forward towards the platform. One of B.'s legs was broken, and he had received internal injuries of which he died. It was after dark; there was a lamp within the tunnel near the entrance, about twenty-eight feet from where B. was found; the tunnel was full of steam.

The judge nonsuited the plaintiff, giving her leave to move to enter a verdict, "If the court considered there

[1] See supra, § 93-5, 304, for cases; and see Eldridge *v.* Long Is. R. R. 1 Sandf. 89; Ingalls *v.* Bills, 9 Met. 1; Southwest R. R. *v.* Paulk, 24 Ga. 356; Jones *v.* Boyce, 1 Stark. 493; R. R. *v.* Aspell, 23 Penn. St. 147.

[1] Law Rep. 6 Q. B. 377.

and where the passenger, in the anxiety of the moment, jumps from the car at an unsuitable place.[1] Thus in a New York case,[2] the evidence was that the plaintiff, by the company's negligence, was suddenly put to an election between leaving the cars while they were moving slowly, or submitting to the inconvenience of being carried by the station where she desired to stop: it was ruled that the company was liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably. It is a proper question, it was ruled, for a jury, whether the adoption of the former alternative is ordinary care and prudence, or a rash and reckless exposure to peril. Under such circumstances, where the decision is required to be made upon the instant, the passenger, it was declared, ought not to be held to the most rigid accountability for the highest degree of caution.[3]

was any evidence of negligence on the part of the defendants which could properly be left to the jury." The court of queen's bench refused a rule. On appeal to the exchequer, it was held, by Bramwell, Channell, Pigott, and Cleasby, BB., that there was not evidence on which a jury could properly have found for the plaintiff, and the nonsuit was therefore right. By the same judges it was ruled that the question of whether there was contributory negligence on the part of the deceased was open on the above reservation. On both points Kelly, C. B., Willes, and Keating, JJ., dissented. But the whole court held that the calling out the name of the station is not in itself an invitation to the passengers to alight; whether it is so or not must depend on the circumstances of each particular case.

[1] Ill. Cent. R. R. *v.* Able, 59 Ill. 131.

[2] Filer *v.* N. Y. Cent. R. R. 49 N. Y. 47.

[3] In ruling this case Allen, J. said: . . . . "The fact is undisputed that the plaintiff received the injury while attempting to get off the cars while they were in motion, making very slow progress, and the jury have found that she was directed by the brakeman on the cars to get off, and was told by him that they would not stop or move more slowly to enable her to do so. That it was culpable negligence on the part of the defendant to induce or permit the plaintiff to leave the train while in motion, and a gross disregard of the duty it owed her, not to stop the train entirely and give her ample time to pass off with her luggage, is not disputed. Notwithstanding this, if the plaintiff did not exercise ordinary care, and might with ordinary care and prudence have avoided the injury, she is precluded from recovering. . . . . Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured by leaping from them, and the attempt to leave the cars, under such circumstances, even at the instance of the railway servants, would have been a wanton and reckless act, and no recovery could have been had against the defendant. In Lucas *v.* New Bedford & Taunton R. R. Co. 6 Gray, 64, the plaintiff had accompanied a friend to the cars and remained with her until the train had started, and then of her own volition attempted to

§ 378. *Starting before passengers have disembarked.* — So a company is liable for negligence in starting from a station before

leave and received an injury, and it was held that her own act was the cause of the injury, and that the defendant was in no respect in fault.

"In Hickey *v.* Boston & Lowell R. R. Co. 14 Allen, 429, the plaintiff's intestate took a position upon the platform of a car as it was coming into a station, where he was exposed to danger, voluntarily, and without reasonable cause of necessity or propriety, and it was properly held that the express or implied assent and permission of the conductor of the train did not change the relation of the parties and relieve the deceased from the consequences of his own want of care. Railroad Co. *v.* Aspell, 23 Penn. R. 147, differed essentially in all its circumstances from the case at bar. The plaintiff there leaped in the dark from a train of cars while under a high rate of speed, against the remonstrances of the persons in charge of the train, and under an assurance that the train would be stopped to permit him to alight. It was properly held a wanton and reckless act, precluding a right to recover against the railroad company. In the same case the principle was recognized that if a passenger was ordinarily careful and attentive to his own safety, and was injured by the negligence of the company, he might recover. The Penn. R. R. Co. *v.* Kilgore, 32 Penn. R. 292, is more analogous to the case in hand. A female passenger accompanied by three young children, on arriving at an intermediate station, proceeded to alight with them. Two of the children had left the car, and whilst the plaintiff was still upon the train the cars started, when she sprang upon the platform on which one of the children had fallen prostrate and was injured. She was allowed to recover. It was held that the question of concurrent negligence was to be determined by the particular circumstances of the case. There, as in this case, the defendant had involved the plaintiff in the attempt to get off the cars; and her efforts, made with proper care under all the circumstances, cannot be imputed to her for negligence.

"It is not denied that the attempt to leave the cars while they are in motion is wrong. But as said by Judge Woodward, in the case last cited, 'it is one thing to define a principle of law, and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed.'

"McIntyre *v.* N. Y. C. R. R. Co. 37 N. Y. 287, is, in principle, analogous to this, and a recovery was had for injuries received by a passenger in passing in the evening, and under circumstances increasing the hazard of the undertaking, from one car to another, while the train was in motion, the attempt having been made by direction of the defendants' servants, and to obtain a seat which could not be had in the car in which the passenger was. A passenger voluntarily and without necessity making such an attempt and receiving an injury would be held to be at fault and without remedy; but the peculiar circumstances of the case took it out of the general rule. In Foy *v.* London, Brighton & South Coast R. R. Co. 18 C. B. R. N. S. 225, a recovery was had for an injury received in alighting from the cars caused by the insufficient means for alighting furnished by the company, although the hazard of the attempt was as patent to the plaintiff as to the servants of the company. The jury

the passengers ticketed for it have disembarked, so that one of them, alighting after the train has started, is hurt.[1] No matter what may be the form in which the election may be put, it is negligence to compel the passenger to alight at an unusual and unsuitable place.[2]

§ 379. *When excused by invitation to alight.* — The calling of the name of a station, on coming to a stop, is to be regarded as an invitation to alight; and a passenger who on such summons leaves the car, taking due caution to look around him when practicable, may recover from the company in case he be injured by ignorantly stepping on an unsuitable place.[3] Thus in a case in

there found that the defendant was guilty of negligence in not having provided conveniences for getting down from the carriage, and negatived the claim that the passenger contributed to the accident.

"The court in banc sustained the recovery and refused leave to appeal, saying, "We do not think this is a fit case for an appeal." In that case, the lady was desired by a porter in the employ of the company to alight; and that circumstance was held by the court to distinguish it from a subsequent case. Siner *v.* G. W. R. Co., L. R. 3 Exch. 150; affirmed in exchequer chambers, 17 W. R. 417.

"The case was similar in all its circumstances to Foy's case, except there was no direction or request by the company's servants to the lady to get down from the carriage. The court held, against the dissent of Kelly, C. B., in the court of exchequer, and Justice Keating, in the exchequer chambers, that there was no evidence of negligence to go to the jury. Chief Baron Kelly was of the opinion that the stopping of the train, without any notice to the passengers to get out, was an invitation to them to do so; that the descent, although dangerous, was not so clearly dangerous that the plaintiff might not properly encounter the risk; and that the company, having wrongfully put the passengers to the necessity of choosing between two alternatives, — the inconvenience of being carried on and the danger of getting out, — they were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably. The reasoning of the chief baron applies with force to this case, and is in harmony with McIntyre *v.* N. Y. C. R. R. Co., supra. The danger here was not certain, and the defendant cannot complain that the plaintiff did, under the circumstances, encounter some degree of peril, the jury having found that it was not imprudent for her so to do, and was encountered at the instance of the brakeman on the cars." . . . .

See in some points *contra*, Damont *v.* N. O. &c. R. R. 9 La. An. 44.

[1] T. W. & W. R. R. R. *v.* Baddely, 54 Ill. 19; Penn. R. R. *v.* Kilgore, 32 Penn. St. 292.

[2] Curtis *v.* R. & S. R. R. 29 Barb. 285; Memphis, &c. R. R. *v.* Whitfield, 44 Miss. 466.

[3] See cases cited supra, § 376; Southern R. R. *v.* Kendrick, 40 Miss. 374. When a train overshoots a platform, calling out the name of a station without cautioning the passengers not to alight at that spot, is negligence.

Indiana,[1] a railroad train ran beyond the platform for landing passengers at a certain station, and stopped over a culvert, and the proper servants of the railroad company announced the name of the station as a notification to the passengers for that station that the train was there; whereupon a passenger for that station who had paid the company the fare demanded of him, alighted upon and into the culvert, without his fault or negligence, supposing he was alighting upon the platform, it being at night and so dark that he could not see that the train had not stopped at the platform. It was held by the supreme court that the company was liable. But it is otherwise where the plaintiff knowingly alights in an unsuitable place. Thus, in a late English case,[2] the plaintiff was a passenger on the defendants' railway from A. to B.; while the train was passing through B. station the company's servant called out the name of the station, and shortly afterwards the train stopped. The carriage in which the plaintiff travelled stopped a little way beyond the platform, and several carriages and the engine, which were in front of that carriage, stopped at some distance from the platform. The plaintiff, who was well acquainted with the station, in alighting from the carriage was thrown down and injured in consequence of the train being backed into the station, for the purpose of bringing the carriages alongside the platform. A very short interval elapsed between the time that the train stopped and the time it was backed into the station. It was held by the queen's bench that there was no evidence of negligence on the part of the company to render them liable to an action.[3]

Weller *v.* London, B. & S. R. R., Law Rep. 9 C. P. 126. But "Calling out" is only an intimation that the train is approaching the station. Honeyman, J., in Weller *v.* R. R., L. R. 9 C. P. 134; quoting Keating, J., in Cockle *v.* R. R., L. R. 5 C. P. 468. See Alb. L. J. Aug. 8, 1874, p. 86.

[1] Columbus & Indianapolis Central R. R. *v.* Farrell, 31 Ind. 408.

[2] Lewis *v.* London, C. & D. Ry. Co., L. R. 9 Q. B. 66.

[3] Blackburn, J.: "I think it is not necessary to hear the defendants' counsel. The question is, whether (the woman having unquestionably sustained injury) the judge could say there was evidence on which the jury could reasonably find that there was negligence on the part of the defendants or their servants, which occasioned injury to the plaintiff. The facts appear to be abundantly clear on the female plaintiff's own story. It appears that the train was coming up to the station, and some official on the platform called out, 'Bromley — Bromley.' Calling out the name of

§ 380. *Whether the speed is such as to make it negligence to step from a car in motion is for the jury.* — Although if a passenger, without any directions from the conductor, voluntarily incurs danger by jumping off the train while in motion, the carrier is not responsible for injury resulting therefrom; yet, if the motion of the train is so slow that the danger of jumping off is

the station I understand, and have always understood, to mean this, that it is an intimation to all who are travelling by the train that the station at which the train is about to stop is that particular station. When the servants of the defendants called out 'Bromley,' the train was still going forward; and the train, by one of those accidents that will sometimes occur, overshot the platform, so that, as the plaintiff herself said, the engine went beyond the bridge, and part of the train went under the bridge, and passed the platform. Immediately after that there was an order given for the train to come back to the platform, and the train was backed. The female plaintiff had in the mean time proceeded to get out, and in consequence of trying to get out at the time the train began to back, a jerk comes, throws her down, causing the injury. The question is, whether there was negligence on the part of the defendants' servants causing her to get out at the time and place she did? Mr. Williams has argued that if the plaintiff supposed she was to get out at the place at which the train stopped, and was injured, the defendants are liable. I do not think so, unless that supposition was induced by the acts of the company's servants; but the plaintiff could not have supposed that, because she says that she knew the place well; that she saw her carriage was not alongside the platform, but at the edge or the corner of it, and that part of the train was beyond the platform. I see no evidence in this case of an act on the part of the company's servants to induce her or to justify her in alighting at the spot where she was getting out. From all the circumstances she, as a reasonable person, must have believed that the train, which had passed the platform, would come back again; that it would not stop under the bridge and let the passengers in the further carriages get out upon the line, and consequently, she had no business to get out at the place she did unless the company's servants told her to do so. There was, therefore, no evidence from which the jury could have reasonably found negligence. I do not agree with Mr. Williams, that calling out the name of a station is an invitation to passengers to alight. On the contrary, the name of the station is generally called out as the train is passing on. Every person must have heard porters at a railway station call out something, which, if he happens to know the name of the station, he can recognize; if not, it frequently happens that the passenger cannot make out what name it is that the porters are calling out. Calling out the name of a station is not an invitation to alight. Cockle *v.* London & South Eastern Ry. Co., Law Rep. 7 C. P. 321, reported supra, § 376, is distinguishable. In that case there was clear evidence that the train had been brought to a final stand-still, and that the passengers were to get out at that place or not at all. I think there was no evidence on which the jury could find for the plaintiff, and that consequently the judge was right in directing a verdict for the defendants."

not reasonably apparent, and the passenger acts under the instructions of the conductor, then the defence of contributory negligence is unavailing.[1] And it is for the jury to say whether the danger of leaving or boarding a train when in motion is so apparent as to make it the duty of the passenger to desist from the attempt.[2] At the same time calling out name of station does not excuse a passenger in leaping from a car when in rapid motion;[3] nor in taking any step in itself reckless, and which might be avoided by inquiry or examination.[4]

§ 381. *Being in wrong car.* — Nor can the company defend itself on the ground that the plaintiff, at the time of the injury, was not in the car to which he was assigned.[5]

§ 381 *a*. *Sunday travelling.* — Under the Massachusetts statute, which makes travelling on Sunday except for necessity or charity illegal,[6] it seems to be held that a person travelling on Sunday cannot recover from the carrier for injuries sustained by the latter's negligence, unless the former can prove that the journey was from necessity or charity. But religious worship, no matter how extravagant, falls within the exception. Thus in a case decided in 1872, the evidence was that the plaintiff, Mrs. Feital, was a Spiritualist, and usually attended public religious services conducted by ministers of her faith in her own neighborhood in Charlestown. On the Sunday afternoon of the collision her meeting-house was closed, and she attended a camp-meeting in Malden, at which it was advertised that "Miss Laura Ellis would give physical manifestations in a tent, to which an admittance fee of twenty-five cents would be charged." The services were testified to be as follows: "Miss Ellis was put into a box with her hands tied; music was heard coming from the box; and when it was opened Miss Ellis was found with her hands untied, and a ring that had been on her finger was then on the end of her nose." On her way home from these services Mrs. Feital broke her leg when on the cars. The counsel for the railroad company argued

[1] Lambeth *v.* N. C. R. R. Co. 66 N. C. 494.

[2] Johnston *v.* R. R. 70 Pa. St. 357; Ill. Cent. R. R. *v.* Able, 59 Ill. 131.

[3] Damont *v.* N. O. &c. R. R. 9 La. An. 441.

[4] See Bridges *v.* R. R., supra; Cockle *v.* R. R., supra.

[5] Penn. R. R. *v.* McCloskey, 23 Penn. St. 526. See Keith *v.* Pinkham, 43 Me. 501; Carroll *v.* N. Y. & H. R. R. 1 Duer, 571; Jacobus *v.* R. R. Alb. L. J. Aug. 8, 1874, p. 86; Cent. L. J. July 30, 1874.

[6] See infra, § 405.

that this was not divine worship, but was a "juggler's show," and was adapted not to the edification but to the disturbance of "serious people." The jury, however, gave Mrs. Feital $5,000 damages. The question whether the "show" was worship, was argued before the supreme court at large, but the court refused to disturb the verdict, holding that the question was one for the jury.[1] The proper course would have been for the court to have told the jury that no matter how much of an outlaw the plaintiff may have been, the railroad had no right to hurt her by its negligence. Her object in Sunday travelling had nothing to do with the issue. If she broke the law, the law itself, and not the railroad company, was to inflict the penalty.[2]

§ 382. 3. *Collision of traveller with train. Persons approaching road bound to look out.* — It is the duty of a person who attempts to cross a railroad to listen for signals, to notice all signs that may be put up as warnings, and to look up and down the road.[3] It

[1] Feital *v.* R. R. 109 Mass. 398.

[2] Supra, § 330; infra, § 405.

[3] Stubley *v.* London & N. W. R. R. Law Rep. 1 Exch. 13; Cliff *v.* Midland R. R. 5 Q. B. 258; Telfer *v.* North. R. R. 30 N. J. 138; State *v.* Manchester & L. R. R. 52 N. H. 528; Webb *v.* P. & K. R. R. 57 Me. 117; Wilson *v.* Charlestown, 8 Allen, 138; Allyn *v.* B. & A. R. R. 105 Mass. 77; Wilcox *v.* Rome, &c. R. R. 39 N. Y. 358; Besiegel *v.* N. Y. Cent. R. R. 40 N. Y. 9; Baxter *v.* Troy & B. R. R. 41 N. Y. 430; North. Penn. R. R. *v.* Heilmann, 49 Penn. St. 60; Hanover R. R. *v.* Coyle, 55 Penn. St. 396; Penn. Canal Co. *v.* Bentley, 66 Penn. St. 30; Lehigh Valley R. R. *v.* Hall, 61 Penn. St. 361; Balt. & Ohio R. R. *v.* Breinig, 25 Md. 378; Lake Shore R. R. *v.* Miller, 25 Mich. 274; Kelly *v.* Hendrie, 26 Mich. 255; Bellefontaine R. R. *v.* Hunter, 33 Ind. 365; Chicago & Alton R. R. Co. *v.* Gretzner, 46 Ill. 74; Chicago & N. W. R. R. *v.* Sweeny, 52 Ill. 325; Ill. Cent. R. R. *v.* Baches, 55 Ill. 374; St. Louis, Alton, &c. R. R. *v.* Manly, 58 Ill. 300; De Armand *v.* R. R. 23 La. An. 264; Penns. R. R. *v.* Beale, 73 Penn. St. 504; Belton *v.* Baxter, 54 N. Y. 245; Gillespie *v.* City, 54 N. Y. 468; McCall *v.* R. R. 54 N. Y. 642. Infra, § 798.

A railway, consisting of several lines, crossed a public foot-path on a level at a point near a station, but the foot-path was not in other respects dangerous. On each side of the railway was a good and sufficient swing gate. The railway company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S., wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then, without looking up or down the line, commenced crossing the railway, and was killed by a passing train. If he had looked up the line he would have seen the train coming in time to stop and avoid the accident. In an action against the company by S.'s administratrix, it was held by the English common pleas that S. contributed to the accident by his negligence. It

follows, therefore, that if a traveller, by looking along the road, could have seen an approaching train in time to escape, it will be presumed, in case of collision, that he did not look, or looking, did not heed what he saw; and in such case the road, under ordinary circumstances, is not liable.[1] At the same time he is not

was further argued by Willes, J., that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to S. to come on the line; and that, therefore, even if S. was not guilty of contributory negligence, the company were not liable. Skelton *v.* London & N. W. R. R., L. R. 2 C. P. 631.

In Baxter *v.* The Troy & Boston R. R. Co. 41 N. Y. 502, it is said: "The law requires care at all times when in a situation of danger, and mental absorption or reverie, from business, grief, &c., will not excuse its omission. The inquiry is whether, from the evidence, it satisfactorily appears that the plaintiff, by looking, could have seen the train in time to have avoided the collision. If so, the plaintiff should have been nonsuited."

In Stubley *v.* London & N. W. R. W. Co., L. R. 1 Ex. 13, Pollock, C. B., said: "The track is of itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming." Bramwell, B., said: "Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that way to see if danger is to be apprehended."

In Butterfield *v.* The Western R. R. Co. 10 Allen, 532, the "plaintiff was acquainted with the highway and railroad. If he had looked he would have seen the train. It came from the west, and for half a mile west of the highway the track was in plain sight. It was a stormy night, raining, blowing hard from the northwest, and snowing some. He had his hand up holding his hat on his head, and this prevented him from seeing the train. He was listening for the cars, his attention was called to the subject, and he expected to hear the bell or whistle, but there was no bell rung or whistle blown. Plaintiff's neglect to use his own eyes was palpable negligence."

See also Cliff *v.* The Midland Railway Co., L. R. 5 Q. B. 258. Infra, § 798.

[1] Haight *v.* R. R. 7 Lansing, 596; Morse *v.* R. R. 55 Barb. 490; Lake Shore R. R. *v.* Miller, 25 Mich. 274; Wilcox *v.* R. W. & O. R. 39 N. Y. 358; Griffin *v.* N. Y. R. R. 40 N. Y. 34; Davis *v.* N. Y. Cent. R. 47 N. Y. 400; Butterfield *v.* West. R. R. 10 Allen, 532; Allyn *v.* R. R. 105 Mass. 77; Wheelock *v.* R. R. 105 Mass. 203; Toledo & Wabash R. R. *v.* Goddard, 25 Ind. 185; Bellefontaine R. R. *v.* Hunter, 33 Ind. 356; North. Penn. R. R. *v.* Heilmann, 49 Penn. St. 60; Penn. R. R. *v.* Beale, 73 Penn. St. 504; Belton *v.* Baxter, 54 N. Y. 245; McCall *v.* R. R. 54 N. Y. 642.

In Indiana the courts go to the utmost limits on this line. Thus in Bellefontaine R. R. *v.* Hunter, 33 Ind. 356, Ray, C. J., says: "In the Toledo & Wabash Railway Co. *v.* Goddard, 25 Ind. 185, the doctrine was stated thus: 'Where negligence is the issue, it must be a case of unmixed negligence, to justify a recovery; and if both parties, by their negligence, immediately contributed to produce the injury, neither can recover.' The authorities then supporting the posi-

required to get out of his team to look out, or even "to stop for the purpose of listening." [1]

tion were very fully stated. Later decisions have only confirmed the rule, which, indeed, rests upon the case of Butterfield *v.* Forrester, 11 East, 60, where Lord Ellenborough held, that 'a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.'

"In the Lafayette & Indianapolis R. R. Co. *v.* Huffman, 28 Ind. 287, the negligence on the part of the plaintiff which will defeat his action is again stated and applied, even where an infant is the injured party. The court below had instructed that if the servants of the company had failed, in the management of the train, to use such diligence and care as prudent and discreet persons should use, &c., and the plaintiff was injured, he was entitled to recover, unless from his own negligence or want of reasonable care he had brought the injury upon himself. The court say this is not the law. It is not necessary that the negligence of the plaintiff should have 'brought the injury upon himself.' If it directly contributed to that result, it would have defeated the action, where the defendant was only chargeable with want of ordinary prudence. The following instruction, given by the court below, viz. 'Although the plaintiff was in fault, yet if the employees of the defendant might with reasonable diligence have avoided the injury, it was their duty to have done so; and their failure to do so would render the company liable,' is thus disposed of: 'That is not the law. Where the plaintiff is in fault, a want of reasonable diligence will not render the defendant liable.'

"We think," continues Ray, C. J., "the law may be regarded as fixed, that no neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing, where these may be available; and injury, where the use of either of such faculties would have given sufficient warning to enable the party to avoid the danger, conclusively proves negligence, and there can be no recovery; unless the railroad company has been guilty of such conduct as will imply an intent or willingness to cause the injury; and this can only be attributed where the company has notice of the particular emergency, in time, by the use of ordinary diligence, the means being at hand, to avoid the collision.

"In The Indianapolis & Cincinnati R. R. Co. *v.* McClure, 26 Ind. 370, where the action was for killing stock, a quotation is made from Redfield on Railways, an author whose language it were well always to carefully weigh, stating that this willingness to injure 'is always to be attributed to the defendant, if he might have avoided injuring the plaintiff, notwithstanding his own negligence.' The decision, however, was in express contradiction of this rule; for it is admitted that the company in that case were guilty of carelessness in running their train at too great speed, and yet they were held not liable. The reporter inadvertently carried into the syllabus this erroneous statement of the law, the use of which was simply incidental and not material to

[1] Grover, J. — Davis *v.* N. Y. Cent. R. R. 47 N. Y. (2 Sickels) 400.

§ 383. *Workmen under orders.* — A workman engaged in his work, under orders, with a special understanding that trains ap-

the decision. Such a doctrine would require the exercise of the highest degree of diligence on the part of the defendant to protect the plaintiff from the consequences of his own negligence.

"In the case before us, each party had a right of passage, limited by that maxim of equity, *sic utere tuo, ut alienum non laedas.* Upon each rested the obligation, in the exercise of this right, to use such reasonable degree of foresight, skill, capacity, and care, as would be consistent with a proper regard for the safety of all others exercising the same right and using the like precautions. We do not say that such care must be used by each as would prevent the possibility of injury to himself or another. There are inevitable accidents. But such care is required as would reasonably and under all ordinary circumstances avoid collision with one using like caution — such care as a prudent man in the exercise of his usual diligence will observe. It is true that prudent men are sometimes careless. When so, they must accept the consequences of their departure from their usual line of conduct, and the exception is not to mark the amount of care exacted by the law.

"Of necessity, the special acts, the omission of which would on the one part constitute carelessness, may not be required from the other party. One approaching in a carriage, on the highway, the crossing of a railroad, over which express trains at a high rate of speed are frequently passing, may reasonably be required to assure himself, if he can, by the use of his organs of sight and hearing, that no cars are in dangerous proximity. If the use of such means would give the information, he may properly be charged with such knowledge. If necessary to make such observation, he will be required to reduce the rate of speed at which he is moving, or even to stop his conveyance; and when regular trains are passing, he should take notice of the time when they are due, if such information is reasonably accessible. On the other hand, the company are required to keep a reasonable look-out at public crossings, and to give such signals of their approach as are calculated to notify the public, when without such signals, and in the exercise of the proper care and caution by the public, their proximity would not otherwise be known. Thus, if the track were concealed from view, and the sound of the train from high wind or any other cause was destroyed, it would devolve upon the company to use any other usual and proper method to give notice to passengers upon the highway. But an express train, having connections to make where failure may involve the loss of many lives, cannot be required to stop, or even materially reduce its speed, at every cross-road where their approach is in full view, and the sound of the train apparent to persons upon the public way.

"By statute in many states certain signals are required to be given by a train when nearing any public crossing, and therefore their neglect to comply with the law under such circumstances is negligence; but no such special act is now required in this state, and therefore its omission is not in itself negligence, unless the peculiar circumstances, the concealment of the train, or the like, may render it necessary and proper."

In a Wisconsin case, the evidence

proaching the spot where he is working are to slacken speed, is not expected to be on the look-out; and hence, if injured by a train coming on him suddenly, without notice, can recover from the company.[1]

§ 384. *Ordinarily, the fact that the train neglected to make statutory or customary warnings does not relieve a person approaching an open crossing from the duty of look-out on approaching the road.* — "Where a person, knowingly about to cross a railroad track may have an unobstructed view of the railroad, so as to know of the approach of a train a sufficient time to clearly avoid any injury from it, he cannot, as a matter of law, recover, although the railroad company may have been also negligent, or have neglected to perform a statutory requirement."[2] Thus, in a New

was that when the engine and first section of cars passed the street, deceased was standing at the head of his horse, harnessed to a buggy, about seventy-seven feet from the track, facing towards the rear section, but with his horse's head and neck intervening. The horse endeavored to escape, and in the effort to hold him deceased was drawn upon the track, and killed by collision with the rear section of cars. It was held that if he actually saw the cars approaching, he was chargeable with contributory negligence in thus getting upon the track. It was further said, the fact that the deceased incurred great risk *from his own horse*, while lawfully endeavoring to prevent its escape, is not proof of negligence on his part, such as will discharge the railroad company from liability. He took that risk, but not a risk arising from any negligence of the company that was unknown to him. Butler *v.* R. R. Co. 28 Wisc. 256.

See Pennsylvania R. R. Co. *v.* Henderson, 43 Penn. St. 449, where it is held that the injured party is charged with knowledge, or regarded as knowing, if he had such warnings and opportunities of knowledge as would, with ordinary caution in these circumstances, have saved him from the danger. And see infra, § 798.

But in Pennsylvania Railroad Co. *v.* Weber, 72 Penn. St. 27, it was held that it is not necessary to prove affirmatively that a person injured when crossing a railroad on a public highway had stopped and looked up and down the railroad; whether he used the proper precautions is to be determined by all the circumstances of the case. See infra, § 798.

[1] See supra, § 245.

[2] Cole, J., in Artz *v.* Chicago & R. I. & P. R. R. 34 Iowa, 160, citing Havens *v.* Erie Railway, 41 N. Y. 296; Ernst *v.* Hudson River Railroad Co. 39 N. Y. 61 (*i. e.*, 68); *S. C.* 35 Ibid. 9; Wilcox *v.* Rome, W. & O. Railroad Co. 39 Ibid. 358; Baxter *v.* Troy & Boston Railroad Co. 41 Ibid. 502; Nicholson *v.* Erie Railway Co. 41 Ibid. 525; Grippen *v.* New York Central Railroad Co. 40 Ibid. 34; Gonzales *v.* New York & Harlem Railroad Co. 38 Ibid. 440; Wilds *v.* Hudson River Railroad Co. 29 Ibid. 315; *S. C.* 24 Ibid. 430. So also Gorton *v.* Erie R. R. 45 N. Y. 660; Morris & Essex Railroad Co. *v.* Henton, 4 Vroom (N. J.), 189; Runyan *v.* Central Railroad Co. 1 Dutch. (N. J.) 558; Chicago & Alton Railroad Co. *v.* Fears, 53 Ill.

York case, it appeared in evidence that the plaintiff lived near, and owned land on both sides of the New York Central Railroad. At four o'clock in the afternoon of the collision, he was travelling in a wagon on a highway, crossing the railroad on a level, at a time when the passenger train was due. No proof was given that he or those with him in the wagon looked for the train, or took any precaution whatever. The wagon was struck, the plaintiff's son killed, and he himself severely injured. The court say: "It should and must be regarded as very little short of recklessness, for any one to drive on the track of a railroad without first looking and listening whether a moving train is near. The negligence of the defendant in this case was a failure to ring the bell or sound the whistle. Yet, as Dascomb (the plaintiff) was also negligent, he could not recover. Those living near a railroad, may, by contact, become careless; but they will be no less chargeable with negligence in case they rush on the track without looking and trying to ascertain first whether danger is near. Failing in this respect, they cannot be permitted to recover for injuries received. It is a well settled principle of the common law, that he whose negligence has contributed in any essential degree to the injury sustained cannot maintain an action against the party whose negligence has also contributed to the injury. When negligence is the issue, it must be a case of unmixed negligence. This rule is important, salutary in its effects, and should be maintained in its purity. The careless are thereby taught that if they sustain an injury to which their own negligence has contributed, the law will afford them no redress." [1]

§ 385. It should, however, be remembered that if a statute requires that a train should give a specific warning of its approach, the travelling public has a right to presume that, in default of

115; Lafayette & Ind. Railroad Co. *v.* Huffman, 28 Ind. 287; Pittsburg & Ft. Wayne Railroad Co. *v.* Vinning, 27 Ibid. 513; Toledo & Wabash Railroad Co. *v.* Goddard, 25 Ibid. 185; Steves *v.* Oswego & Syracuse Railroad Co. 18 N. Y. 422; Sheffield *v.* Rochester & S. Railroad Co. 21 Barb. 399; Brooks *v.* Buffalo & N. F. Railroad Co. 25 Ibid. 600; Chicago, Rock Island & Pacific Railroad Co. *v.* Still, 19 Ill. 499; C. C. & C. Railroad Co. *v.* Terry, 8 Ohio St. 570; Evansville &c. Railroad Co. *v.* Hiatt, 17 Ind. 102; Illinois Central Railroad Co. *v.* Buckner, 28 Ill. 303; North Pennsylvania Railroad Co. *v.* Heilmann, 49 Penn. St. 60; Harlem Railroad Co. *v.* Coyle, 5 P. F. Smith, 396; Chicago & A. Railroad Co. *v.* Gretzner, 46 Ill. 74. See fully infra, § 804; so also Parker *v.* Adams, 12 Metc. 415.

[1] Dascomb *v.* Buffalo & St. Louis R. R. 27 Barb. 221. See infra, § 804.

such warning, an approaching train may purpose to reduce its speed; and it should require proof of rashness on part of the plaintiff to defeat his recovery if such warnings are omitted. The same reasoning also, which would permit this check to be dispensed with, would permit a railroad to dispense with the restrictions requiring it to slacken its speed in passing through village or city. Hence it has been correctly ruled, that if a railroad neglects signals and look-out, when required by either statute or common law, it is liable, although the plaintiff was incautiously on the track, supposing the plaintiff kept a proper look-out.[1]

[1] Balt. & O. R. R. *v.* Trainor, 33 Md. 542. See also Cliff *v.* Midland R. R. Co., L. R. 5 Q. B. 258.

As will hereafter (§ 804) be more fully seen, the preponderance of American authority, however, is to the effect that "contributory negligence of a person attempting to cross a railroad track undoubtedly excuses the railroad company, whether the required signals are or are not given; or whether the company is or is not guilty of any other negligence. . . . . The rule of this court is . . . . that where the injured party has not used ordinary care, there can be no recovery against the company." Clerke, J., in Ernst *v.* Hudson River R. R. 39 N. Y. 61. See also McCall *v.* R. R. 54 N. Y. 642.

"A traveller is bound to use his eyes and ears as far as there is opportunity." "Negligence in the railroad company to give the proper signals, or in omitting precautions of any kind, will not excuse his (the traveller's) omission to be diligent in such use of his own means of avoiding danger." "And when by such use of his senses the traveller might avoid danger, though the company neglect to give signals or warning, yet his omission (to be diligent) is concurring negligence, and should be so peremptorily declared by the court." Woodruff, J., in same case.

So in Havens *v.* Erie Railway Co. 41 N. Y. 296, it was ruled that even where the statute required signals to be given by the company on approaching a railroad crossing, and they were omitted, yet such omission did not absolve the person approaching such crossing from looking up and down the track, to see whether a train was approaching; and his omission to do so precluded his recovery. So also Beisegel *v.* N. Y. Cent. R. R. 41 N. Y. 296; and Gorton *v.* Erie R. R. 45 N. Y. 660.

So in Galena & Chicago Union R. R. Co. *v.* Loomis, 13 Ill. 548, the court held, "that if without signals the injured party might, with care, have seen the train and known that it was approaching, he could not recover. A failure to ring the bell or sound the whistle does not raise a presumption that this was the cause of the injury." Chicago & Mississippi R. R. Co. *v.* Patchin, 16 Ill. 198; Galena & Chicago Union R. R. Co. *v.* Dill, 22 Ill. 264; Illinois Central R. R. Co. *v.* Phelps, 29 Ill. 447.

And so where the evidence was that the plaintiff was approaching a railroad crossing with his wagon and team, and when at the distance of thirty yards from the crossing he saw the smoke of the locomotive of the approaching train, and could have stopped before reaching the track, but

§ 386. *When the view of the road is obstructed, or when other circumstances make a look-out inadequate, the omission of sig-*

did not check the speed of his horses until he reached the track, when the pole of his wagon struck the train, or was struck by the train, and the wagon was overturned, and threw him out; it was ruled by the supreme court of Illinois that he could not recover, though there may have been negligent omissions by the train. C. & C. & A. R. R. Co. *v.* Fears, 53 Ill. 115. See Wild *v.* Hudson R. R. R. 24 N. Y. 430.

So where the son of plaintiff *told him* that he thought he heard a train coming, plaintiff decided to rush his stock over the track, and in doing so three head were killed, it was held, that plaintiff's negligence was equal to that of defendant in not ringing the bell or sounding the whistle according to law. Ohio & Miss. R. W. Co. *v.* Evans, 42 Ill. 288. See also Dascomb *v.* Buff. & St. Louis R. R. 27 Barb. 221; Mackay *v.* N. Y. Cent. R. R. 27 Barb. 528; and infra, § 799, 804.

In R. R. Co. *v.* Whitton, 13 Wall. 276, ... "The evidence being closed, the defendant asked nineteen different instructions, which the court refused to give, except in so far as they were contained in the instructions whose substance is hereinafter mentioned and given of its own accord. Among the nineteen were these two: —

"Under ordinary circumstances a person possessing the use of those faculties should use both eyes and ears to avoid injury in crossing a railway track; and if in this case the wind and noise of the freight train tended to prevent Mrs. Whitton from hearing the approach of defendant's engine, she was under the greater obligation to use her eyes. It was her duty to look carefully along the tracks of defendant's railway, both northwardly and southwardly, before attempting to cross them, and it was not sufficient excuse for failing to do so that the day was cold and windy, or that one train had just passed on the track nearer to her.

"It was the duty of Mrs. Whitton to look carefully along the tracks of defendant's railway to the north before putting herself in the way of danger, and in time to see and avoid any engine or train approaching from that direction. If necessary, in order to do this, it was her duty to pause before starting to cross until the freight train had so far passed as to give a sufficient view to determine whether she could safely cross; and if she failed to look carefully along these tracks to the north, after the freight train had so far passed as to give her such a view, and in time to have seen and avoided defendant's engine, the plaintiff cannot recover."

The plaintiff asked three instructions, which were refused in the same way.

The questions submitted to the jury were: —

"1. Whether Mrs. Whitton's death was caused by the negligence of those who had the management of the train; and,

"2. Was Mrs. Whitton herself guilty of any fault or negligence which contributed to that result."

As to the negligence of the defendant, the court, in substance, instructed the jury that it was the duty of those having the management of the train to cause the bell of the engine to be rung a sufficient time before crossing Academy Street, to give warning to any passengers on that street desirous of crossing, and to keep it ringing until the tender had crossed the street; and also that it was the duty of those hav-

nals is negligence making the company liable. — But however we may decide the last question, there can be no hesitation as to agreeing, that "if the view of the railroad, as the crossing is approached upon the highway, is obstructed by any means, so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then, whether it was negligence on the part of the plaintiff or the person injured, under the particular circumstances of the case, is a question of fact for the jury. If he was negligent, he cannot recover; if he was not, he may recover."[1]

ing the management of the train to keep a proper and vigilant look-out in the direction the train was moving, particularly under the circumstances of the case, — a freight train going up one of the tracks in an opposite direction, the train in question just approaching a much frequented street, and a violent southwest wind blowing at the time, and that there was a peculiar vigilance incumbent on those who had the management of the train, to ring their bell and keep a proper look-out, because it was natural, if there were any persons standing at that crossing (a freight train passing along at the time), that they would seek to cross the track after the freight train had gone over the street.

As to the negligence of Mrs. Whitton, the court, in substance, instructed the jury that she was required to exercise that degree of prudence, care, and caution incumbent on a person possessing ordinary reason and intelligence, under the special circumstances of the case, having regard to the fact of its being a railroad crossing, and another train crossing the street, for which she had to wait in company with Mrs. Woodward, and that she must have used ordinary care, prudence, and caution.

"Upon these facts," it was said by the supreme court of the United States, "the court gave to the jury a clear and full charge upon the duties and responsibilities of the railroad company in crossing the street of the city, with its engines and trains, and upon the care, prudence, and caution, which it was incumbent upon the deceased to exercise in crossing the tracks; and as to the damages which the jury were authorized to find, in case they were satisfied that the employees of the company had been guilty of negligence, and that such negligence had caused the death of the deceased."

[1] Cole, J., in Artz *v.* Chic. & R. I. R. R. 34 Iowa, 160; citing O'Mara *v.* Hudson River Railroad Co. 38 N. Y. 445; Renwick *v.* New York Central Railroad Co. 36 Ibid. 132; Beisiegel *v.* New York Central Railroad Co. 34 Ibid. 622; Telfer *v.* Northern Railroad Co. 30 N. J. 188; *S. C.* 3 Am. Law Reg. (N. S.) 665; Indianapolis, P. & C. Railroad Co. *v.* Keeley, 23 Ind. 133; Evansville, &c. Railroad Co. *v.* Lowdenwick, 15 Ibid. 120; Galena &c. Union Railroad Co. *v.* Dill, 22 Ill. 264; Tabor *v.* Missouri Valley Railroad Co. 46 Mo. 353; *S. C.* 2 Am. Rep. 517; Kennayde *v.* Pacific Railroad Co. 45 Mo. 255; Milwaukee, &c. Railroad Co. *v.* Hunter, 11 Wis. 160. See also Richardson *v.* N. Y. Cent. R. R. 45 N. Y. 846, and infra, § 801, 804.

§ 387. *Company liable if their servants invite travellers to cross the road improvidently.* — Flagmen or other servants of the company are presumed to act as its agents in giving notice; and hence a person who, in compliance with a notice that he can cross, crosses the track, though it may be in view of an approaching train, may recover of the company in case of injury.[1] Thus, in an English case,[2] the evidence was that the defendants' line of railway was crossed by a public carriage road diagonally on a level, and there was also at the same spot, crossing the railway nearly at right angles, a private way leading to C.'s storeyard. There was a gate on C.'s side of the railway opening into his yard, which was a private gate under C.'s control; but nearly immediately opposite, on the other side of the railway, there was one gate across both the private way and the public carriage road, and this gate was under the control of the defendants, there being a gate-keeper stationed there by them, pursuant to section 47 of the Railways Clauses Consolidation Act. Any one going with a carriage, &c. to C.'s yard passed through this gate across the railway and in at the private gate opposite, and *vice versa* on leaving the yard. The plaintiff's carman with his cart and horses having unloaded in C.'s yard one evening after dark, was about to leave, and having opened C.'s gate, the gate opposite being nearly closed, hailed the defendants' gate-keeper on the opposite side of the railway to know if the line was clear, and he answered, "Yes, come on." The cart and horses accordingly proceeded, and were run into by a train. It was held by the court of queen's bench that though section 47 in terms imposed the duty on a railway company of merely keeping "the gates closed across a public carriage road, except when carriages, &c., shall have to cross the railway," yet the duty was implied of using proper caution in opening them; that, whatever might have been the consequence had the way which the plaintiff's carman was using been simply the private way, as he could not get across the railway without passing through the public gate, it was the gate-keeper's duty to open or refuse to open it for him; that what the gate-keeper said was equivalent to opening the gate, and he, therefore, was guilty

And see particularly Maginnis *v.* R. R. 52 N. Y. 215; Phil. R. R. *v.* Hagan, 47 Penn. St. 244.

[1] Chaffee *v.* Bost. & L. R. R. 104 Mass. 108; Wheelock *v.* Bost. & A. R. R. 105 Mass. 203. Infra, § 798.

[2] Lunt *v.* London & N. W. R. R., L. R. 1 Q. B. 277. Infra, § 798.

of negligence in connection with his duty for which the defendants were liable.[1]

§ 388. *Plaintiff's negligence in approaching track no defence if train could have prudently avoided collision.* — This results from the position already laid down, that a trespasser cannot be run down with impunity simply because he is a trespasser.[2] To railroad trains, in view of the destructive power they carry with them, this position is peculiarly applicable. Hence it is justly held that though a person be injured while unlawfully on the track, or contributes to the injury by his own carelessness or negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, they are liable for damages for the injury.[3]

[1] Blackburn, J., said: "This case, therefore, seems to me to be stronger against the defendants than the case of Stapley *v.* London, Brighton & South Coast Railway Company. In that case the facts were, that a public carriage road crossed the railway on a level, and there was alongside of the road a public footway, as is almost universally the case. The company's obligation is only with regard to a public carriage road, to put gates across it, so that horses, cattle, and carriages cannot go upon the line; but the statute impliedly directs what the company in fact had done, that there should still be a turnstile so as to allow foot-passengers to pass, foot-passengers being intrusted to look out for themselves. But in that particular case the man whose duty it was to open and shut the gates, and whose duty it was to be on the spot to give warning and directions as to carriages and horses, was absent, and had left the carriage gate open. The gate-keeper was placed there for this particular duty of opening and shutting the gate, and although the person about to cross was a foot-passenger to whom he had no such duty, and for whom, if there, he would not have been bound either to open or shut the gate, nevertheless the court of exchequer held, that the passenger seeing that the gate was open might reasonably think that this was an invitation to carriage passengers, and therefore that he also had a right to assume that all was safe and go on; and that consequently, on an injury occurring to him from the passing of a train, there was evidence of negligence on the part of the company. The present case is much stronger, because the only gate that could be used by the plaintiff's man was the gate placed by the company for the public traffic, and what the gate-keeper did was much more clearly and plainly within the scope of the duty of the company towards the passenger who was going to pass through the gate, and who could not get from across the line at all unless the man in charge opened the gate. I think, therefore, there was evidence to go to the jury upon this point, and that it was properly left to them, and we cannot enter a verdict for the defendants."

[2] See supra, § 345; infra, § 798.

[3] Brown *v.* Hannibal & St. Jo. R. R. 50 Mo. 461. In this case it was further held that while a train has a right to stop at a public crossing for a reasonable time for proper purposes,

§ 389. *Not negligence for engineer not to stop train if stoppage cannot be made without undue risk.* — When a person dashes across a railroad on an open crossing so suddenly and unexpectedly that the train cannot be checked in time to save him except at risks which a prudent engineer would not assume, the company is not liable for the consequences of the collision, if there was no failure in statutory duty of giving notice.[1]

§ 389 *a*. *Distinction in this respect between persons apparently helpless, and those capable of helping themselves.* — An engineer

passengers are not obliged to wait until the train is removed; and if the passengers are obliged to cross at other points than the public crossing on account of such obstruction, the company is bound to use ordinary care and diligence to prevent injuries to them; and when persons were in the habit of crossing the track at another than the public crossing, the agents and servants of the company were bound to take notice of the fact, and use a precaution commensurate with it.

See to same effect, in addition to cases cited supra, § 345 *et seq.*, Gray *v.* Scott, 66 Pa. St. 345; Trow *v.* R. R. Co. 24 Vt. 487; Kerwhacker *v.* C. C. &c. R. R. 3 Ohio St. 172; Railroad Co. *v.* Caldwell, 9 Ind. 397; Railroad Co. *v.* Adams, 26 Ind. 76; Bellefontaine R. R. *v.* Hunter, 33 Ind. 365; R. R. *v.* Collins, 2 Duvall, 114; Brown *v.* R. R. Co. 50 Mo. 461; Railroad Co. *v.* State, 36 Md. 366; L. & N. R. R. *v.* Burke, 6 Cold. 45; R. R. *v.* Whitton, 13 Wall. 176; Rothe *v.* Railway Co. 21 Wis. 256; Butler *v.* M. & St. P. R. R. Co. 28 Wisc. 487; B. & O. R. R. *v.* Fitzpatrick, 35 Md. 32; Daley *v.* Norwich, &c. R. R. 26 Conn. 591; Brown *v.* Lynn, 31 Penn. St. 510; Col. C. C. R. R. *v.* Terry, 8 Ohio, N. S. 570; Budge *v.* Grand June. R. R. 3 M. & W. 244; Macon, &c. R. R. *v.* Davis, 18 Ga. 679; Lackawanna R. R. *v.* Chendworth, 52 Penn. St. 382; Cent. R. R. *v.* Davis, 19 Ga. 437.

In B. & O. R. R. Co. *v.* Trainor, 33 Md. 542, it is well said by Maulsby, J.: "It is argued that if the deceased walked on the track, and his walking on the track was want of ordinary care, and the accident would not have happened if he had not walked on the track, then such walking was the proximate cause of the accident, and the plaintiff cannot recover. This argument does not justly apply the rule in 29 Md. 421. By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. No man would ever have been killed on a railway, if he had never gone on or near the track. But if a man does, imprudently and incautiously, go on a railroad track, and is killed or injured by a train of cars, the company is responsible, unless it has used reasonable care and caution to avert it, provided the circumstances were not such, when the party went on the track, as to threaten direct injury, and provided that being on the track he did nothing, positive or negative, to contribute to the immediate injury."

[1] Chicago & Alt. R. R. *v.* Gretzner, 46 Ill. 74.

who sees before him on the track a person apparently capable of taking care of himself has a right to presume that such person on due notice will leave the track, if there be opportunity to do so; and the engineer will not in such cases be chargeable with negligence if, in consequence of such person not leaving the track, the train cannot be checked in time to avoid striking him.[1] But

[1] Infra, § 803; Jones *v.* N. C. R. R. 67 N. C. 125; Phil. & Read. R. R. *v.* Spearen, 47 Penn. St. 300; Telfer *v.* R. R. 30 N. J. 188.

Thus it is not the duty of a railroad engineer, on nearing a public road-crossing, to stop his train for the purpose of avoiding a collision with a wagon and team he may see approaching the crossing, though by applying the brakes he could do so in time to avoid a collision. The engineer in such a case has a right to suppose, when he sees the wagon at a distance approaching the crossing, and the proper signal is sounded, that the person in charge of the team, in obedience to the known custom of the country, will stop, and not attempt to pass immediately in front of a swiftly advancing train. The converse, also, is true, that should the engineer, on approaching the crossing, see a team on the track when it would not be likely to get across in time to avoid the train, he should use every means in his power to check his train and prevent the collision. St. Louis, Alt. & T. H. R. R. *v.* Manly, 58 Ill. 300.

So in Telfer *v.* North. R. R. Co. 30 N. J. 188, the court said: "In crossing ordinary roads, caution and care are chiefly demanded to avoid running against or over anybody else; in crossing railroads, it is exacted to avoid being run over yourself. In the former case, the blame attached *primâ facie* to the party doing the injury; in the latter, it attaches, in the first instance, to the party obstructing the track." It is added: "Whether the whistle was blown or bell rung upon the approaching engine, is immaterial, if the boys knew, or with ordinary caution might have known, in time to avoid the collision, that the train was approaching. Although the engineer saw the boys approaching the crossing, while yet at such a distance as not to indicate their ignorance of the coming train, it was his right to suppose that they did not mean to attempt to cross before the train; and if he acted upon that impression, it was not negligence or want of ordinary caution on his part, although the supposition proved to be groundless." The law, it is further argued, only requires that the speed should be lessened when crossing a highway or other railroad, unless the track be concealed from view, or runs through a village or city. But it is the duty of the public to approach the track cautiously. The engine cannot turn to avoid collision; all other conveyances can.

This distinction is well expressed in the following passage from an opinion of Christiancy, C. J., in Lake Shore R. R. *v.* Miller, 25 Mich. 277: —

"It is true there are some apparent qualifications or exceptions to this rule (that a party whose negligence has contributed to the injury cannot recover); thus, though the plaintiff is in fault by negligently driving upon the track of a railroad, or not using due diligence to get out of the way, yet, if he be seen by the engineer in time to avoid the injury by reasonable diligence in checking the train, the

it is otherwise with persons apparently not capable of taking care of themselves, such as very young children, and persons lying

failure to do so would be treated as the proximate cause of the injury, if, from what the engineer could see, he had good reason to believe the plaintiff could not, or was not likely to, get off in time, or did not seem to be aware of the danger, and was therefore making no effort to avoid it. But if an engineer see a team and a carriage, or a man, in the act of crossing the track, far enough ahead of him to have ample time, in the ordinary course of such movements, to get entirely out of the way before the approach of the engine; or if he sees a man walking along upon the track at a considerable distance ahead, and is not aware that he is deaf or insane, or from some other cause insensible of the danger; or if he sees a team or man approaching a crossing too near the train to get over in time, he has a right to rely upon the laws of nature and the ordinary course of things, and to presume that the man driving the team or walking upon the track, has the use of his senses, and will act upon the principles of common sense and the motive of self preservation common to mankind in general; and that they will, therefore, get out of the way, — that those on the track will get off, and those approaching it will stop, in time to avoid the danger; and he, therefore, has the right to go on, without checking his speed, until he sees that the team or the man is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible, in time to avoid disaster. If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time. A more stringent rule than this, — a rule that would require the engineer to check his speed or stop his train, whenever he sees a team crossing the track or a man walking on it far enough ahead to get out of the way in time, until he can send ahead to inquire why they do not; or which would require the engineer to know the deafness or blindness, or acuteness of hearing or sight, or habits of prudence or recklessness, or other personal peculiarities of all those persons he may see approaching, or upon the track, and more especially of all those who may be approaching a crossing upon the highway, though not seen, — any such rule, if enforced, must effectually put an end to all railroads as a means of speedy travel or transportation, and reduce the speed of trains below that of canal-boats forty years ago; and would effectually defeat the object of the legislature in authorizing this mode of conveyance. But how are railroad companies, or their engineers or employees, to know the personal peculiarities, the infirmities, personal character, or station in life of the hundreds of persons crossing or approaching their track? By inspiration or intuition? And if they do not know, then how and why shall the company be required to run their road, or regulate their own conduct, or that of their servants, by such personal peculiarities of strangers, of

helpless on the track. The engineer has no right in such cases to presume that such persons will leave the track in time to avoid a collision. His duty is to check the train as soon as he sees an apparently helpless person on the track; and if he does not do so, and a collision ensue, the company is liable for the negligence.[1]

§ 390. *Surprise caused by cars running irregularly.* — If a person watching on a road takes due precautions to avoid collision, but the collision occurs from the train being moved unexpectedly to the surprise of the person so watching, he can recover if there was negligence in so moving the train. In a case of this character it appeared that the defendants and another company used the same grounds in the city of Chicago, the main tracks of the two roads being between six and seven feet apart. The plaintiff, being a track repairer, in the employ of the latter company, was engaged, with two other men, in replacing a rail on the track of this company, when a train of freight cars, which was being pushed backward, approached the workmen unobserved by them until nearly upon them, when they heard the shouting of a brakeman on the rear car, and hastily jumped backward to the end of the ties on the track of the defendants. While standing there waiting for the train to pass, the plaintiff and one of his fellow-laborers were struck by two freight cars belonging to defendants, and the plaintiff was severely injured. These cars were moving in the same direction as the train on the other road, by their own momentum, having been uncoupled from a train while in motion, and left quietly to run along the track without any person upon them to check their motion or to give an alarm. It was ruled the defendants were guilty of negligence in running their cars in the manner indicated; but the plaintiff was not chargeable with such negligence as would bar his recovery because of his omission, under the excitement and alarm of the occasion, to look along the track of the defendants' road to see if there might not be a train approaching, although he had time to do so before the collision.[2]

§ 391. Nor, as has been seen, does the fact that the plaintiff

which they know nothing?" See also R. *v.* Longbottom, 3 Cox C. C. 439; R. *v.* Walker, 1 C. & P. 320.

[1] R. *v.* Longbottom, 3 Cox C. C. 439; R. *v.* Walker, 1 C. & P. 320; East Tenn. R. R. *v.* St. John, 5 Sneed, 524. Supra, § 42, 307, and cases cited infra, § 803.

[2] Chic., R. I. & P. R. R. *v.* Dignan, 56 Ill. 487. Infra, § 810.

was a trespasser relieve the company from liability for the consequences of darting their cars to and fro without notice over a passage way. Thus where the end of a railroad track was over a passage way in a yard from a rolling-mill through which wheelbarrows and trucks frequently passed from the mill, and a car was negligently pushed over the end of the track, and killed a boy playing in the passage, it was held no defence that the boy had been frequently warned not to be in the passage on account of danger from the trucks. His not heeding the warning was not contributory negligence.[1]

§ 392. *Creeping under cars is contributory negligence.* — For a person to attempt to pass under cars about to start is such gross negligence as precludes him from recovering from the railroad company for damages, even though it appear that the engine started without the usual signal from the engineer.[2]

§ 393. *Passing between cars about to start.* — And so when the plaintiff, having warning that a freight train was about to start, undertook to pass through it on his way to a passenger train.[3] *A fortiori* is this the case with passing through cars when in motion.[4]

§ 394. *Leaving a quiet horse, accustomed to railroads, without care, near a crossing, not as a matter of law contributory negli-*

[1] Gray *v.* Scott, 66 Pa. St. 345. Supra, § 314.

[2] Central R. R. *v.* Dixon, 42 Ga. 327. See Lewis *v.* Balt. & O. R. R. 38 Md. 392 ; Am. Law Reg. May, 1874 (N. S. vol. 13, No. 5), 284. In Rauch *v.* Lloyd, 31 Pa. St. 358, it was held that when the plaintiff was a child, and the position of the cars in the street was illegal, the plaintiff's conduct in thus attempting to cross was not contributory negligence.

In Lewis *v.* Balt. & O. R. R. 38 Md. 588, plaintiff desiring to cross a street in Baltimore, after dark, the street lamps being lighted, found a train of railroad cars blocking the crossing. A crowd had collected waiting for an opportunity to cross, and while plaintiff was waiting two women had been prevented by the police from creeping under the couplings, but several persons had climbed up the platforms and thus crossed. After waiting about five minutes plaintiff started to get on the platform with the intention of crossing in the same manner, when the train started and his leg was crushed between two cars. *Held*, that such an act was contributory negligence, and he could not recover. The fact that the railroad company was negligent in thus blocking a street crossing contrary to the city ordinances, it was held, did not relieve plaintiff from the duty to use ordinary care to avoid danger.

[3] Chicago, &c. R. R. *v.* Dewey, 26 Ill. 255.

[4] Gahagan *v.* Bost. & L. R. R. 1 Allen, 187.

gence. — It has been ruled in Massachusetts,[1] that the fact that a horse was frightened and not under the control of any one, at a time when it was struck by a railroad train on a highway crossing, is not conclusive, as matter of law, of such a want of care on the part of its owner as to defeat an action brought by him against the railroad corporation to recover for the injury as caused by their negligence. In this case the evidence was that a servant, whom traders employed to deliver goods, upon stopping with his horse and wagon to deliver a parcel at a house from fifty to a hundred rods from a railroad crossing, left the horse unfastened for four or five minutes while he was in the house, knowing that it was not afraid of cars, and having used it for three or four months without ever hitching it or knowing it to start. This was ruled not to be conclusive, as matter of law, of a want of due care on his part; it being held that the question was for the jury. But if the case thus be left to the jury, it should be with the instructions, that if it should appear that the distance from the track was such that even a quiet horse might be alarmed on finding himself left, without attendant or fastening, near an engine dashing up, a case of contributory negligence was made out.[2]

§ 395. *Negligence of persons by whom plaintiff is carried.* — If there is a collision between two carriages or trains, belonging to different owners, a passenger in one carriage or train cannot recover from the other carriage or train, if the collision was caused by the negligence of his own carrier.[3] But if the negligence was joint, he may recover from either company or from both.[4] Thus in a late New York case,[5] the evidence was that the tracks of two horse-railroad companies crossed each other at an acute angle; a car upon each track was approaching the intersection from opposite directions, and a collision occurred. It was held, that if the acts of the defendant's servants contributed to the injury, the defendant was liable, although the negligent acts of the persons in charge of the other car were also contribu-

[1] Southworth *v.* Old Colony & Newport Railway, Company 105 Mass. 342.

[2] See supra, § 103–7, and particularly infra, § 838.

[3] Thoroughgood *v.* Bryan, 8 C. B. 115; Catlin *v.* Hills, 8 C. B. 123; Smith *v.* Smith, 2 Pick. 621; Cleveland R. R. *v.* Terry, 8 Ohio St. 570; Lockhardt *v.* Lichtenthaler, 46 Penn. St. 151.

[4] Colegrove *v.* N. Y. & N. H. R. R. 20 N. Y. 492; aff. *S. C.* 6 Duer, 382; Davey *v.* Chamberlain, 4 Esp. 229.

[5] Barrett *v.* The Third Ave. R. R. Co. 45 N. Y. 628; see Bennett *v.* R. R. 36 N. J. 225.

tory. The comparative degrees in the culpability of the two will not, it was said, affect the liability of either. If both were negligent in a manner contributing to the result, they are liable jointly or severally. For, even if the plaintiff's conveyance is negligently driven, this does not excuse subsequent colliding negligence by defendant.[1]

§ 396. 4. *Owner of cattle, &c., in suit against railroad for running them down. At common law persons permitting cattle to stray from inclosures are trespassers.* — As will be hereafter seen, by the common law the owner of cattle is obliged to keep them within inclosures, and he is liable for any damage they may do by straying at large; nor can he recover for any damage naturally received by them while so straying.[2] To what extent this portion of the common law is in force in the United States is discussed in another chapter.[3]

§ 397. *But though cattle are trespassing on a road, it is negligence for which the company is liable for the engineer to run them down, when this can be avoided by precautions which a prudent and skilful engineer would take.* — Undoubtedly it has been held by respectable courts that for the owner of cattle to permit them to run at large is such contributory negligence as precludes him from recovery from the company for their loss by a negligent collision.[4] But this, on the reasoning heretofore given,[5] cannot be sustained. Negligence does not throw those chargeable with it outside the pale of the law; and railroads, from the risks they are exposed to from the negligence of others, should be the last to deny this rule. If a railroad can defend running over man or beast on the single plea that the man or the beast was negligently on the track, then a trespasser, negligently playing with signals or switches, could excuse himself on the ground that the railroad was negligently run. The true rule is that if the engineer could, by the exercise of the prudence and diligence of a good business

[1] Bennett *v.* R. R. 36 N. J. 225; Chapman *v.* R. R. 19 N. Y. 341; Webster *v.* R. R. 38 N. Y. 260; Tuff *v.* Warman, 2 C. B. (N. S.) 740; aff. in *S. C.* 5 C. B. (N. S.) 573; Rigby *v.* Hewitt, 5 Exch. 540. Supra, § 335.

[2] See infra, § 883.

[3] Infra, § 883.

[4] Tonawanda R. R. *v.* Munger, 5 Denio, 255; *S. C.* 4 Comst. 349, as cited infra; Wilds *v.* R. R. 24 N. Y. 430; Indianapolis, &c. R. R. *v.* McClure, 26 Ind. 370; as explained by Ray, C. J., in Bellefontaine R. R. *v.* Hunter, 33 Ind. 356, cited supra. See Williams *v.* R. R. 2 Mich. 259; and infra, § 893.

[5] Supra, § 345.

man in his particular department, have escaped the collision, then the consequences of the collision cannot be avoided by the company on the ground that the cattle injured were trespassers.[1] At the same time a railroad, as will hereafter be more fully seen,[2] is, independent of statutory requisitions, not bound to fence their roads, or to take other measures to prevent the incursions of cattle.[3]

[1] Eames *v.* S. & L. R. R. 98 Mass. 560; Toledo, P. & W. R. R. *v.* Bray, 57 Ill. 514; Toledo, P. & W. R. R. *v.* Ingraham, 58 Ill. 120; Rockford, Rock. I. & St. L. R. R. *v.* Lewis, 58 Ill. 49; Perkins *v.* East. R. R. 29 Me. 307; Towns *v.* Chephue, 21 N. H. 364; Cornwell *v.* Sullivan R. R. 28 N. H. 161; Mayberry *v.* Concord R. R. 47 N. H. 391; Locke *v.* R. R. 15 Minn. 351; Parker *v.* R. R. 34 Iowa, 399; Louis. & Nash. R. R. *v.* Wainscott, 3 Bush, 149; Cin. & Zanes. R. R. *v.* Smith, 22 Ohio St. 227; Needham *v.* R. R. 37 Cal. 417; Bemis *v.* R. R. 42 Vt. 375; Isbel *v.* R. R. 27 Conn. 393; Jones *v.* R. R. 70 N. C. 696; Chic., B. & Q. R. R. *v.* Seirer, 60 Ill. 295; and cases cited infra, § 893.

[2] See infra, § 893–6.

[3] Buxton *v.* N. E. R. R., L. R. 3 Q. B. 549; R. R. *v.* Skinner, 19 Penn. St. 358; Jackson *v.* Rutland & B. R. R. 25 Vt. 150; Lord *v.* Wormwood, 29 Me. 282; Perkins *v.* E. R. R. 29 Me. 307; Tonawanda R. R. *v.* Munger, 4 N. Y. 349; Cecil *v.* P. R. R. 47 Mo. 246; Toledo R. R. *v.* Wickery, 44 Ill. 76; Price *v.* N. J. R. R. 2 Vroom, 229. In Needham *v.* S. F. & S. J. R. Co. 37 Cal. 417, this point is discussed by Sanderson, J., as follows: "This view of the law seems to be sustained by the New York cases, which counsel have cited. It has been held in that state that a railroad company is not liable for negligently running its engine upon and killing domestic animals found upon its road, under circumstances similar to those presented by the record in this case. Tonawanda Railroad Co. *v.* Munger, 5 Denio, 255; same case, 4 Comstock, 349. The reason given for this rule is, that the owner of cattle found straying upon the road, although he may be guiltless of actual carelessness in allowing them to escape from his premises, is nevertheless guilty in law of a wrongful and negligent act, without which the injury complained of would not have happened, and, therefore, having thus cooperated in causing the injury which he has sustained, he cannot be allowed to recover, whatever may have been the negligence of the defendant. That the defendant has an unqualified property in its road, and an unqualified right to occupy and use it in whatever manner may suit its pleasure and convenience, and hence, whenever such occupation and use is wrongfully obstructed, the defendant may lawfully remove the obstruction in any manner which, under the circumstances, it may find most convenient, provided it stops short of wanton and malicious mischief. In the case above cited, Mr. Chief Justice Beardsley said: 'Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. *A man is under no obligation to be cautious and circumspect towards a wrong-doer.* A horse straying in a field falls into a pit left

§ 398. *When there is imposed by statute on the railroad a duty to fence, then neglect to fence, in consequence of which cattle stray*

open and unguarded; the owner of the animal cannot complain, for, as to all trespassers, the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrong-doer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief.' Pp. 266, 267. In keeping with this definition of negligence, he also said, in a preceding portion of his opinion: 'The present action is founded on the alleged negligence of the agents and servants of the defendants in running their engine on the railway, whereby, as is charged, the plaintiff's oxen were killed. It is not charged the act was done *designedly* by the persons in charge, but, simply, that it occurred through negligence and want of care. It is a well settled rule of law that such an action cannot be sustained, if the wrongful act of the plaintiff co-operated with the misconduct of the defendants, or their servants, to produce the damage sustained. I do not mean that the coöperative act of the plaintiff must be wrong in intention to call for the application of this principle, for such is not the law. The act may have been one of mere negligence on his part, still he cannot recover. Or his beast, while trespassing on the land of another person, and that without the consent or knowledge of its owner, may have been damnified through some careless act of the owner of the land, yet the fact of such trespass constitutes a decisive obstacle to any recovery of damages for such an injury. It is, strictly speaking, *damnum absque injuria*.' This view of the law was sustained by the court of appeals in the same case, and seems to have become the settled law of that state. See also Wilds *v.* Hudson River R. R. Co. 24 N. Y. 430.

"To this doctrine, however, notwithstanding the very respectable authority by which it is sustained, we are unable to assent. About the general rule upon which it is founded — that a plaintiff cannot recover for the negligence of the defendant, if his own want of care or negligence has in any degree contributed to the result complained of — there can be no dispute. Gay *v.* Winter, 34 Cal. 153. The reason of this rule is, that both parties being at fault, there can be no apportionment of the damages, and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant, which would seem to be the true reason in the estimation of the New York courts. The law does not justify or excuse the negligence of the defendant. It would, notwithstanding the negligence of the plaintiff, hold the defendant responsible, if it could. It merely allows him to escape judgment, because, from the nature of the case, it is unable to ascertain what share of the damages is due to his negligence. He is both legally and morally to blame, but there is no standard by which the law can measure the consequences of his fault, and therefore, and therefore only, he is allowed to go free of judgment. The impossibility of ascertaining in what degree his negligence contributed to the injury being then the sole ground of his exemption from liability, it follows that such exemption cannot be allowed where such impossibility does not exist; or, in other words, the general rule, that a plaintiff who is himself at fault cannot recover, is limited by the reason upon which it is founded.

on the road and are injured, makes the road liable for the injury. — But, independently of the questions just discussed, is to be no-

"The golden rule is a corner-stone of the law as well as of morals, and in the department of the former finds its expression in the maxim: *Sic utere tuo, ut alienum non laedas.* No more in law than in morals can one wrong be justified or excused by another. A wrong-doer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs, nor property are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and if, by so doing, he can avoid injuring the person or property of the former, he is liable if he does not, if, by reason thereof, injury ensues. The error of the New York court lies in the fact that they ignore all distinction between cases where the negligence of the plaintiff is proximate and where it is remote, and in not limiting the rule, which they announce, to the former."

It should be added, however, that in Sheaf *v.* Utica, &c. R. R. 2 N. Y. Supreme Ct. 388 (1874), and Fanning *v.* Long I. R. R. Ibid. 585, the old rule in New York, as above controverted, appears to be abandoned.

In Cin. & Zanesv. R. R. Co. *v.* Smith, 22 Ohio St. 227, it is said, by White, J.: "The court instructed the jury that the defendant had the right to the free and unobstructed use of its railroad track, and that the paramount duty of its employees was the protection of the passengers and property in the train, and the train itself. But this being their paramount duty, they were bound to use ordinary care and diligence so as not *unnecessarily* to injure the property of others.

"We think the charge stated the law correctly. We see no good reason, in principle, why a party, so far as may be consistent with the full enjoyment of his own rights, ought not to use ordinary care so as not unnecessarily to injure the property of others.

"It is true, the rule contended for by the counsel of the plaintiff in error is sustained by a number of authorities. But the later and better considered cases are to the contrary. Illinois Central R. R. Co. *v.* Middlesworth, 46 Ill. 494; Bemis *v.* Conn. &c. R. R. 42 Vt. 375; Isbel *v.* N. Y. R. R. Co. 27 Conn. 393; Redfield's Amer. Railway Cases, 355, 356.

"The rule contended for has never been adopted in this state. It is, moreover, as respects railroad companies, inconsistent with our statute law on the subject. S. & C. 331.

"The facts in the case of the C. H. & D. R. R. Co. *v.* Waterson & Kirk, 4 Oh. St. 424, cited and relied upon by the counsel of the plaintiff in error, were different from those in the case now before us, and we do not regard the rule there laid down, as to the liability of the company in that case, as applicable to this.

"From what has been said of the charge in the first particular named, it would seem to follow that it is unobjectionable as respects the second. If it was the duty of the servants of the company, so far as was consistent with their other and paramount duties, to use ordinary care to avoid injuring animals on the track, they were, of course, bound to adopt the ordinary precautions to discover danger, as well as to avoid its consequences after it became known."

"The fact that the road was fenced, at the place of collision with the horses, was a circumstance to be con-

ticed that which arises when a statute requires a railroad to fence in its track. This is a positive duty, the neglect to comply with which renders the company liable, in case, through such neglect, cattle wander on the road and are injured.[1] Hence, where a statute makes a railroad responsible for injury done, through its neglect in fencing, to cattle running at large, it is no defence that such cattle were not legally running at large, but were required to be inclosed by a local county regulation.[2] At the same time the obligation on the part of a railroad to build fence does not relieve persons owning cattle or other animals from obligation to guard them with due care.[3]

sidered, in connection with the other circumstances of the case, in determining whether the engineer was guilty of negligence in not looking ahead and discovering the danger in time to avoid it. The fact that the road was fenced rendered it less probable that wandering animals would be on the track; but it cannot be said that the engineer, as a matter of law, by reason of the fences, was wholly excused from keeping a look-out ahead of the train.

"If the servants of the company, in charge of the train, having due regard to their duties for the safety of the persons and property in their charge, could, by the exercise of ordinary care, have seen and saved the horses, we think they were bound to have done so." Bemis *v.* Conn. &c. R. R. supra, 381; Louis. & Nash. R. R. Co. *v.* Wainscott, 3 Bush, 149.

[1] See infra, § 887, 891–2; Hinman *v.* Chic., R. I. &c. 28 Iowa, 491; Swift *v.* N. Mo. R. R. 29 Iowa, 243; Toledo, &c. R. R. *v.* Weaver, 34 Ind. 398; Toledo, &c. R. R. *v.* Cory, 39 Ind. 48; Walsh *v.* V. & T. R. R. 8 Nev. 110; McCoy *v.* Cal. Pac. R. R. 40 Cal. 532; Bay City *v.* Austin, 21 Mich. 390; Corwin *v.* N. Y. & E. R. R. 13 N. Y. 42; 34 N. Y. 427; Sheaf *v.* Utica, &c. R. R. 2 N. Y. Supr. Ct. 388. See Fanning *v.* Long I. R. R. 2 N. Y. Supr. Ct. 585.

[2] See infra, § 892; Stewart *v.* B. & M. R. R. 32 Iowa, 561; Spence *v.* N. W. R. R. 25 Iowa, 139; Fernew *v.* Dubuque & S. W. R. R. 22 Iowa, 528; Fritz *v.* Milwaukee & St. Paul R. R. 34 Iowa, 337.

The fact that plaintiff's horses entered the close of another, through an insufficient fence upon the highway, and passed from thence upon the defendants' road, could not affect his right of recovery. Chic. & N. W. R. R. *v.* Harris, 54 Ill. 528. And in this case, upon objection that the plaintiff was so far in fault in permitting his horses to run at large, when prohibited by the statute, that he should not be permitted to recover, it appearing the escape of the horses was involuntary on his part, that he made reasonable efforts to reclaim them soon after their escape, but was unsuccessful, continuing the search for them until dark of the night, they were injured, and when last seen by him, while endeavoring to get them up, they were going in an opposite direction from the railroad, it was held, the negligence of the defendants was so much greater than that of the plaintiff, that, when compared, that of the latter was slight, and rendered the defendants liable for the injury. Ibid.

[3] Joliet & North. Int. R. R. *v.* Jones,

§ 399. 5. *Owner of goods and cattle in suit against carrier for bad carriage.* — This topic is so mingled with that of the carrier's duty in this respect, that it is reserved for future consideration.[1]

§ 400. 6. *Traveller injured in highway.* — The question of contributory negligence on highways will be hereafter incidentally noticed when the general subject is discussed.[2] At present one or two points may be distinctively stated.

Person cannot recover who voluntarily and unnecessarily strikes an obstruction. — A person who knows a defect on a highway, and voluntarily undertakes to test it, when it could be avoided, cannot recover against the municipal authorities for losses incurred through such defect.[3] But the question of due care is for the jury. Thus, if it appear that if there is danger in treading on a piece of ice, and the plaintiff voluntarily and unnecessarily undertakes to walk over it, when he could plainly see it, and easily avoid it, and falls and breaks a limb, he is precluded from recovery.[4]

20 Ill. 221; Terre Haute & St. L. R. R. *v.* Augustus, 21 Ill. 186; C., B. & Q. R. R. *v.* Cauffman, 28 Ill. 513; C., B. & Q. R. R. *v.* Seirer, 60 Ill. 295; C., B. & Q. R. R. *v.* Magee, 60 Ill. 529.

The Nevada law providing that companies shall "maintain a good and sufficient fence on either or both isdes of their property," taken in connection with the further provision that they shall be liable for the killing of domestic animals "when they stray upon their line of road where it passes through or alongside of the property of the owners thereof," simply requires companies to fence their road where it may run through or alongside of the land of private individuals; that is, on either or both sides, as occasion may demand; and even then the fencing is only for the protection of adjoining owners, and no other person can complain of the want of it. It is held that the law (Stats. 1864–5, 427, sec. 40) does not require railroad companies to fence their road where it runs through public land. It is further said, that if cattle stray upon a railroad directly from the land of their owner, and by reason of the failure on the part of the company to fence their road at that point, and are killed, the company would be held liable under the railroad act (Stats. 1864–5, 427, sec. 40), on a simple showing of the facts of such killing and neglect to fence, without any further showing of negligence; but it is otherwise if they stray from public land, or from land not belonging to their owner. Walsh *v.* V. & T. R. R. 8 Nev. 110.

[1] See infra, § 563, 614–9.

[2] See infra, § 960 *et seq.*

[3] Horton *v.* Ipswich, 12 Cush. 488; Wilson *v.* Charlestown, 8 Allen, 137; Lyman *v.* Amherst, 107 Mass. 339; Frost *v.* Waltham, 12 Allen, 85.

Under the Massachusetts statute it has been ruled that the plaintiff cannot recover if the evidence in the cause is consistent equally with his diligence or his negligence. Crafts *v.* Boston, 109 Mass. 519.

[4] Durkin *v.* The City of Troy, 61 Barb. 437. See Willey *v.* Belfast, 61 Me. 569; City *v.* Hildebrand, 61 Ill. 155.

§ 401. *Going off prepared track.* — As will be seen, it is the duty of the traveller to follow the prepared track. Where, however, this is imperceptible, on account of snow-drifts, a passenger may follow the line of travel on a road without contributory negligence.[1]

§ 402. *Traveller bound to look out.* — This is a fundamental principle, which lies at the base of this branch of the law.[2] Yet even here there are distinctions to be observed. It is not negligence to travel a road in the dark, when there can be no look-out.[3] Nor is it necessary that the traveller should have perfect eyesight, though it would be negligence in a blind man to undertake to travel a road unattended.[4] The same rule applies to drunken men.[5]

§ 403. *Not conclusive defence that traveller knew of the defect and did not avoid it.* — A traveller may be entitled to presume that a defect observed by him would have been removed. Aside from this, his forgetfulness, in many cases, may be imputed to causes other than negligence. And even supposing him to be negligently absent-minded or forgetful, the town on this ground cannot be excused for putting obstacles in his way.[6] Again: if necessary, the danger may be rightfully braved, and the town held liable for the consequences; but it is otherwise when the traveller, from mere foolhardiness, knowing a defect exists, rushes against it, when he also knows that it could be avoided by taking another side of the road.[7] But the fact that a road is defective does not oblige him to take another less convenient road which is safe.[8]

§ 404. *Unskilfulness of driver.* — Public roads are meant to be driven in by drivers of all classes. When, however, unskilful-

[1] Infra, § 968; Coggswell *v.* Lexington, 4 Cush. 307. See Gerald *v.* Boston, 108 Mass. 580; Hayden *v.* Attleborough, 7 Gray, 338.

[2] Davenport *v.* Ruckman, 37 N. Y. 568.

[3] Williams *v.* Clinton, 28 Conn. 264.

[4] See infra, § 995; supra, § 42, 307.

[5] Cassidy *v.* Stockbridge, 21 Vt. 391; Alger *v.* Lowell, 3 Allen, 402; supra, § 306, 332.

[6] Folsom *v.* Underhill, 36 Vt. 580; Fox *v.* Sackett, 10 Allen, 553; Whittaker *v.* W. Boylston, 97 Mass. 273; Smith *v.* Lowell, 6 Allen, 39; Snow *v.* Housatonic R. R. 8 Allen, 441; Fox *v.* Glastenbury, 29 Conn. 204; Humphreys *v.* Armstrong Co. 56 Penn. St. 204; Achtenhagen *v.* Watertown, 18 Wisc. 331.

[7] Hubbard *v.* Concord, 35 N. H. 52; Horton *v.* Ipswich, 12 Cush. 488; Wilson *v.* Charlestown, 8 Allen, 137; James *v.* San Francisco, 6 Cal. 528.

[8] Infra, § 994.

ness is such as to unfit for ordinary purposes of driving, and when it causes the damage, then it is a bar to recovery.[1]

§ 405. *Sunday travel.* — Under the Massachusetts statute, fining a person travelling on Sunday except from necessity or charity, it is ruled that such a traveller cannot recover from the town for injuries sustained when travelling, unless from necessity or charity.[2] This, however, does not apply to a person walking on a highway on Sunday for exercise,[3] nor to a person going to religious worship, no matter how eccentric such worship may be.[4] But, as has been already seen,[5] the Massachusetts rule on this topic is exceptional, and cannot be sustained consistently with those broad principles of the law of negligence which have just been detailed.

§ 406. 7. *Participant injured in public games. Generally no liability on either side unless there be malice.* — The Roman law gives us the following illustration of this principle: "Si quis in colluctatione vel in pancratio vel pugiles dum inter se exercentur alius alium occiderit, siquidem in publico certamine alius alium occiderit, cessat Aquilia, quia gloriae causa et virtutis, non injuriae gratia videtur damnum datum. Hoc autem in servo non procedit, quoniam ingenui solent certare: in filio fam. vulnerato procedit: plane si cedentem vulneraverit erit Aquiliae locus."[6] In other words, no liability attaches to the wounding or killing (if the rules of the game be preserved, and no malice shown) of a freeman in a wrestling match or other public game. While the trial of strength continues it is the understanding of the game that each party exerts all the strength at his command; and each party goes into the game with full notice that this will be done. When, however, the game is ended, then the conqueror must exhibit *diligentia* in his treatment of his prostrate antagonist. And the game, to protect its participants, must be a *bonâ fide* match, *gloriae et virtutis causa*. A wrestling match with a slave did not fall under this head; it was no "gloria" to over-

[1] Flower *v.* Adams, 2 Taunt. 314; Butterfield *v.* Forrester, 11 East, 60; Reed *v.* Deerfield, 8 Allen, 522; Bigelow *v.* Rutland, 4 Cush. 247; Dimock *v.* Sheffield, 30 Conn. 129.

[2] Bosworth *v.* Swansey, 10 Mete. 363; Jones *v.* Andover, 10 Allen, 18.

[3] Hamilton *v.* Boston, 14 Allen, 475.

[4] Feital *v.* R. R. 109 Mass. 398; supra, § 330, 381 *a*.

[5] Supra, § 331, 381 *a*.

[6] L. 7. § 4. leg. Aq.; Pernice, p. 54.

come a slave in such a trial. It was otherwise, so argues Pernice,[1] with the game of ball, as appears by the following extract: "Cum pila complures luderent quidem ex his servulum cum pilam percipere conaretur impulit: servus cecidit et crus fregit. Quaerebatur: an dominus servuli lege Aq. cum eo cujus impulsu ceciderat agere potest? Respondi non posse, cum casu magis quam culpa videretur factum.[2] Here the presumption indicates *casus*. In this case, however, the game is not limited to the *ingenui*. The case is therefore one in which slave and freeman stood alike; the former having no greater privilege than the other. Here also, from the nature of the game, the idea of *diligentia* is excluded; the players of one side seeking to hinder the players of the other side from catching the ball, and a struggle therefore accepted which cannot go on without the risk of bruises and falls. In such case a hurt received in the usual course of the game cannot be regarded as *culpa*. In games, therefore, which are sanctioned by long usage and by indirect if not direct legal sanction, there is no application of the maxims, *Lusus quoque noxius in culpa est*,[3] and *Non debet esse impunitas lusus tam perniciosus*.[4]

III. RELATIONS OF LAW AND FACT.

§ 407. This topic will be hereafter distinctively discussed.[5]

[1] Op. cit. p. 54.

[2] L. 52. § 4. D. h. t.

[3] L. 10. § 4. D. leg. Aq.

[4] L. 50. § 10. D. h. t. See also Penn. *v.* Lewis, Addison, 279; Fenton's case, 1 Lewin, 179; Wh. Crim. Law (7th ed.), § 1012. And see as to fireworks, infra, § 881.

[5] Infra, § 423.

CHAPTER X.

IGNORANCE AS A DEFENCE.

I. Ignorance of law, § 410.
Reasons why such ignorance is no defence, § 410.
Law presumed to be known by all, § 411.
Courts have no capacity to determine such ignorance, § 412.
Public safety endangered by contrary view, § 413.
Distinction between ignorance of a specialist and that of a non-specialist, § 414.
II. Ignorance of fact, § 415.
Facts as to which defendant ought to be cognizant, § 415.
Facts with which he does not claim to be cognizant, § 416.

I. IGNORANCE OF LAW.

§ 410. IGNORANCE is a defence so constantly made to suits for negligence that it demands from us particular and distinct consideration. The first phase in which it presents itself is that of ignorance of law; and here the rule is both emphatic and uniform. Ignorance of the law is no defence to suits either criminal or civil. As, however, the amount of damages often depends largely on the jury's conception of the reasonableness of this rule, it is proper to pause to consider on what this reasonableness rests.

§ 411. 1. *The law is presumed to be known by all persons subject to it.* — But even supposing this were one of those fictions of law, which, as *presumtiones juris et de jure*, the law does not permit to be impugned, a jury could rarely be persuaded to give more than nominal damages on a case resting on a fiction they know to be false in fact. No man knows all the laws of the land in which he lives, to say nothing of the laws of foreign lands, and the law of nations, which the laws of his own land under certain circumstances embrace. The most eminent and experienced judges, for instance, when called upon to act without study or counsel, in their private affairs (*e. g.* as in making of their own wills), show, by their blunders and inadvertencies,

that there is no man who, in the ordinary affairs of life, can possess himself of the laws of the land, except by deliberation and study. The reason is to be found not merely in the incapacity of the actor himself, but in the character of the law which he is thus supposed to master. For that law is not only so extensive, viewing it in all its branches, as to exceed the bounds of ordinary comprehension, but it involves conclusions as yet imperfectly expressed. The idea of Blackstone, that the common law of England consists of a fund of established though unwritten jurisprudence, from which each judge draws what is necessary for every litigated case, is now universally dismissed as incorrect. By each new decision the law as previously announced is extended. By many new decisions the law as previously announced is overruled. The law applicable to multitudes of combinations of acts, therefore, is a law which is not determined until those particular combinations of acts are specifically judicially scanned; and even then we cannot be certain what this law is until it has been affirmed by the highest territorial court having jurisdiction.

§ 412. 2. *It is necessary to society that ignorance of the law should be no excuse for an act the law pronounces to be unlawful; because ignorance of the law is a subject which the courts have no capacity to determine.* — This is the position taken by Mr. Austin,[1] in those lectures which form the most philosophical treatise on general jurisprudence which has as yet sprung from English pen. "The only *sufficient* reason for the rule in question," he declares, "seems to be this: that if ignorance of law were admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as ground for exemption, ignorance of law would always be alleged by the party, and the court, in every case, would be bound to decide the point. But in order that the court might decide the point, it were incumbent upon the court to examine the following questions of fact: 1st. Was the party ignorant of the law at the time of the alleged wrong? 2dly. Assuming that he was ignorant of the law at the time of the wrong alleged, was his ignorance of the law *inevitable* ignorance, or had he previously been placed

[1] Lectures, 3d edition, I. 498.

in such a position that he might have known the law, if he had duly tried? It is manifest that the latter question is not less material than the former. . . . . Now, either of these questions were next to insoluble. Whether the party was *really* ignorant of the law, and was so ignorant of the law that he had no *surmise* of its provisions, could scarcely be determined by any evidence accessible to others. And for the purpose of determining the *cause* of his ignorance (its *reality* being ascertained), it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution. The reason for the rule in question would, therefore, seem to be this: It not infrequently happens that the party is ignorant of the law, and that his ignorance is inevitable. But if ignorance of law were a ground for exemption, the administration of justice would be arrested; for, in almost every case, ignorance of law would be alleged. And, for the purpose of determining the *reality* and ascertaining the cause of his ignorance, the court were compelled to enter upon questions of fact, insoluble and interminable."

§ 413. *The safety of society would be endangered if ignorance of the law were a legal palliation for an illegal act.* — Here we strike directly at the subject matter of the present treatise. To the safety of society it is requisite that those employed either as managers or operatives in any industry should be *experts* in their respective specialties; and hence that they should be experts in the law by which they are bound, whether that law consists in statutes, or customs, or prior adjudications, or in conclusions from such statutes, customs, or adjudications. Society requires that a switch-tender should know the law of his road bearing on him, which is the law by which the law of the land would guage in this respect his conduct; that a common carrier should know the law of the land in respect to his particular class of bailments; that the trustee should know the law of the land in respect to the way he should invest the funds of his *cestui que trust*. If, however, the courts should admit ignorance of law as relieving either switch-tender, or common carrier, or trustee from responsibility, then, in order to become irresponsible, it would simply be necessary for switch-tender, common carrier, or trustee to become totally ignorant of the law. Immunity, therefore, would rise in proportion to incompetency; and the most incom-

petent and therefore mischievous agents would be those whom the law would most thoroughly protect.[1]

§ 414. *This important distinction, however, remains, that a person not claiming to be an expert in law is chargeable, in matters requiring such knowledge, only with culpa lata, or gross negligence, if he prove ignorant, whereas a person claiming to be an expert, and failing in such knowledge, is chargeable with culpa levis, or the negligence of a specialist.* — I throw, for instance, business into the hands of an agent who does not profess to be an expert in the law. In such case he is not liable to me for negligence for not possessing a knowledge that he did not pretend to; in other words, he is not chargeable with *culpa levis*. I may prove that he entered into the agency without such knowledge, yet this will not be enough to base a verdict against him. He will be only liable in this respect for the gross negligence, or *culpa lata*, which consists in not knowing what every one ought to know. But if I employ him as an expert in law, then he is negligent if he enters upon the employment without due knowledge, and consequently is chargeable not only with *culpa lata*, but in addition to this, with *culpa levis*, or with negligence as a specialist.[2] At the same time

[1] The ethical side of this question is finely developed by Pascal, in his Fourth Provincial Letter: "What a blessing," he argues with exquisite satire, "would this view (that of the irresponsibility of those ignorant of law) be to many. You would never, in this view, meet with people with fewer sins. For, in the first place, they never think of law at all; their viciousness has extinguished their reason; their life is spent in a perpetual round of pleasure or passion; yet the excesses which I supposed increased their guilt, you tell me insure their acquittal. I always supposed that the less a man thought of moral law the more culpable he was; but now I learn that the more entirely he relieves himself from a knowledge of his duty, the more approvedly is his duty performed. What folly is it then to have any sense of duty at all. The only truly wise man is the utter villain, the one who has no conscience." And he sustains himself by Aristotle's well known remarks on the same point: "All wicked men are ignorant of what they ought to do and what they ought to avoid; and it is this very ignorance which makes them wicked and vicious. Accordingly, a man cannot be said to act involuntarily merely because he is ignorant of what it is proper for him to do in order to fulfil his duty. This ignorance in the choice of good or evil does not make the action involuntary; it only makes it vicious. The same thing may be affirmed of the man who is ignorant generally of the rules of his duty; such ignorance is worthy of blame and not of excuse."

I cite here, with some adaptations, from McCrie's translation of Pascal.

[2] See supra, § 26 *et seq.;* infra, § 510, 520, 749; Miller *v.* Proctor, 20 Oh. St. 442.

it is essential to remember that *the knowledge required of a specialist is not perfect knowledge*, for if this were exacted no specialist could escape the imputability of negligence, but *such knowledge as specialists* of the class in *question are under the particular circumstances accustomed to possess*.[1]

II. IGNORANCE OF FACT.

§ 415. That ignorance of fact may be an excuse, is a maxim of the Roman law as well as of our own.[2] Certain modifications, however, arise, which it is desirable specifically to notice: —

1. *Facts of which the defendant ought to be cognizant as a specialist.* — He who accepts an office or agency is bound not only to exercise due diligence in possessing himself with the facts, knowledge of which is necessary to enable him to discharge his duties, but is guilty of negligence if he accepts the trust without a preliminary acquaintance with the particular specialty. Claiming to be an expert, he must have the education of an expert; and if an injury occurs in consequence of his ignorance, he is responsible for the consequences. A trustee, for instance, undertaking to act as such, not only must obtain a proper knowledge of the investment he makes for his beneficiary, but must be, when he assumes the trust, adequately acquainted with the ordinary modes in which good trustees do business. If loss occurs to his principal from his incapacity in either of these respects, he is liable to make good the loss.[3] Nor is this all. He must, as he proceeds with his duties, possess himself with the facts necessary to enable him to discharge his engagements judiciously. To omit this, exposes him to make good the loss accruing to his principal from his neglect. This, however, does not involve an implied undertaking on his part to be possessed of any knowledge which a good business man in his department would not be likely to obtain. Thus he cannot be held responsible for failure to prognosticate natural casualties, such as are called the act of God, or revolutions produced by the interposition of independent moral

[1] See supra, § 52; and particularly infra, § 744–9, and Montrion *v.* Jefferys, 2 C. & P. 113; where Abbott, C. J., declared that neither attorney or counsel or judge is expected to know all the law, or to be liable for mistakes into which cautious men may fall.

[2] See authorities cited in Wharton's Crim. Law, § 83, and Broom's Maxims, *in loco*.

[3] See supra, § 26 *et seq.*; infra, § 518. See also Chambersburg *v.* McLellan, Sup. Ct. Penn. 1874; Leg. Int. Aug. 14, 1874.

agencies. So, also, the officers of a railroad undertake to have a knowledge of all facts of which the diligence of good railroad men could have possessed them. They cannot be held responsible, however, for ignorance of facts which such diligence could not have discovered, — such, for instance, as the weakness of particular bars of iron or beams of wood, which were purchased by them as of good quality, and whose defects were latent.[1] So as to physicians. A professed physician is guilty of negligence when he enters upon his duties without the preparation usual with good physicians under his particular circumstances, or when he omits, when attending, to acquaint himself with the peculiarities of his patient's case. But he is not required to possess himself with a knowledge not attainable in the place in which he lives, and not usual with good physicians of his class.[2]

§ 416. 2. *Facts of which a person does not claim as a specialist to be cognizant.* — A person, for instance, not claiming to be skilled in medicine, and giving notice of his ignorance, cannot, if called upon to act as a medical attendant, be made responsible for his ignorance of the specialty, unless it appear that he displaced, by his rash acceptance of the post, a more competent person from undertaking its duties.[3] And generally, we may hold that where a person is employed, not as a specialist, but as a non-specialist, undertaking a business of which he professes to know nothing, he then can only be held liable for gross negligence, or *culpa lata*, consisting of ignorance of facts which every ordinary person ought to know.[4]

[1] See supra, § 26 *et seq.*
[2] See infra, § 730–7.
[3] See infra, § 730–7.
[4] Supra, §§ 26–45–48.

CHAPTER XI.

PROVINCES OF COURT AND JURY. — BURDEN OF PROOF.

Diligence and negligence, where the evidence is conflicting, are mixed questions of law and fact, § 420.
In actions not based on contract, burden of negligence is on plaintiff, § 421.
Against bailees, after proof of loss, burden is on defendant, § 422.
Burden of contributory negligence is on defendant, § 423.
But plaintiff, when his own case shows contributory negligence, may be nonsuited, § 427.
Employee against employer, § 428.
Casus, § 429.
Gratuitous depositaries, § 430.

§ 420. *Diligence and negligence, where the evidence is conflicting, are mixed questions of law and fact.* — The question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed, and the evidence is conflicting.[1]

[1] Mayo *v.* Boston R. R. 104 Mass. 137; Lane *v.* Atlantic Works, 107 Mass. 104; Gaynor *v.* O. C. R. R. 100 Mass. 208; Goodale *v.* Worc. Ag. Soc. 102 Mass. 401; Conn. *v.* Vt. R. R. 108 Mass. 7; Gerald *v.* Boston, 108 Mass. 580; Raymond *v.* Lowell, 6 Cush. 524; Lyman *v.* Inhab. 107 Mass. 339; Lake Shore R. R. *v.* Miller, 25 Mich. 274; Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 14; Hackford *v.* N. Y. C. & H. R. R. 53 N. Y. 654; Norris *v.* Litchfield, 35 N. H. 277; Foot *v.* Wiswell, 14 Johns. 304; Moore *v.* Cent. R. R. 4 Zabr. 268; Gagg *v.* Vetter, 41 Ind. 228; Field *v.* New York Central Railroad, 32 N. Y. 339; Freemantle *v.* London, &c. R. W. Co. 10 C. B. N. S. 89; 31 Law J. C. P. 12; Jenkins *v.* Little Miami R. R. Co. 2 Disney, 49; Maloy *v.* The New York Central R. R. Co. 58 Barb. 182; Belton *v.* Baxter, 2 Sweeny (N. Y.), 339; Anderson *v.* Steam Co. 64 N. C. 399; Lambeth *v.* N. C. R. 66 N. C. 494; St. Paul *v.* Kirby, 8 Minn. 154; Johnson *v.* Winona & S. R. R. 11 Minn. 96; Smith *v.* Hann. & St. Jo. R. Co. 37 Mo. 292; O'Flaherty *v.* Union R. Co. 40 Mo. 70; Morrisey *v.* Wiggins Ferry Co. 43 Mo. 380; 47 Mo. 523; Knight *v.* Ponchartrain R. Co. 23 Lou. An. 462; Lesseps *v.* Same, 17 Lou. R. 361; Fleytas *v.* Same, 18 Ibid. 339; Carlisle *v.* Holton, 3 Lou. An. 48; B. & O. R. R. *v.* Shipley, 31 Md. 368; B. & O. R. R. *v.* Fitzpatrick, 35 Md. 32; B. & O. R. R. 36 Md. 366; Felder *v.* L. C. & C. R. Co. 2 McMullan, 403; Storer *v.* Gowen, 6 Shep. 174; Stuart *v.* Inh. of Machias Port, 48 Maine, 477; Stratton *v.* Staples, 59 Me. 94; Hill *v.* Portland & Roch. R. Co. 55 Maine, 438; Gerke *v.* Cal. Va. Co. 9 Cal. 251; Wolf *v.* Water Co. 10 Cal. 545; Rich *v.* Sacr. Val. R. 18 Cal. 358; Karr *v.* Parks, 10 Cal. 188; Seigel *v.* Eisen, 41 Cal. 109; Whirly *v.* White-

§ 421. *In actions for injuries not based on contract the burden of proof of negligence is on the plaintiff.* — "To warrant," says

man, 1 Head, 610; Un. Pac. R. R. *v.* Rollins, 5 Kan. 180; Kansas P. R. R. *v.* Butts, 7 Kan. 315; Green *v.* Hollingsworth, 5 Dana, 173; Matheny *v.* Wolffs, 2 Duv. 137; State *v.* The Manchester & Lawrence Railroad, 52 N. H. 528; Viner *v.* N. Y. A. G. & W. S. Co. 50 N. Y. 23; McGrath *v.* N. Y. C. & H. R. R. 1 N. Y. Supr. Ct. 243; Barton *v.* N. Y. C. & H. R. R. 1 N. Y. Supr. Ct. 297; Totten *v.* Phipps, 52 N. Y. (7 Sickles) 354; Matteson *v.* N. Y. Cent. R. R. 62 Barb. 364; Johnson *v.* W. C. & P. R. R. 70 Penn. St. 357; West Ch. & P. R. R. *v.* McElwee, 67 Penn. St. 311; Kay *v.* Penn. R. R. 65 Penn. St. 269; Penn. C. C. *v.* Bentley, 66 Penn. St. 30; Gillespie *v.* City, 54 N. Y. 468; City *v.* Hildebrand, 61 Ill. 155; Phil. R. R. *v.* Hassard, Leg. Int. June 19, 1874; Cent. L. J. July 30, 1874.

That question of reasonable care is for jury, see Hackett *v.* Middlesex Man. Co. 101 Mass. 101; Eagan *v.* Fitchburg R. R. 101 Mass. 315. See Carter *v.* Russell, 101 Mass. 50; Reynolds *v.* Hanrahan, 100 Mass. 313; Warren *v.* Fitchburg R. R. 8 Allen, 227; Johnson *v.* Hudson River R. R. 20 N. Y. 65; Simmons *v.* New Bedf. Vineyard & N. Steamboat Co. 100 Mass. 34; Barron *v.* Eldridge, 100 Mass. 455; Cook *v.* Met. R. R. 98 Mass. 361.

Where evidence is indisputed, question one of law. — Where the evidence is all one way, the court may determine the whole case as a question of law; and while the credibility of witnesses and the weight of evidence are for the jury, whether there is any evidence, or what its legal effect may be, is to be decided by the court. Boland *v.* Missouri R. Co. 36 Mo. 491; *S. P.* Trow *v.* Vt. Cent. R. R. 24 Vt. 497; Sexton *v.* Zett, 44 N. Y. 430; Chic. & A. R. R. 58 Ill. 226.

In Pennsylvania, as stated in an excellent article in the American Law Register for May, 1874, the following exceptions are recognized: "1st. Where the standard or measure of duty is defined by law, and is the same under all circumstances. 2d. Where there is such an obvious disregard of duty and safety as amounts to misconduct. W. C. & P. R. Co. *v.* McElwee, supra; N. P. R. Co. *v.* Heilman, 49 Pa. St. 63; Glassey *v.* Hestonville, &c. R. Co. supra. The following are cases of negligence *per se:* Reeves *v.* Del., Lack. & West. R. Co. 30 Ibid. 454; held, that it was negligence for a train to approach a public crossing, on a curve and through a deep cut, at a high rate of speed. Powell *v.* Penna. R. Co. 32 Ibid. 414, held negligence in defendants to use straw for bedding stock in cars where there was exposure to sparks from the locomotive. Penna. R. Co. *v.* Zebe, 33 Ibid. 318; where the plaintiff's son stepped off the cars on the side opposite the platform, and was killed by a passing train See also Penna. R. Co. *v.* Ogier, 35 Ibid. 60, citing Reeves *v.* D., L. & W. R. Co. and Penn. R. Co. *v.* Zebe, supra. Citizens' Ins. Co. *v.* Marsh, 41 Ibid. 395; held negligence, or rather misconduct, for the captain of a steamboat, racing on the Mississippi, to stand a barrel of oil of turpentine near the furnace to use upon the wood as it went into the fire, whereby the steamboat was destroyed by fire. North Penna. R. Co. *v.* Heilman, 49 Ibid. 60, where the plaintiff approached a railroad track without looking out for a train. To the same effect is the late case of Penna. R. Co. *v.* Beale, 30 Leg. Int. 232, affirming that case, where

Erle, C. J.,[1] "a case of this class being left to the jury it is not enough that there may be some evidence. A mere *scintilla* of

Sharswood, J., says: 'There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court.' Pittsburg & Connellsville R. Co. *v.* McClurg, 56 Pa. St. 300, where a passenger in a railway car voluntarily put his arm outside the car window and was injured. Glassey *v.* Hestonville, &c. R. Co. 57 Ibid. 172, where it was held in an action *by a parent*, that he was negligent in law in allowing his son, less than four years of age, to run at large in the street without a protector. Empire Transportation Co. *v.* Wamsutta Oil Co. 63 Ibid. 14, where part of the measure of duty resting upon defendants as common carriers was to have perfect car-couplings. The defendants' oil-train caught fire, and by reason of a defective coupling the car containing plaintiff's oil could not be uncoupled, but was consumed, with its contents, although it could otherwise have been saved. The jury were instructed to find for the plaintiff.

"To show the limits of the rule in this state, the following cases may be added, which were, under the circumstances, held proper to go to the jury: Penna. R. Co. *v.* Barnett, 59 Pa. St. 259 (where the whistle of the locomotive was not sounded at a crossing); McCully *v.* Clark, 40 Ibid. 399 (where the defendants permitted a large heap of burning coal to remain unextinguished, by which the plaintiff's warehouse was destroyed); Huyett *v.* Phila. & Read. R. Co. 23 Ibid. 373 (where fire was communicated by the emission of sparks from a locomotive); Johnson *v.* Bruner, 61 Ibid. 58 (where a servant fell through an open hatchway in defendant's mill); Johnson *v.* West Chester & Phila. R. Co. 70 Ibid. 357 (where, under peculiar circumstances, the plaintiff stepped on a train in motion); Kay *v.* Penna. R. Co. 65 Ibid. 269."

In a late case in Massachusetts, (Fisk *v.* Wait, 104 Mass. 71), the evidence was that A. and his minor son B. were in the vestibule of their house preparing to set off fireworks while a procession was passing, when C. fired a rocket, from his house opposite, which struck and injured B. Many rockets and other fireworks were set off by other persons while the procession was passing the house. It was held, in an action against C. for the injury as caused by his negligence, that the question whether A. and B. were careless in being in the vestibule was for the jury. And it was further ruled, also, that evidence offered by C., that he and A. were members of a club, which got up the procession, and published notices calling on citizens to decorate and illuminate their houses along its route, but not mentioning fireworks; that they both decorated and illuminated their houses, in aid of the object of the procession and in pursuance of the call; that C. fired the rocket as a part of his illumination; and that no one had license to set off fireworks on the occasion,— was immaterial.

In Brooks *v.* Somerville, 106 Mass. 271, it was said by Ames, J.: "It is too well settled to be now brought in question, that there may be a state of things in the trial of a cause, in which it is the duty of the court either to in-

[1] Cotton *v.* Wood, 8 Com. B. N. S. 568.

evidence is not sufficient, but there must be proof of well-defined negligence." The plaintiff, therefore, must give some affirmative

struct the jury that there is no evidence upon which the plaintiff is entitled to recover, or on which the other party can maintain his defence. Such a course of proceeding in a proper case is not an invasion of the province of the jury. The rule of law upon which it depends is simple and intelligible in itself, although, in the wide diversity of the cases in which it is discussed, there is some practical difficulty in its application, and perhaps some apparent conflict in the decisions upon the subject. Thus, upon this subject of negligence, it has been held as matter of law, that an attempt to cross a railroad train by going between two cars in motion (Gahagan *v.* Boston & Lowell Railroad Co. 1 Allen, 187); leaving a train of cars after it had started (Lucas *v.* Taunton & New Bedford Railroad Co. 6 Gray, 64); leaping from a train while in motion (Gavett *v.* Manchester & Lawrence Railroad Co. 16 Gray, 501); crossing a railroad track in front of an approaching train without looking up (Butterfield *v.* Western Railroad Co. 10 Allen, 532; Wilds *v.* Hudson River Railroad Co. 24 N. Y. 430); if without any reasonable excuse, are facts upon which the jury should be told that they cannot find that the party so conducting was in the exercise of due and reasonable care. But in all of these cases there was no dispute about the facts; nothing material was left in doubt; there was no question as to the credibility of witnesses; and nothing was left to be inferred in the way of explanation or excuse. In such cases, the court may properly decide that no case is proved which could in law support a verdict for a plaintiff, and that the testimony furnishes nothing for the consideration of the jury. In Denny *v.* Williams, 5 Allen, 1, this court has said that it is not necessary, in order to apply the rule, that there should be absolutely no evidence, provided the *scintilla* of evidence be so slight that the court would feel bound to set aside any number of verdicts resting on no other foundation.

"It is impossible to say that the case at bar falls within the rule. It is enough that the facts were in dispute; there certainly was evidence tending to show that there were no lights at the opening where the plaintiff fell; and whether there were any lights in the neighborhood, and if so, how near, and where, and whether they were sufficient to reach the spot where she fell, were all matters in controversy, upon which the jury alone could decide. Whether they have judged correctly as to the weight and sufficiency of the evidence is not the question submitted for our determination."

In W. C. & P. R. R. Co. *v.* McElwee, 67 Pa. St. 315, Williams, J., said: "It is always a question for the jury, when the measure of duty is ordinary and reasonable care. In such cases the standard of duty is not fixed but variable. Under some circumstances a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with. But when the standard is fixed, when the measure of duty is defined by the law, and is the same under all circumstances, its omission is negligence, and may be so declared by the court.

evidence of the existence of such negligence, and the mere happening of an accident is not sufficient evidence to be left to the

And so, when there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. McCully *v.* Clark & Thaw, 4 Wright, 399; Citizens' Ins. Co. *v.* Marsh, 5 Ibid. 386; North Penna. Railroad Co. *v.* Heilman, 13 Ibid. 60; Pittsburg & Connellsville Railroad Co. *v.* McClurg, 6 P. F. Smith, 295; Glassey *v.* Hestonville, &c. Passenger Railway Co. 7 Ibid. 172; Penna. Railroad Co. *v.* Barnett, 9 Ibid. 269; Johnson *v.* Bruner, 11 Ibid. 58."

In Morange *v.* Mix, 44 N. Y. 322, Leonard, C., said: "The defendant's counsel refers to several cases which hold that an agent is responsible only for the actual damages sustained by his principal. He assumes, however, that the burden of proof rests upon the plaintiff to prove that his remedy on the covenants of the deed was not available. The cases cited by him are to the contrary effect. Allen *v.* Suydam, 20 Wend. 321; Blot *v.* Boiceau, 3 Comst. 78; Walrod *v.* Ball, 9 Barb. 271. The case of Allen *v.* Suydam was an action for negligence in presenting a draft for acceptance. It appeared that the bill would not have been accepted if it had been presented in season, and that the drawer had failed, and probably would not have paid it had it been protested in due season. The judge instructed the jury that the amount of the draft was *primâ facie* the measure of damages. The court of errors held that this was error; that the jury should have been told to find only such damages as they believed from the evidence probable that the plaintiff might have sustained from the neglect to present the draft in due season (page 330). The case of Blot *v.* Boiceau presents the same principle. The plaintiff consigned merchandise to the defendants for sale, and limited them as to the price at which they should sell. Having proved these facts, the plaintiff rested his case. The defendants offered to prove that the value of the articles was obtained, and that they could not have been sold at a higher price up to the time of the trial. This evidence was excluded. On appeal, this was held erroneous; that it was competent for the factor to show that the goods were worth no more, down to the time of the trial, than the price at which they were sold; that, *primâ facie*, the invoice price was the actual value, and if no other evidence had been offered the plaintiff should have recovered according to his claim (page 84). The other case of Walrod *v.* Ball is to the same effect. The defendant, who undertook to collect a written obligation for the plaintiff, said, when he received it, that he presumed the maker was good. Held, that was *primâ facie* evidence that the maker was good for the whole amount, and that the defendant was liable for negligence in not attempting to collect; that the *onus* was on the defendant to show it, if the maker was insolvent, as that was his excuse for neglecting to prosecute. If the cases cited by the defendant are analogous at all, they fail to maintain his position. There was no evidence that the remedy

jury.[1] The same rule, as has already been shown in the discussion of cases of collision with persons crossing railroads and with

against Lichtenstein on the covenants of his deed was available. It was the duty of the defendant to prove that the plaintiff had sustained no damages, or that he had another sufficient remedy to which he ought to resort, before he could claim a verdict on that ground. The exception does not point directly to the ground now urged. The judge may have supposed, from the exception to the portion of his charge containing two propositions, as to the measure of damages (the principal sum paid, and the interest), that counsel objected to the rule as to interest. The exception should state specifically the grounds upon which it rests, unless it is distinctly and readily apparent from the subject referred to. Although defectively taken in this respect, the exception is bad on the merits. . . . ."

So it has been held in New York, that where in an action against a railroad corporation, to recover damages for injuries received at a railroad crossing by a traveller on the highway, by the conceded or undisputed facts some act or omission is established on the part of the person injured, which of itself constitutes negligence, it is the duty of the court to nonsuit the plaintiff, and a refusal to do so is error at law. But if the fact depends upon the credibility of witnesses, or upon inferences to be drawn from the circumstances proved, about which honest men might differ, then it is the right of the plaintiff to have the question submitted to the jury, whose decision is conclusive in this court. It was said that in cases so near the border line between fact and law that nice discrimination is required to determine to which side it belongs; where the verdict of the jury has been sustained by the general term, this court will presume in favor of the judgment that the questions were properly submitted to the jury, and will require the party alleging error to show it with reasonable certainty. Hackford *v.* N. Y. C. & H. R. R. Co. 53 N. Y. 654.

In R. R. *v.* Stout, 17 Wall. 659, it was said by Hunt, J.: "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action

[1] Scott *v.* London & St. Cath. R. Docks, 3 H. & C. 596; Losee *v.* Buchanan, 51 N. Y. 476; Hammack *v.* White, 11 Com. B. N. S. 588; 31 L. J. C. P. 129; Toomey *v.* London & Brighton Railway Co. 3 Com. B. N. S. 146; Morgan *v.* Sim, 11 Moore P. C. 312; McCully *v.* Clarke, 40 Penn. 399; Batchelder *v.* Heagan, 16 Shep. 32; McGinity *v.* Mayor, 5 Duer, 674; Chicago *v.* Mayor, 18 Ill. 349; Gliddon *v.* McKinstry, 28 Alab. 408. As to burden of proof in actions for negligent communication of fire, see infra, § 867, 870. In railway collision with cattle, § 899.

stock, obtains in this country.[1] "No one," says Judge Field, in 1872, in the supreme court of the United States, "is responsible

can be sustained by him or his representatives. So if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

"In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding, in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence.

"In Redfield on the Law of Railways (vol 2, p. 231), it is said: 'And what is proper care will often be a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony to show negligence, it is a question for the jury.' Quimby *v.* Vermont Central Railroad, 23 Vermont, 387; Pfau *v.* Reynolds, 53 Illinois, 212; Patterson *v.* Wallace, 1 McQueen's House of Lords Cases, 748.

"In Patterson *v.* Wallace (McQueen's House of Lords Cases, 748) there was no controversy about the facts, but only a question whether certain facts proved established negligence on the one side, or rashness on the other. The judge at the trial withdrew the case from the jury, but it was held in the house of lords to be a pure question of fact for the jury, and the judgment was reversed.

[1] Comstock *v.* Des Moines R. R. 32 Iowa, 376; Walsh *v.* Virg. & T. R. R. 18 Nev. 110; B. & O. R. R. *v.* Fitzpatrick, 35 Md. 32.

for injuries resulting from unavoidable accident, when engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty imposed on him, which has caused the injury complained of." [1] But the very nature of the accident may of itself, and through the presumptions it carries, supply the requisite proof. [2]

"In Mangam *v.* Brooklyn Railroad (38 New York (11 Tiffany), 455), the facts in relation to the conduct of the child injured, the manner in which it was guarded, and how it escaped from those having it in charge, were undisputed. The judge at the trial ordered a nonsuit, holding that these facts established negligence in those having the custody of the child. The court of appeals of the State of New York held that the case should have been submitted to the jury, and set aside the nonsuit. In Detroit & W. R. R. Co. *v.* Van Steinberg (17 Michigan, 99), the cases are largely examined, and the rule laid down, that when the facts are disputed, or when they are not disputed but different minds might honestly draw different conclusions from them, the case must be left to the jury for their determination. . . . . It has been already shown that the facts proved justified the jury in finding that the defendant was guilty of negligence, and we are of opinion that it was properly left to the jury to determine that point."

"See, among other cases cited, the following: Carsly *v.* White, 21 Pickering, 256; Rindge *v.* Inhabitants of Coleraine, 11 Gray, 157; Langhoff *v.* Milwaukee & P. D. C. 19 Wisconsin, 497; Macon & Western Railroad *v.* Davis, 13 Georgia, 68; Renwick *v.* New York Central Railroad, 36 New York, 132."

See also, to same effect, Gillespie *v.* City, 54 N. Y. 468; City *v.* Hildebrand, 61 Ill. 155.

[1] Parrott *v.* Wells, 15 Wal. 524.

[2] Addison, Torts, 1870, p. 17, 366, 400; Czech *v.* Gen. St. Nav. Co., L. R. 3 C. P. 120; Templeman *v.* Haydon, 12 Com. B. 507.

"The same rule," says Earl, C. (in Losee *v.* Buchanan, 51 N. Y. 476), "applies to injuries to the person. No one in such a case is made liable without some fault or negligence on his part, however serious the injury may be which he may accidentally cause; and there can be no reason for holding one liable for accidental injuries to property when he is exempt from liabilities for such injuries to the person. It is settled in numerous cases that if one driving along a highway accidentally injures another, he is not liable without proof of negligence. Center *v.* Finney, 17 Barb. 94; Hammock *v.* White, 103 Eng. Com. Law, 587.

"In Hussey *v.* Dunlap (Lalor's Supplement, 193), the action was for throwing a stone at the plaintiff's daughter and putting out her eye. It did not appear that the injury was inflicted by design or carelessness, but it did not appear that it was accidental, and the court held that the plaintiff could not recover, laying down the broad rule, that no liability results from the commission of an act arising from inevitable accident, or which ordinary human care and foresight could not guard against. In Dygert *v.* Bradley (8 Wend. 469), the action was for running one boat against another in the Erie Canal, and the court held, that if the injury was occasioned by

§ 422. *As against bailees, after proof of loss, burden is on defendant.* — As will be hereafter seen,[1] this is the prevalent opinion in suits against passenger carriers for injuries to passengers.[2] And the same rule applies *a fortiori* to an action of contract against a common carrier for a failure to perform his ordinary undertaking of transportation; in which case the burden is on him to prove that he failed to perform it from a cause which relieved him from liability.[3] Hence the breakage of goods in the hands of a carrier makes out a *primâ facie* case of negligence.[4]

unavoidable accident, no action would lie for it; but if any blame was imputable to the defendant, he would be liable. In Brown *v.* Kendall (6 Cushing, 292), the defendant having interfered to part his dog and the plaintiff's, which were fighting, in raising his stick for that purpose, accidentally struck the plaintiff and severely injured him; it was held that he was not liable. In writing the opinion of the court, Chief Justice Shaw says: 'It is frequently stated by judges that where one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question whether trespass and not case will lie, assuming that the facts are such that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless.' 'We think, as the result of all the authorities, that the rule is that the plaintiff must come prepared with evidence to show that the *intention* was unlawful, or that the defendant was in *fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be held liable. If, in the prevention of a lawful act, a casualty, purely accidental, arises, no action can be supported for an injury arising therefrom.' So, too, contrary to what was held in an early English case, if one raise a stick in self-defence to defend himself against an assault, and accidentally hit a third person, he cannot, in my opinion, be made liable for the injury thus, without fault or negligence, inflicted."

At the trial of an indictment of a railroad corporation, on the Mass. Gen. Sts. c. 63, § 97, for causing the death of a passenger by gross negligence of their servants, all the facts were agreed, and it appeared upon the statement of them that the passenger was killed in a collision of a train with a hand-car, which the track-master suffered to be on the track through a mistake in time, occasioned by his failure to observe correctly the hour indicated by his watch. Held, that the defendants had no ground of exception to the refusal of a request for a ruling that there was no evidence of negligence, and to the submission of that question to the jury. Com. *v.* Vt. & Mass. R. R. Co. 108 Mass. 7.

[1] Infra, § 661.

[2] In suits against warehousemen, see infra, § 593.

[3] Lewis *v.* Smith, 107 Mass. 334; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184.

[4] Ketchum *v.* Merch. Un. Ex. 52 Mo. 390; Steele *v.* Townsend, 37 Ala. 247; Graham *v.* Davis, 4 Ohio St. 363. When both a railway itself, and

Where, however, the plaintiff's case indicates a peril of naviga-

the carriages in which the passengers are conveyed, are under the exclusive control of the company, the very fact of a train's running off the line is *primâ facie* proof of negligence on the part of such company or its officers, and sufficient to throw upon them the burden of explaining how it happened, and of showing that it occurred without any fault or neglect on their part. Carpue *v.* London & B. R. R. 5 Q. B. 751. See also Cotton *v.* Wood, 8 Com. B. N. S. 568; 29 L. J. C. P. 333; Toomey *v.* The London, Brighton & South Coast Railway Co. 3 Com. B. N. S. 146; 27 L. T. C. P. 39.

In Empire Trans. Co. *v.* Wamsutta Oil Co. 63 Pa. St. Sharswood, J., said: "But it is said that the *onus* in this case was on the plaintiffs below, to show that the defect of the coupling arose from the negligence or want of care of the defendants. We think not. When the carriage is proved to have been defective at the time of the injury, and that the defect contributed to the loss, the *onus* is then necessarily shifted to the carrier. He must rebut it by evidence that the defect arose, not from the insufficiency of the vehicle, into which the goods were loaded, but from some subsequent accident beyond his control. This puts the burden where it ought most properly to rest. The carrier ought to be able to show, with ease, by his servants, that the vehicle was inspected before the commencement of the trip, and everything found to be in good order. It would be very difficult for the plaintiffs to prove the contrary, — that it had not been examined, or that it was in bad order when it started. On the trial of this case, in the court below, there was no evidence to show when, or how, the links of the coupling of the cars became jammed, so that they could not be separated in time. It was surmised by one of the witsenses, that it must have got into that shape by going around a curve. Even admitting this to be so, the important question remains unanswered, and which it was incumbent on the carriers to answer, when did this occur? Had it been shown to have happened during the course of the same trip in which the fire took place, and that it was not known to or discovered by the carriers or their servants in time to be remedied, then, indeed, there might have been a question of negligence for the jury. But without any evidence as to this point, there was nothing for them but that which was submitted, whether the coupling of the car was defective, and that defect contributed to produce the loss."

Although in an action against a bailee for loss or damage to goods by accident, the burden of proof of negligence rests upon the plaintiff, yet the nature of the accident itself may afford *primâ facie* proof of negligence. If it is one which, in the ordinary course of events, would not have happened but for the want of proper care on the part of the bailee, it is incumbent upon him to show that he took proper precautions; and his failure to furnish this proof, which, if it existed, would have been in his power, may subject him to the inference that such precautions were omitted. Russell Man. Co. *v.* New Y. & N. H. R. R. 50 N. Y. 121.

Burden of proof in suit against bailee. — The following extracts from Judge Bennett's edition of Story on Bailments, § 410, contains some valuable suggestions on this topic: —

"The question may here arise, as in many other cases of bailments, on whom lies the burden of proof of negligence, or of repelling it. Ante, §

tion, or *casus* within the exception of a bill of lading, or a case

212, 213, 278, 339. With certain exceptions, which will hereafter be taken notice of, as to innkeepers and common carriers (5 Term R. 276; Jones on Bailments, 96), it would seem that the burden of proof of negligence is on the bailor; and proof merely of the loss is not sufficient to put the bailee on his defence. 1 Bell Comm. § 889, 4th edit.; 1 Bell Comm. p. 454, 5th edit.; 2 Kent Comm. Lect. 40, p. 587 4th edit. See Adams *v.* Carlisle, 21 Pick. 146; Carsley *v.* White, 21 Pick. 254, 255; Brind *v.* Dale, 8 Carr. & Payne, 207, 212; *S. C.* 2 Mood. & Rob. 80; Foote *v.* Storrs, 2 Barbour, 326, overruling Platt *v.* Hibbard, 7 Cowen, 497. See also Harrington *v.* Snyder, 3 Barbour, 380; Browne *v.* Johnson, 29 Texas, 43; Post, § 454, 529. This has been ruled in a case against a depositary for hire, where the goods bailed were stolen by his servants. Finucane *v.* Small, 1 Esp. 315. And see Butt *v.* Great Western Railway Co. 7 Eng. Law & Eq. 448; 11 C. B. 140. And also in the case of a horse hired and injured during the term of the bailment, where positive proof was required on the part of the owner to sustain his action. Cooper *v.* Barton, 3 Camp. 5, note; Newton *v.* Pope, 1 Cowen, 109; 1 Bell Comm. § 389, 4th edit.; 1 Bell Comm. p. 454, 5th edit. But in a recent case, where the bailee returned the horse in an injured condition, *and gave no explanation how the injury occurred*, the burden of proof was held to be upon him, to show that there was no negligence. Logan *v.* Matthews, 6 Barr, 417. And see Bush *v.* Miller, 13 Barbour, 481; Cummins *v.* Wood, 44 Illinois, 416.

"There seem, however, to be some discrepancies in the authorities on this subject, which may properly invite the attention of the learned reader. Platt *v.* Hibbard, 7 Cowen, 497, 500, note (*a*); Harris *v.* Packwood, 3 Taunt. 264; Marsh *v.* Horne, 5 Barn. & Cress. 322; Anon. 2 Salk. 654; Schmidt *v.* Blood, 9 Wend. 268; Beardslee *v.* Richardson, 11 Wend. 25; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Beckman *v.* Shouse, 5 Rawle, 179; Clark *v.* Spence, 10 Watts, 335; Ante, § 212, 213, 278, 339; Post, § 454, 529; 2 Kent Comm. Lect. 40, p. 587, 4th edit.

"§ 410 *a*. Perhaps the discrepancy in the authorities cited in the preceding section, and many others, decided since, may be in part reconciled by the fact that the phrase 'burden of proof' is often used in a vague and inaccurate sense. Properly understood, it seems to be clear that the burden of proof must always be upon the plaintiff to make out all the facts upon which his case rests; and as negligence is the foundation of the action between bailor and bailee, that the duty of proving such negligence is on the former rather than that of disproving it on the latter. That the burden is on the plaintiff in other cases founded on negligence is now quite generally agreed. Tourtellot *v.* Rosebrook, 11 Met. 460; Robinson *v.* Fitchburg & Worcester Railroad, 7 Gray, 92; Tobin *v.* Murison, 9 Jur. 907; 5 Moore P. C. 110; Hammack *v.* White, 11 C. B. (N. S.) 588 (1862); Cox *v.* Burridge, 13 Ibid. 430 (1863); Welfare *v.* London & Brighton Railway Co. Law Rep. 4 Q. B. 693 (1869). And does not the same rule apply to actions between bailor and bailee? Negligence is the gist of such actions, and without it no cause of action exists.

"Negligence is no more to be presumed in such cases than in any other. Tobin *v.* Murison, 9 Jur. 907.

"Still farther, mere proof of loss or

otherwise amounting, if proved, to a defence, then the plaintiff is

injury to goods while in the hands of a bailee does not, *per se*, prove negligence in him. It may do so, or may not, according to the attending circumstances; but it is the circumstances which show the negligence, not the mere loss or absence of the property. Evidence, therefore, that the goods are missing, that they are not on hand when called for, does not, in and of itself, establish negligence in the bailee. See Gilbart *v.* Dale, 5 Ad. & El. 543 (1836); Midland Railway Co. *v.* Bromley, 33 Eng. Law & Eq. 235; 17 C. B. 372 (1855). The bailor must show that fact *affirmatively*, that the bailee has done something, or omitted to do something, which he ought not to have done or omitted.

"The question in such cases properly is, whether the acts of the bailee, either of omission or commission, improperly led to, or furnished an opportunity for the loss of, or injury to the goods bailed; the simple naked fact of the loss of the property does not itself, except as explained in the light of the surrounding circumstances, create any presumption of negligence, or even make out a *primâ facie* case against the bailee, calling upon him to explain how the loss occurred, and to show affirmatively on his part that he was not in fault. Various *dicta* of judges may be found which seem to militate with this view, but most of them may be explained by remembering the confusion which exists in the use of the term. The best considered modern authorities, in which the question has been most directly discussed and decided, support the view above expressed.

"See Lamb *v.* Western Railroad, 7 Allen, 95; Runyan *v.* Caldwell, 7 Humph. 134; Brown *v.* Johnson, 29 Texas, 40; Cross *v.* Brown, 41 N. H. 283; Am. Law Review, Jan. 1871. But see Brown *v.* Waterman, 10 Cush. 117; Lichtenhein *v.* Boston & Prov. Railroad, 11 Cush. 70; McDaniels *v.* Robinson, 26 Vt. 316)."

And again, at § 454: —

"In respect to depositaries for hire, there seem to be some discrepancies in the authorities, whether the *onus probandi* of negligence lies on the plaintiff, or of exculpation on the defendant, in a suit brought for the loss. In England the former rule is maintained. Finucane *v.* Small, 1 Esp. 316; Harris *v.* Packwood, 3 Taunt. 267; Marsh *v.* Horne, 5 Barn. & Cress. 322, 327; Ante, § 278, 339, 410, 410 *a*; Post, 529. But see Mackenzie *v.* Cox, 9 Carr. & P. 632, *contra*. In Cass *v.* Boston & Lowell Railroad Co. 14 Allen, 448, it was held that in an action of *contract* against warehousemen for a failure to deliver goods upon demand, the burden of proof is on them to show that the goods have been lost without their fault. Chief Justice Bigelow, however, dissented in a very able judgment, holding that in actions on the contract, as well as in actions in tort, the burden of proof is always on the plaintiff to offer some evidence of negligence before he makes out a *primâ facie* case. And this seems to be the better law. See Barron *v.* Eldridge, 100 Mass. 460; Am. Law Rev. Jan. 1871. In America an inclination of opinion has sometimes been expressed the other way; yet perhaps the weight of authority coincides with the English rule. Platt *v.* Hibbard, 7 Cowen, 497, 500. See also Beardslee *v.* Richardson, 11 Wend. 25; Schmidt *v.* Blood, 9 Wend. 268; Ante, § 410; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Ante, § 213, 278, 389; Post, § 529;

McCarthy *v.* Wolfe, 40 Miss. 520; Beckman *v.* Shouse, 5 Rawle, 179; Clark *v.* Spence, 10 Watts, 335."

In Russell Man. Co. *v.* New Haven Steamb. Co. 50 N. Y. 121, the question of the burden of proof, in actions against warehousemen, is thus satisfactorily discussed by Rapallo, J.: . . . . "The wharf upon which the fire occurred and the goods were placed, appears to have been in the occupation of the defendant; a large quantity of goods besides the plaintiff's were upon it at the time of the fire, and were destroyed. It was about three hundred feet long, and provided with a gate through which passengers, by the defendant's boats, were admitted. The defendant's receiving clerk was there until about twelve o'clock on the night in question. One of the defendant's boats left the wharf with passengers at about that time. A police officer remained there until a little after midnight, when he left the wharf in its usual condition, with freight piled upon it in proper order and a private watchman in charge with some colored men. The fire occurred at some time between midnight and three o'clock, A. M., but at what precise time does not appear. It may be inferred from the evidence and admissions on the trial that the fire originated on the wharf. Two witnesses testified that they had frequently been on the dock, but had never seen any apparatus or means for extinguishing fire there. Neither the private watchman nor the colored men were produced as witnesses, nor did it appear that the watchman was at his post, or that any person was upon the wharf when the fire broke out.

"We think that enough was shown to call upon the defendant to explain the circumstances attending the destruction of the property; and that, in the absence of any such explanation, the jury would have been authorized to infer that proper precautions for its safety had not been taken. Whether due caution required that the wharf should be furnished with the means of extinguishing fire, or that a watchman should be kept there during the night, were questions for the jury, dependent upon the circumstances of danger which may have surrounded the premises. The plaintiff's evidence of the absence of the means of extinguishing fire was not of the most satisfactory character; but the defendant, although possessing the best means of proof upon the subject, did not controvert it; while the fact of the fire originating upon the defendant's premises, in connection with the failure of the defendant to offer any explanation of its origin, or even to produce any of the persons said to have been left in charge, or to show that they performed their duty, or that any effort was made to take the goods out of the reach of the fire, were circumstances from which the jury might have drawn inferences unfavorable to the defendant on the question of negligence. The nature of an accident may itself afford *primâ facie* proof of negligence (Curtis *v.* Roch. & Syra. R. R. Co. 18 N. Y. 534, 544; Story on Bailments, § 338; 5 Exch. 787; 3 Hurlst. & Coltm. 596; 13 Peters, 181; 5 Ad. & El. 747; 11 Pick. 106; 2 Camp. 79); and we think, as the case stood, the judge erred in not submitting the question of negligence to the jury.

"These views do not conflict with the case of Lamb *v.* The Camden & Amboy R. R. Co. (46 N. Y. 271), cited on the part of the respondent; although the burden of proof of negligence in such cases unquestionably rests upon the plaintiff, yet he is not always required to point out the pre-

bound to negative the exception, before the defendant is thrown on his defence.[1]

cise act or omission in which the negligence consists. Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate, and his failure to furnish the proof, where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted. In Scott *v.* London, &c. Dock Co. (3 Hurlst. & Coltm. 596) the rule that the burden of proof of negligence in this class of cases rests upon the plaintiff was fully recognized, but the rule was laid down thus: 'If the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of proper care.' The burden of proof on the issue of negligence is not changed by this rule. The jury must find affirmatively that the defendant was negligent; and if, after duly considering all the evidence, and all inferences proper to be drawn from it, they are in doubt, the defendant is entitled to the benefit of that doubt. He is not required to satisfy the jury, affirmatively, that he was free from negligence. That was all that was decided in the case of Lamb *v.* C. & A. R. R. Co. The question, what was sufficient *primâ facie* evidence of negligence, was not passed upon.

"The judgment must be reversed, and a new trial ordered, with costs to abide the event."

[1] This point is thus disposed of in the supreme court of the United States, in Transportation Co. *v.* Downer, 11 Wall. 134, by Field, J.: . . . . "A peril of navigation having been shown to exist, and to have occasioned the loss which is the subject of complaint, the defendant was *primâ facie* relieved from liability, for the loss was thus brought within the exceptions of the bill of lading. There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. Thus, in Scott *v.* The London & St. Catharine Dock Company (3 Hurlstone & Coltman, 596), the plaintiff was injured by bags of sugar falling from a crane in which they were lowered to the ground from a warehouse by the defendant, and the court said, 'There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defend-

§ 423. *Contributory negligence, — burden on defendant to prove.* — That the plaintiff, by his negligence, so contributed to the injury as to break the causal connection between such injury and the defendant's act is a matter of defence, which, in the ordinary process of proof, it is incumbent on the defendant to make out. So, indeed, has it frequently been held.[1]

ant, that the accident arose from want of care."

So in Curtis *v.* The Rochester & Syracuse Railroad Company, 18 New York, 543, the court of appeals of New York held that the mere fact that a passenger on a railroad car was injured by the train running off the switch, was not of itself, without proof of the circumstances under which the accident occurred, presumptive evidence of negligence on the part of the company. The court "said that carriers of passengers were not insurers, and that many injuries might occur to those they transported for which they were not responsible; but as railroad companies were bound to keep their roads, carriages, and all apparatus employed in working them free from any defect which the utmost knowledge, skill, and vigilance could discover or prevent, if it appeared that an accident was caused by any deficiency in the road itself, the cars, or any portion of the apparatus belonging to the company, and used in connection with its business, a presumption of negligence on the part of those whose duty it was to see that everything was in order immediately arose, it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have seen or discovered it." . . . . But such portions of the above argument as refer to suits against *carriers of passengers*, and to suits based on the maxim, *sic utere tuo ut non alienum laedas*, must not be strained to apply to suits against carriers of goods. The latter are insurers; and, as such, when loss occurs, have to establish (supposing there be no qualified contract) *casus* or *vis major*.

[1] Railroad Co. *v.* Gladmon, 15 Wall. 401; Oldfield *v.* N. Y. & Harl. R. R. 3 E. D. Smith, aff. 14 N. Y. 310; Johnson *v.* Hudson River R. R. 20 N. Y. 65; Wilds *v.* Same, 24 N. Y. 430; Wheeler *v.* Westport, 30 Wisc. 392; Strahlendorf *v.* Rosenthal, 30 Wisc. 675; Karasich *v.* Hasbroue, 29 Wisc. 569; Castello *v.* Landwehr, 28 Wis. 522.

In Thompson *v.* The North Missouri Railroad, 51 Mo. 190, it was ruled that in an action against a railroad company, for personal injuries to plaintiff, the burden is not on the plaintiff to aver affirmatively that he was at the time exercising due care, and was himself, without negligence, contributing to the injury. Negligence in the plaintiff is a mere defence to be set up by the answer, and shown like any other defence.

Wagner, Judge, delivered the opinion of the court: . . . . "The question as to burden of proof in respect to plaintiff's freedom from negligence, and as to whether he should make the affirmative averment, that he exercised proper care and was free from negligence, is new in this court, and is involved in uncertainty by the conflicting and evasive decisions of the courts of other states. While some courts hold that he must allege and affirmatively establish that he was free from culpable negligence contributing to the injury, others hold that his negli-

§ 424. On the other hand, it is argued by high authority, that "Wherever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the

gence is matter of defence, of which the burden of pleading and proving rests upon the defendant.

"In my view the latter is the correct doctrine. Negligence on the part of the plaintiff is a mere defence to be set up in the answer and shown like any other defence, though of course it may be inferred from the circumstances proved by the plaintiff upon the trial. It seems to be illogical and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind. In an ordinary complaint upon negligence, it is not necessary to aver that the plaintiff has taken due care. It is true the action may be defeated by showing that the plaintiff was guilty of such contributory negligence as would preclude a recovery, but that is a question for the jury, to be determined upon the evidence, and not a matter of pleading. I cannot see what possible ground of distinction there can be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*. Yet it would be difficult to find a case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault."

So, in Pennsylvania, in C. & P. R. R. Co. *v.* Rowan, 66 Pa. St. 393, Thompson, C. J. said: "It was contended in argument, on part of the plaintiff in error, that the plaintiffs below had the *onus* of showing affirmatively that the deceased was guilty of no negligence or want of care at the moment of the disaster to him. This is in one sense the rule, but not so broadly as it has been stated. It is true that negligence on his part would defeat the plaintiff's right of recovery; but to call witnesses to declare the absence of negligence of the kind insisted on, or to prove acts negativing negligence before the defendant is bound to answer, is not required in the first place. It is not a necessary averment in the *narr*, and is, therefore, not required to be proved until the opposite is set up in defence. It is true, if negligence appear by the plaintiff's own testimony, the defendant might rest on it as securely as if proved by himself. As the love of life and the instinct of preservation are the highest motive for care in any reasoning being they will stand for proof of care until the contrary appears. Railroad *v.* Hagan, 11 Wright, 244; Railroad Co. *v.* Hall, 11 P. F. Smith, 361; Allen *v.* Williard, 7 Ibid. 374. But there was proof of acts on part of the deceased clearly evincive of care on part of the deceased before he took the fatal step, to wit: looking and apparently listening in the direction of the approaching train. His advance, and that of his companion, a young lady, who was also struck and injured at the same time, corroborated what the witness testified to, viz.: that they took the ordinary precaution to avoid danger by looking and listening before they stepped on the track. This was referred to the jury on the question of care on the part of the deceased, and they have found, in accordance therewith, that there was no negligence. There was no error in this, and this assignment is not sustained."

plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part." [1]

§ 425. It must be remembered, that as a person is presumed to be careful until the contrary appear, the plaintiff, after proving the defendant's negligence, ought to be entitled to rest on this

[1] Wells, J. — Murphy *v.* Deane, 101 Mass. 466, citing Trow *v.* Vt. Cent. R. R. 24 Vt. 487; Birge *v.* Gardiner, 19 Conn. 507. See Dowell *v.* Gen. Steam Nav. Co. 5 E. & B. 195; Johnson *v.* Hudson River R. R. 20 N. Y. 65.

To the same effect is Warren *v.* Fitchburg R. R. 8 Allen, 227; Hickey *v.* Boston & L. R. R. 14 Allen, 429; Murphy *v.* Deane, 101 Mass. 455; Allyn *v.* Bost. & A. R. R. 105 Mass. 77; Wheelock *v.* Bost. & A. R. R. 105 Mass. 403; Baird *v.* Morford, 29 Iowa, 531. See Gillespie *v.* City, 54 N. Y. 468.

When we scrutinize the Massachusetts cases we find that they do not exact from the plaintiff that he should prove due care on his part by direct affirmative evidence. The inference of such care, it is held, may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received. Thus in Mayor *v.* B. & M. R. R. 104 Mass. Wells, J., said: "Such cases stand upon a different footing from those in which the arrangements of the road for the accommodation of persons in taking or leaving the cars, or crossing the track, afford a reasonable justification to the party for being upon the track, and thus exposed to the dangers incident to such a position. Of the latter class are Warren *v.* Fitchburg Railroad Co. 8 Allen, 227; Caswell *v.* Boston & Worcester Railroad Co. 98 Mass. 194; and Gaynor *v.* Old Colony & Newport Railway Co. 100 Mass. 208. Although the burden of proof still remains upon the plaintiff in these cases, to show the exercise of such a degree of care as was appropriate to the place and occasion, yet the court will not attempt to decide the question of due care upon the preponderance of the evidence. The surrounding circumstances, and the whole conduct of the plaintiff in reference thereto, will ordinarily afford ground for such a variety of inferences as to make the verdict of a jury the only proper means to determine the essential fact. However indicative of carelessness the circumstances may seem to the court, if there be any evidence upon which it is competent for the jury to find that reasonable care was in fact exercised, it is proper to submit it to them. It is only when the whole evidence on which the plaintiff's case rests shows conclusively that he was careless, or when there is no evidence tending to show the contrary, that it is deemed to be the duty of the court to withdraw the case from the jury, or to direct a verdict for the defendant. Gahagan *v.* Boston & Lowell Railroad Co. 1 Allen, 187. In Butterfield *v.* Western Railroad Co. 10 Allen, 532, the omission of the plaintiff to take any observation with his eyes to ascertain whether a train was near, although he knew that he was coming upon the track, was an undisputed fact, for which there was no excuse, and no explanation to make it consistent with reasonable care on his part."

presumption. At all events, very slight inferences should be sufficient to throw on the defendant the burden of proving the plaintiff's negligence. In any view, whether a person injured by a railway collision was exercising ordinary care is for the jury, if there be any dispute as to the facts, or the inferences from facts.[1]

§ 426. The conflict, therefore, which is just noticed, is only superficial. No doubt where, in an action for injuries caused by failure of duty on part of the defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff was guilty of such negligence. On the other hand, when the plaintiff's own case exposes him to suspicion of negligence, then he must clear off such suspicion.[2]

[1] Webb *v.* Portland R. R. 57 Me. 117; Bradley *v.* R. R. 2 Cush. 539; B. & O. R. R. *v.* Fitzpatrick, 35 Md. 32; Southworth *v.* O. C. & N. R. R. 105 Mass. 382; Brown *v.* Hannibal & St. Jo. R. R. 50 Mo. 461; Quimby *v.* Vt. Cent. R. R. 23 Vt. 387; Briggs *v.* Taylor, 28 Vt. 180; Pfau *v.* Reynolds, 53 Ill. 212; Mayo *v.* Bost. & M. R. R. 104 Mass. 157; Ch. & Pitts. R. R. *v.* Rowan, 66 Penn. St. 393; Hill *v.* Haven, 37 Vt. 501.

[2] This is well put by Sharswood, J., in Hays *v.* Gallagher, 72 Penn. St. (22 P. F. Smith) 140: —

"In Beatty *v.* Gilmore, 4 Harris, 463, it was held by this court that in such an action as this, if no facts are proved from which a deduction of want of ordinary care, on the part of the plaintiff, can be drawn, the presumption is against the defendant, whose misconduct rendered the accident possible. In that case it is remarked by Mr. Justice Bell that 'when in the darkness and solitude of the night one suffers grievous injury from the culpable commission or omission of another, the carelessness which would excuse ought certainly to be of a very gross character, made apparent by direct or circumstantial proof.' There is nothing in Waters *v.* Wing, 9 P. F. Smith, 211, which is inconsistent with this doctrine. That was a case of an injury from an accident in broad daylight. The plaintiff was riding on horseback on a public road. The defendant was driving a buggy in the opposite direction; the shaft of the defendant's buggy ran into and killed the plaintiff's horse. 'It is the duty of a plaintiff seeking to recover,' said Chief Justice Thompson, 'where the *gravamen* of the action is the alleged negligence of the defendant, to show a case clear of contributory negligence on his own part. In other words, he must establish a *primâ facie* cause of action, resulting exclusively from the negligence and wrong of the defendant, before the latter need answer at all. The learned judge went too far, therefore, we think, in holding as he did in effect, in his answer to the point, that the plaintiff was not holden to such a rule, and that the defendant must disprove care, and thus establish negligence on part of the plaintiff. This would be so in a

§ 427. *Plaintiff, when his own case shows contributory negligence, may be nonsuited.* — If, therefore, the plaintiff, in his own case, shows that he brought the injury on himself by his own carelessness, he may be nonsuited.[1] But unless such a case be presented, the question of the plaintiff's negligence, like that of the defendant's, is for the jury.[2]

primâ facie case on part of the plaintiff. But he should have so answered the point that the jury might have been left free to consider the defects in the plaintiff's case. If ever there was a case in which this was a duty, it was in this case. The accident occurred in open day, on a broad public highway, by a rider running his horse so hard upon the shaft of a buggy, driven at an ordinary gait, as instantly to kill the horse, though there was plenty of room to pass without obstruction.' It is plain that Waters *v.* Wing in no way impinges upon the rule in Beatty *v.* Gilmore, but is entirely accordant with it. If the plaintiff's own evidence discloses facts which prove negligence, it is not necessary that the defendant should prove it. This almost self-evident proposition was subsequently affirmed in Pennsylvania Canal Co. *v.* Bentley, 16 P. F. Smith, 30, while it was at the same time there distinctly ruled that if the plaintiff makes out a *primâ facie* case the burden is on the defendant to disprove care or show contributory negligence.

"Had the plaintiff below fallen from the bridge in question, being of the width of eighteen feet, in broad daylight, there would be great reason for saying that it could only have happened from the want of ordinary care on his part, and to have taken the case from the jury. But certainly such bridges should be constructed and kept in repair so as to be safe for travellers by night as well as by day. But though there was no evidence of the circumstances of the fall from which any inference of negligence upon so dark a night could be inferred, nevertheless the learned judge below instructed the jury that 'if the plaintiff's injuries resulted either in whole or in part from the want of ordinary care and prudence on his own part he is not entitled to recover any damages.' In answer to one of the points, he had also said 'that the jury might properly give some weight to the fact that the plaintiff, who was a competent witness, present in court during the trial, had not been called to explain how the accident occurred.' If the plaintiff below had made out a *primâ facie* case, without his own testimony, he was certainly not bound to offer himself as a witness. The defendant might have called and examined him. Of all this the plaintiff in error has certainly no right to complain."

[1] Holden *v.* Liverpool, 3 C. B. 1; Central R. R. *v.* Moore, 4 Zabr. 824; Brown *v.* E. & N. A. R. R. 58 Me. 384; Holly *v.* Bost. Gas Light Co. 8 Gray, 123; Gahagan *v.* Bost. & L. R. R. 1 Allen, 187; Trow *v.* Vt. Cent. R. R. 24 Vt. 487; Henning *v.* N. Y. & Erie R. R. 13 Barb. 9; Thringo *v.* Cent. Park Co. 7 Rob. 616; Brooks *v.* Somerville, 106 Mass. 271, cited supra, § 420; Wilds *v.* Hudson River R. R. 24 N. Y. 430; Hackford *v.* R. R. 53 N. Y. 654, cited supra, § 420; Langhoff *v.* R. R. 19 Wisc. 497; Rothe *v.* R. R. 21 Wisc. 258; Penns. R. R. *v.* Matthews, 36 N. J. 531.

[2] Belton *v.* Baxter, 54 N. Y. 245;

§ 428. *Employee against employer.* — The burden of proof is upon the employee to show both the negligence of the employer and his own care. But he is not bound to do more than raise a reasonable presumption of negligence on the part of the defendant.[1]

§ 429. *Burden when casus or necessity is set up.* — This branch of the subject has been already independently discussed.[2]

§ 430. *Burden in suits against gratuitous depositaries.* — The burden of exculpation, in such suits, cannot be properly thrown on the defendant, unless there is some presumption of negligence raised by the plaintiff's case.[3]

Gillespie *v.* City, 54 N. Y. 468, and cases cited supra, § 155.

[1] Greenleaf *v.* Ill. Cent. R. R. 29 Iowa, 14.

[2] See supra, § 128.

[3] Infra, § 477.

BOOK II.

NEGLIGENCE IN DUTIES BASED ON CONTRACT.

CHAPTER I.

GENERAL RULES AS TO NEGLIGENCE BASED ON CONTRACT.

Whoever by contract assumes a duty to another person is liable in an action on the case to such other person for damages arising from the negligent performance of such duty, § 435.

Confidence bestowed and accepted is a sufficient consideration, § 438.

But such confidence must be immediate between the parties, § 439.

Nor can such a suit be maintained on the defendant's gratuitously undertaking a duty on which he does not enter, § 442.

Action lies against those on whom public duty is imposed, § 443.

§ 435. *Whoever by contract assumes a duty to another person is liable, in an action on the case, to such other person for damages arising from the negligent performance of such duty. Contract to do a particular thing.* —Where a contract creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Hence it is at the election of the party injured to sue either on the contract or the tort.[1] For "if the law," says Lord Brougham, "casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures;"[2] and although, as we will presently see, this liability, if based on contract, must be limited to persons whose confidence in the party owing the duty is immediate, yet with this limitation, which is involved in the strict meaning of the term "duty,"

[1] Addison on Torts (1870), p. 913; Boorman *v.* Brown, 3 Q. B. 526; 11 Cl. & F. 1; Robinson *v.* Threadgill, 13 Ired. 39; Central, &c. *v.* City, 4 Gray, 485; Ives *v.* Carter, 24 Conn. 392; Butts *v.* Collins, 13 Wend. 154.

[2] In Ferguson *v.* Earl of Kinnoul, 9 Cl. & Fin. 289.

the proposition as thus stated may be accepted as of universal application.

§ 436. *Contract based on employment.* — The same rule obtains as to duties based on employment, though there be no specific contract. "Where there is an employment, which employment itself creates a duty, an action on the case will lie for a breach of the duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast." [1]

§ 437. Illustrations of this principle will be found in abundance in those portions of the following pages which treat of duties based on contracts. The most familiar are those arising from the engagements of common carriers. "Every person who enters upon the performance of the work of carrying merchandise or passengers is bound to exercise due and proper care and skill in the performance of the work, *whether the work is done under a contract or gratuitously;* [2] and every person who has been injured by the negligent performance of the work of carrying, is entitled, as we have seen, to an action against the carrier, *although he is no party to the contract* under which the work was done." [3] So a medical man is responsible to a person neglected by him for the negligence, though the contract to employ the medical man was made with a friend of the person neglected.[4]

§ 438. *Confidence bestowed and accepted is a sufficient consideration to sustain a suit for such damages.* — "The confidence induced by undertaking any service for another is a sufficient consideration to create a duty in the performance of it." [5] This principle, in fact, lies at the root of the whole law of mandates,

[1] Jervis, C. J. — Courtenay *v.* Earle, 10 C. & B. 83; Brown *v.* Boorman, 11 Cl. & F. 44. See Holmes *v.* N. E. R. C., L. R. 1 Ex. 254; Indermaur *v.* Dames, L. R. 2 C. P. 311; infra, § 547.

[2] See Austin *v.* Gt. West. R. R., L. R. 2 Q. B. 442.

[3] Addison on Torts (1870), p. 914; citing Collett *v.* Lond. & N. W. R. 16 Q. B. 989, where a railway company was held liable for negligence in carrying officers of the post-office, whom they were bound to carry safely by statute; and Marshall *v.* York, Newcastle & B. R. R. 11 C. B. 655; Gerhard *v.* Bates, 2 E. & B. 476; Behn *v.* Kemble, 7 C. & B. N. S. 260; Hall *v.* Cheney, 36 N. H. 26; and cases of free passengers cited supra, § 355; infra, § 547, 641.

[4] Pippin *v.* Shepherd, 11 Price, 40; Gladwell *v.* Steggall, 5 Bing. N. C. 733; 6 Exch. 767. See Longmeid *v.* Holliday, 6 Exch. 767; infra, § 730–7.

[5] Mr. Smith, in his note to Coggs *v.* Bernard, Smith's Lead. Ca. 6th ed. 193; adopted in Broom's Com. 680.

to be hereafter discussed.[1] So, as is stated by a learned Massachusetts judge, "For an injury occasioned by want of due care and skill in doing what one has promised to do, an action may be maintained against him in favor of the party relying on such promise and injured by the breach of it, although there was no consideration for the promise."[2] And again, by another judge of the same court: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence."[3]

§ 439. *But such confidence must be immediate between the parties to the suit.* — "Privity of contract," indeed, to employ one of the old terms, is not in such case essential. If a carrier employed by me to transport my servant on the cars neglects his duty, my servant cannot sue him on the *contract*, because there is no privity of contract between the two; and if the contract is to be sued upon, it must be by myself.[4] But the servant, being the party injured, may sue the carrier in an action on the case, in which privity of contract is not necessary, but which is based on injuries directly received;[5] and in such a suit the servant alone can sue.[6] So I may engage a physician to attend a hospital; and if he neglects his duty to a particular patient in that hospital, who thereby suffers, he is liable to me in an action on the contract, but to the patient, in an action on the case.[7]

[1] Infra, § 490–501, 503, 547, and cases there cited; and also infra, § 641.

[2] Ames, J. — Gill *v.* Middleton, 105 Mass. 479; citing Benden *v.* Manning, 2 N. H. 289; Thorne *v.* Deas, 4 Johns. R. 84; Elsee *v.* Gatwood, 5 T. R. 143; Shiells *v.* Blackburne, 1 H. Bl. 158.

[3] Bigelow, C. J., in Sweeny *v.* O. C. & N. R. R. 10 Allen, 368, adopted by Hoar, J., in Coombs *v.* New Bed. Cord. Co. 102 Mass. 572.

[4] "The general rule of law," says Gray, J., in delivering the judgment of the court in a late Massachusetts case, "is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter." Exchange Bk. *v.* Rice, 107 Mass. 37.

[5] Marshall *v.* York, &c. R. R. 11 C. B. 655.

[6] Alton *v.* Midland R. R. 19 C. B. N. S. 213; Fairmount R. R. *v.* Stutler, 54 Penn. St. 375.

[7] Pippin *v.* Shepherd, 11 Price, 40; Gladwell *v.* Steggall, 5 Bing. N. C.

Yet the confidence must be immediate, or the action fails. In other words, there must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition, between the negligence and the hurt, of any independent human agency.[1]

Thus a contractor is employed by a city to build a bridge in a workmanlike manner; and after he has finished his work, and it has been accepted by the city, a traveller is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveller in an action on the case for damages. The reason sometimes given to sustain such a conclusion is, that otherwise there would be no end to suits. But a better ground is, that there is no causal connection between the traveller's hurt and the contractor's negligence. The traveller reposed no confidence on the contractor, nor did the contractor accept any confidence from the traveller. The traveller, no doubt, reposed confidence on the city that it would have its bridges and highways in good order; but between the contractor and the traveller intervened the city, an independent responsible agent, breaking the causal connection.[2]

§ 440. So a contract is made with the postmaster general to furnish certain road-worthy carriages; and after the delivery of the carriages, the plaintiff is injured in using one of them, the carriage having been defectively built. No doubt, had the carriage been built for the plaintiff, he could have recovered from the contractor. But there is no confidence exchanged between him and the contractor; and between them, breaking the causal connection, is the postmaster general, acting independently, forming a distinct legal centre of responsibilities and duties.[3]

So a contract is made with a machinist to furnish a machine

733; 6 Exch. 767. The same view is expressly recognized in the Roman law in respect to mandates.

[1] See this fully exhibited supra, § 134 *et seq.*; infra, § 535.

[2] See supra, § 134; Collis *v.* Selden, L. R. 3 C. P. 495; Pickard *v.* Smith, 19 C. B. (N. S.) 480. Thus, a sub-contractor engaged on an unfinished building was held not liable to a custom-house officer, who was in the habit of passing that way (not being the regular entrance) to perform his duty in visiting a bonded vault, and who in doing so fell into an opening and was damaged. Castle *v.* Parker, 18 L. T. (N. S.) 367.

[3] Winterbottom *v.* Wright, 10 M. & W. 115; Blakemore *v.* Brist. & Ex. R. R. 8 E. & B. 1049. As to telegraphs, see infra, § 768. As to agents, infra, § 535.

safe for particular purposes. The machine, after delivery, proves unsafe, and injures a third person. The latter cannot recover from the machinist, though the machinist could be sued by the owner of the machine on the contract.[1] It would be otherwise, however, if the machinist had placed on a thoroughfare, without notice, a dangerous machine, likely to injure all who touched it.[2]

So as to poison. If A. negligently gives poison to B., and B. negligently gives it to C., C. has no remedy against A.[3] But where A. places the poison in a place where B. inadvertently takes it and is damaged by its use,[4] or where C., an unconscious agent, gives the poison to B., then B. may recover from A.[5]

§ 441. So where A. employed B., a solicitor, to do an act for the benefit of C., A. having to pay B., and there was no intercourse of any kind between B. and C., it was held that C. could not maintain a suit for negligence against B.[6] This is a strong case; for where a special act is to be performed by contract for the benefit of a particular individual, it is hard to suppose a case in which the person performing the act and the person benefited do not meet in such a way as to raise an implied duty on the part of the former to the latter. Hence, whenever there is any evidence to show a duty accepted, and a trust imposed, a jury may infer such duty or trust, even though the parties have never met.[7] But in support of the necessity of a personal relationship between the person neglected and the person neglecting the reasons are obvious. Practically, were such a limitation not imposed, a physician would be liable for neglect to all persons who may have lost the services of the person neglected; and disappointed legatees might sue solicitors for neglect in drawing wills. And even if this objection be waived, we fall back upon the general principle, already so frequently announced, that where, between the negligence and the damage, an independent causality intervenes, there the connection between the first negligence and the damage is broken.[8]

[1] Losee *v.* Clute, 51 N. Y. 494; Loop *v.* Litchfield, 42 N. Y. 358. Infra, § 774–5.

[2] See infra, § 860.

[3] Supra, § 91.

[4] Supra, § 90, 91.

[5] Supra, § 91; George *v.* Skivington, Law Rep. 5 Exch. 1.

[6] Robertson *v.* Flemming, 4 Macq. H. L. Ca. 177.

[7] Lord Campbell, C. J. — 4 Macq. H. L. Ca. 177–8; 1 Smith L. Ca. 6th ed. 193. Supra, § 438.

[8] See supra, § 134.

So, as in a late New York case,[1] where the firm of O. and M. contracted with defendant, a mill company, to place an iron cornice on its mill, the defendant agreeing to erect the scaffolding necessary for the purpose. The evidence was that the defendant erected the scaffolding, and O. and M. began to put the cornice in place; but while doing so the scaffold fell, killing a workman in the employ of O. and M. who was upon it. It was held that the company was not liable for the injuries thus received. The ground taken was that the contract of the company to erect the scaffold was made with the firm, and because the deceased afterward, as the employee of such firm and in the proper course of his employment, used the scaffold, he did not therefore become a party to the contract; and could not, therefore, sue for a breach of duty based on it. The only duty or liability of the company concerning the scaffold was founded on the contract, and it owed no duty and was under no liability to the deceased on that behalf.[2]

[1] Coughtry *v.* Globe Woollen Company, 1 N. Y. Supreme Court, 452.

[2] Talcott, J., speaking of Winterbottom *v.* Wright, above cited, said: "The action was attempted to be maintained on the authority of Levy *v.* Langridge, 4 M. & W. 337; but the court said the case of Levy *v.* Langridge rested on the ground of fraud.

"Baron Rolfe says in this case: 'The breach of defendant's duty stated in this declaration is his omission to keep the carriage in a safe condition. And when we examine the mode in which that duty is said to have arisen, we find the defendant took upon himself, under and by virtue of said contract, the sole and exclusive duty, charge, care, and burden of the repairs, state, and condition of said mail-coach. . . . . The duty, therefore, is shown to have arisen solely from the contract, and the fallacy consists in the use of that word "duty." If a duty to the postmaster-general be meant, that is true; but if a duty to the plaintiff be intended (and in that sense the word is evidently used), there was none.'

"Alderson, B., says: 'The contract in this case was made with the postmaster general alone, and the case is just the same as if he had come to the defendant and ordered a carriage and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty.'

"In Longmeid *v.* Holliday, 6 Eng. L. & Eq. 562, 6 Exch. 761, which was a case by a husband and wife against the maker and seller of certain lamps, and who sold one to the husband, for the use of himself and his wife in a shop, and which it was alleged the defendant fraudulently warranted to be reasonably fit for the purpose, but which, in consequence of defects in the construction, exploded and burned the wife; the jury having negatived the fraud, it was held the wife could not recover because she was not a party to the contract.

§ 442. *Nor can a suit be ordinarily maintained for damages arising from the defendant gratuitously undertaking to do a thing on the performance of which he does not enter.* — As a general rule a mere volunteer cannot be made responsible for damages in undertaking to execute an office on which he does not enter.[1] Thus B. who voluntarily undertakes to insure A.'s vessel, which vessel is lost, is not responsible to A. for neglecting to make the insurance, there being no relationship of principal and agent between the two.[2] Indeed, if we do not maintain this exception, few persons who make general offers of service to others could escape actions on the case for negligence. Yet if there are several persons undertaking to execute a particular commission, and the defendant, pressing to do it, excludes others by whom it would have been faithfully performed, it is hard to see why a confidence thus accepted and abused should not be the basis of an action on the case for negligence.[3]

§ 443. *Where a statute requires an act to be done or abstained from by one person for the benefit of another, then an action lies in the latter's favor against the former for neglect in such act or abstinence, even though the statute gives no special remedy.* — In such cases applies the maxim, *Ubi jus ibi remedium.*[4] Thus, in an

"Both of these cases are referred to in the opinion, concurred in by the court of appeals, in Thomas *v.* Winchester, 6 N. Y. 408, as being sound expositions of the law, and in the latter case, and also in the case of Loop *v.* Litchfield, 42 N. Y. 358, where it was held the action could not be sustained for want of privity. The distinction between the cases where the liability can be traced only through the contract, and those in which it arises, from the fact that the negligent act is one imminently dangerous to the lives of others; like selling poison in the market with a false label, representing it as a harmless substance; cases of public nuisances, and similar interferences with the absolute rights of others, is clearly pointed out and adopted by the court of appeals. See also Barrett *v.* The S. M. Co. 1 Sweeny, 545; Losee *v.* Clute, 51 N. Y. 494." . . . .

[1] Balfe *v.* West, 13 C. B. 466. See Simpson *v.* Lamb, 17 C. B. 603.

[2] Thorne *v.* Deas, 4 Johns. R. 84.

[3] See Elsee *v.* Gatwood, 5 T. R. 143.

[4] Anon. 6 Mod. 27; Mitchell *v.* Knott, 1 Sim. 499; Braithwaite *v.* Skinner, 5 M. & W. 327; Couch *v.* Steel, 3 E. & B. 402; Fawcett *v.* York & N. M. R. R. 16 Q. B. 610; Ricketts *v.* E. & West. Ind. R. R. Docks, 12 C. B. 160; Buxton *v.* N. E. R. C., L. R. 3 Q. B. 549; Ellis *v.* Sheffield Gas Co. 2 E. & B. 767. See Gray *v.* Pullen, 5 B. & S. 981; R. *v.* Longton Gas Co. 2 E. & E. 651; Clothier *v.* Webster, 12 C. B. N. S. 790; Mersey Docks *v.* Gibbs, 11 H. L. Cas. 686; Thompson *v.* N. E. R. R. 2 B. & S. 106; Coe *v.* Wise, L. R. 1 Q. B. 711; Walker *v.*

action against a public officer for neglect, whereby the plaintiff was injured, it is no defence that the defendant contracted not with the plaintiff, but with the government; the action being founded not on contract but on breach of duty.[1] Even the imposition of a penalty by the statute does not oust the remedy by indictment, nor, *a fortiori*, by suit for negligence,[2] unless the penalty be given to the party injured in satisfaction for injury.[3]

Goe, 4 H. & N. 350; Ohrby *v.* Ryde Com. 5 B. & S. 743; Cane *v.* Chapman, 5 A. & E. 647; Collins *v.* Middle Lev. Com., L. R. 4 C. P. 479.

[1] See cases cited supra, § 285; and also Winterbottom *v.* Wright, 10 M. & W. 107; Burnett *v.* Lynch, 5 B. & C. 589; Marshall *v.* York, 11 C. B. R. 655; Farrant *v.* Barnes, 11 C. B. N. S. 553; Sawyer *v.* Corse, 17 Gratt. 230; Weightman *v.* Washington, 1 Black, U. S. 39; Jones *v.* New Haven, 34 Conn. 1; Adsit *v.* Brady, 4 Hill, N. Y. 630; Hutson *v.* Mayor, 9 N. Y. 69; Robinson *v.* Chamberlain, 34 N. Y. 389; Fulton Ins. Co. *v.* Baldwin, 37 N. Y. 648. See supra, § 81.

[2] Couch *v.* Steel, 3 E. & B. 402.

[3] See St. Pancras *v.* Battersbury, 2 C. B. N. S. 477; Kennett & Avon Canal Co. *v.* Witherington, 18 Q. B. 531; Stevens *v.* Jeacocke, 11 Q. B. 741; Coe *v.* Wise, L. R. 1 Q. B. 711. Supra, § 81.

CHAPTER II.

DEPOSITUM.

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Liability of finder for negligence in keeping goods found by him, § 475.
What gross negligence means, § 476..
When burden is on depositary in case of loss, § 477.
Gratuitous warehousemen, § 478.

§ 450. *Definition.* — Depositum or deposit, according to the definition of the Roman law, is a contract by which one party, the deponent, leaves a movable thing with another, the depositar, or depositary, for safe keeping, under the obligation that it shall be returned.[1] In the Anglo-American law the definition is substantially the same, with the exception that the bailment is averred to be gratuitous.[2]

[1] So Vangerow, § 630; Holtzend. Ency. *in tit.*

[2] Judge Story (Bailments, § 41) declares that "a deposit is usually defined to be a naked bailment of goods, to be kept for the bailor without reward, and to be returned when he shall require it. Perhaps," he proceeds, however, to say, "a more correct definition would be, that it is a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust; for, in some cases, the deposit may be for the benefit of a third person, and to be delivered to him when demanded, and not to be returned to the bailor. The definition of the Roman law, as we shall presently see, is singularly brief, and pregnant in meaning." He then quotes Pothier, who defines it to be "a contract, by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously, and obliges himself to return it, when he shall be requested."

§ 451. *Delivery.* — The delivery is complete when it is made to an agent of the depositary, for the latter's use; though it is otherwise when the delivery is to an agent not employed by the master in the particular work, and in fraud of the master.[1] It is not necessary that there should be an actual delivery. If the depositary has the thing in his possession at the time the obligation is entered into, the law supposes a delivery coincident with the obligation. Thus, when after an article is hired, the purpose of the hiring is completed, the hirer who retains the article with the owner's consent holds it as a depositum.

§ 452. *In essence gratuitous.* — The contract is for the benefit of the deponent, and is on principle gratuitous; though the fact that a voluntary remuneration is subsequently made does not cause the thing bailed to cease to be a depositum.[2] The *use* of the depositum is from the nature of the contract forbidden to the depositary.

§ 453. *Deposits in times of necessity, e. g. fire, shipwreck, riot, &c.* — A peculiar protection is cast by the Roman law over deposits made in terror of some impending calamity; as when goods are intrusted to a neighbor or friend in cases of fire, or civil war, or riot, or shipwreck, or probable plunder. Public policy,

[1] Foster *v.* Essex Bk. 17 Mass. 479.

[2] Holtzend. *ut supra.* "The custody," says Judge Story (Bailments, § 57), "must be gratuitous; which results, indeed, from the very definition already given.[1] And care should be taken not to confound cases where a compensation is allowed with cases of pure deposit. Sometimes a compensation may be given to the party *diverso intuitu*, and yet the contract may be a pure deposit; and sometimes the case may be of a mixed nature. As if A. desires to hire the use of my barn, in common with me, for his chaise, for a specific price, to which I agree; and I keep my own carriage in the same barn; and afterwards he desires me to take care of his chaise when in the barn, to which I assent; there I am a mere depositary of the chaise. But if the original contract were, that for the hire of the barn I should take care of the chaise, there it would be the case of a lucrative contract, and not a mere deposit. The same rule would apply to a case where the trunk of the bailor should be delivered to the bailee for safe custody, and the bailor should at the same time agree to pay a certain sum per week for room rent for the trunk, but nothing was to be paid on account of the care and custody thereof, the trunk would be a mere deposit."[2]

[1] Dig. Lib. 16, tit. 3, l. 1, § 8, 9; Pothier, Traité de Dépôt, n. 9; Durnford *v.* Segher's Syndics, 9 Martin, 484; Code of Louisiana (1825), art. 2900.

[2] See Finucane *v.* Small, 1 Esp. 315; 2 Kent Comm. Lect. 40, p. 565, 4th edit.; Pothier, Traité de Dépôt, n. 13, 31.

it is argued, requires that deposits of this kind should be viewed with more tenderness, and guarded with higher sanctions than is the case with those in which the deponent voluntarily and with full liberty of selection, chooses his own depositary, and hence becomes in part responsible for any breach of trust on the part of the latter. By the Roman law, the depositary, in cases of such necessary deposit (*depositum miserabile*), is held liable for *culpa levis*, and by the old code was condemned to pay double damage for his neglect. By the Code Napoleon, the *depositum miserabile* is distinguished as the *dépôt nécessaire*, and is invested with peculiar protection; and a similar distinction is made by the Prussian Code. The reason is obvious. If goods can be obtained on gratuitous deposit in times of shipwreck, conflagration, or riot, then wreckage, incendiarism, and riot may be promoted, in order to obtain gratuitous deposits of goods. The law is bound not only to avert this, but to establish the principle, that in peculiar cases of disaster, peculiar consideration and protection are due to those on whom the shock falls.

§ 454. *Deposits with innkeepers.* — By the Roman law, as well as by our own, the innkeeper, on the principle that with him the deposit is a *dépôt nécessaire*, is liable for the goods of his guest, unless torn from him by inevitable accident, or superior force.[1] The modern Roman law extends the same shelter to *travellers* (Reisende) who take *chambres garnies* or furnished chambers, and to visitors at bathing apartments; but not to guests at coffee-houses and restaurants. It is not necessary, to entitle the deponent to recover under this system, that he should be the *owner* of the deposit. It is enough if he has an interest therein. On this topic, however, the discussion is more appropriate to another head.[2]

§ 455. *Deposits of gold or currency.* — The law of deposit has been extended by modern Roman jurists to embrace the case where fungible articles (*e. g.* gold or currency) are left with the depositary, with an obligation of general as distinguished from special return (tantumdem ejusdem generis); in which case the depositary has the use of the deposit, and has to bear its risks. Our own law in this respect will be noticed in a subsequent section.[3]

[1] See Doorman *v.* Jenkins, 2 Ad. & E. 256; 2 N. & M. 170.

[2] See infra, § 675–93.

[3] See infra, § 469.

§ 456. *Duty of depositary.* — This consists in the safe custody and return of the deposit, with all its incidents, in the shape in which it was received.[1] It must be returned in such shape; depositum in this respect differing from *mutuum*, where the article may be returned in value.

§ 457. *Degree of diligence exacted from.* — If the return of the deposit, in the shape in which it was received, is not possible, then the depositary, for the reason that the thing has not been used by him, and has produced him no benefit, is responsible only for *culpa lata* or gross negligence.[2] He is responsible, however, for special negligence (*culpa levis*), if he forced himself into the trust, or if by any peculiar inducements or persuasion he led the deponent to intrust him with the article, or if he derived from it any benefit, direct or indirect.

§ 458. *Diligentia quam suis not the test.* — Is *diligentia quam suis*, or the diligence shown by a person in his own affairs, the test of the diligence required in depositum? Not unfrequently in our Anglo-American reports we find expressions implying the affirmative; and not unfrequently, by the scholastic jurists, is it positively affirmed that *diligentia quam suis* is requisite in all cases of depositum. The classical jurists, however, unite in holding that the only *culpa* in such bailments as are purely voluntary is *culpa lata*, or gross negligence, and that the lack of *diligentia quam suis* is only an ancillary element in the case when such lack goes to show gross negligence or fraud. Judge Story, it is true,[3] gives another interpretation to the Digest, probably misled by one of the false readings of the glossators. He declares that Bracton, in adopting the test of *diligentia quam suis*, "is supported by the clear result of the Pandects." He cites for this the Digest, L. 20. 32. D. L. 16. 3. Of these passages he quotes the second as follows: —

[1] Thibaut *v.* Thibaut, 1 La. 493.

[2] Holtz. *in loco;* Doorman *v.* Jenkins, 2 N. & M. 170; 2 Ad. & El. 256; Giblin *v.* McMullen, Law Rep. 2 P. C. 317; Foster *v.* Essex Bk. 17 Mass. 500; Smith *v.* First Nat. Bk. 99 Mass. 500; Spooner *v.* Mattoon, 40 Vt. 300; Edson *v.* Weston, 7 Cowen, 278; Lafarge *v.* Morgan, 11 Martin, 462; Lebenstein *v.* Pritchell, 8 Kans. 13; and cases cited infra; Lancaster Bank *v.* Smith, 62 Penn. St. 47; Scott *v.* Nat. Bk. of Chester, 72 Penn. St. (22 P. F. Smith) 471; Levy *v.* Pike, 25 La. An. 235. See also infra, § 496, as to the analogy drawn from mandates.

[3] Bailments, § 63–5. As to meaning of *diligentia quam suis*, see supra, § 54. As to classification of contracts in this respect, supra, § 68–9.

"Nam etsi quis non ad eum modum, quem hominum natura desiderat, diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret. *Nam* enim salva fide minorem iis, quam suis rebus, diligentiam praestabit. Sed is ex eo solo tenetur, si quid dolo commiserit. Culpae autem nomine, id est, desidiae et negligentiae, non tenetur. Itaque securus est, qui parum diligenter custoditam rem furto amiserit; quia qui negligenti amico rem custodiendam tradit, non ei, sed suae facilitati, id imputare debet."

§ 459. The first part of this passage, ending with "praestabit," is an extract from Celsus, and appears as follows in the Digest, being the 32d clause of lib. xvi. tit. 3.: "Quod Nerva diceret, latiorem culpam dolum est, Proculo displicebat, mihi verissimum videtur. Nam etsi quis non ad eum modum, quem hominum natura desiderat, diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret; nec enim salva fide minorem iis, quam suis rebus, diligentiam praestabit."

The second part of the passage as given by Judge Story, beginning with "Sed is," is (with some slight errors of the press), an extract from the Institutes, lib. 3, tit. 15, § 3, and is preceded by the following: —

"Praeterea et is, apud quem res aliqua deponitur, re obligatur et actione depositi; quia et ipse de ea re, quam accepit, restituenda tenetur." It will be seen, therefore, if we separate the extract from the Institutes from the passage given by Judge Story, and read it with its own proper introduction, that it simply affirms the well known doctrine, that if I give an article in deposit to a friend *qua* friend, I do so in view of such friend taking charge of my deposit in the way in which he takes charge of his own goods.

The extract from the Digest, as given by Judge Story, differs, however, from the original, not merely in the fact of the forced connection in which it is placed with the fragment from the Institutes, but in the change of *nam* for *nec*, in the second sentence. The original text, following the paraphrase of Hasse, may be translated as follows: —

"I fully accept (so speaks Celsus) the opinion of Nerva, which was controverted by Proculus, that the grosser form of *culpa* is *dolus*. For when a person not only does not exhibit a diligence commensurate with human capacity in general, but fails to ex-

hibit the care exerted by him in his own affairs, he cannot be relieved from fraud; for he acts (under the circumstances) in violation of good faith if he refuse to the management of another's affairs the care he bestows on his own."

§ 460. Now the question at the beginning of this extract (which does not appear in Judge Story's quotation) relates to *culpa lata*, — that form of *culpa* which consists in not knowing or seeing that which men generally know or see. Whether this is to be viewed as *dolus* is contested, and Celsus decides in the affirmative. He reasons by an *argumentum a potiori*. When a bailee, he argues, fails to exhibit in his bailment the diligence which another might have exhibited, which other applies such diligence as human nature, in such a case, calls for (*e. g.* that which a *bonus et diligens paterfamilias* applies), then his offence is comparatively slight; but it is otherwise, and the offence takes the quality of fraud, when it appears that negligences of the character complained of were not committed by him in his own affairs. For it is an element in the good faith that each party to a contract owes to the other, that in the particular transaction he will not be more negligent than in his own affairs, be the negligence greater or less. If, therefore, *culpa levis* can thus become in a certain sense *dolus*, so must this be *a fortiori* the case with *culpa lata*, — the *latior culpa* spoken of by the jurist. Nothing is here said to intimate that the *culpa in concreto* (negligence such as the party does not exhibit in his own affairs) is in any way a test of *depositum*, or that *diligentia quam suis* is to be always exhibited in *depositum*. *Culpa lata* is not spoken of as in any sense convertible with *culpa in concreto*. So far from this, we are told that *culpa levis*, which is at the same time *culpa in concreto*, may be imputable as *dolus;* and that *culpa lata*, whether accompanied by *culpa in concreto* or not, may become *dolus*. The difficulty has arisen from viewing the *dolus*, which is spoken of in the edict, in its narrow meaning of *animus nocendi*, or fraud with conscious fraudulent intent. This is erroneous. Under *dolus* the praetor here includes all *mala fides;* all action springing from evil motive; all reckless contempt of another's rights resulting in injury; therefore all negligence, however slight, which is such as the party avoids in his own affairs. All authoritative recent commentators agree with Hasse

in his exegesis of this and other passages of the Digest under the title of *depositum*.[1]

§ 461. But though Judge Story mistakes the meaning of the Digest in this contested passage, he is unquestionably right in holding that the depositary's liability is not to be gauged by the test of his conduct in his own affairs. He may let his own affairs go to ruin; he may be ready to leave his door unlocked so that every one can pass through his premises; he may choose as to his own affairs not to see what every one else sees; but he cannot take this course as to deposits. He is here bound to see what every one sees; and his blindness in this respect as to his own affairs is no defence when he is charged with showing this blindness as to the affairs of others. The language of Sir W. Jones,[2] intimating a contrary view, is therefore not merely inconsistent with the Roman standards, but is, as Judge Story properly holds, unsustainable in principle. At the same time, it must be again remembered, this want of the *diligentia in suis* may be proved as part of the evidence by which gross negligence, and sometimes even fraud, may be made out. And so, on the other hand, when gross negligence by a depositary is charged, the defendant, as evidence from which such gross negligence may be inferentially qualified, may show that the care that he bestowed on the deposit was the same that he bestowed on his own goods. And this is eminently the case when there is ground to suppose that the deponent selected the depositary from any special confidence in the latter's mode of doing business.[3]

§ 462. *Generally, therefore, no defence that depositary was guilty of like negligence with his own goods.* — Of the abstract proposition we have a direct illustration in a case where the depositary of a horse put him in a field with his own cattle, around which there was a defective fence, through which the horse fell into a field, where he was killed. Here the defect in the fence was something that everybody of ordinary observation could see; and hence the depositary, neglecting to see it, was

[1] Thus in Dr. Baron's Pandekten, a work of high excellence, published in Leipzig in 1872, it is declared that the depositary is as a rule liable only for *culpa lata*, or gross negligence; though when he forces himself into the trust he becomes a quasi insurer. Baron's Pandekten, § 277. So also Vangerow, § 630; Hasse. p. 195.

[2] Jones on Bailm. 31, 32, 46, 47.

[3] This is the case in Giblen v. McMullen, L. R. 2 P. C. Ap. 317, elsewhere noticed; infra, § 466–7.

held guilty of gross negligence, and hence responsible for the loss of the horse.[1] So, also, it is gross negligence for a depositary to place money deposited with him in a place so conspicuous and accessible to others that persons of ordinary observation would see that when so placed it would be exposed to theft; nor is it any defence that the depositary placed his own goods in the same situation.[2]

§ 463. On the other hand, in an interesting Vermont case,[3] the evidence was that the plaintiff and the defendant being soldiers in camp, occupying tents ten rods apart, and the plaintiff having with him considerable money, and fearing it might not be safe with him, left it with the defendant, his friend, without expectation of reward, for safe keeping, for two nights, and called for it in the morning. The third night he so left it, but did not call for it in the morning; and the defendant, being desirous of relieving himself of the care of it, started, before going upon duty, for the tent of the plaintiff, with the intention of returning it to him. For the purpose of not exposing the pocket-book containing the money to view, having no pocket large enough to contain it, he placed it between his shirt and vest, intending to keep it secure by the pressure of his arm upon it. On the way, his attention was diverted, and the pocket-book slipped out and was lost. It was properly held, that the casualty (fraud being excluded) was one which did not imply gross negligence, and hence that the defendant was not liable. In giving the opinion of the court, Prout, J., said: "The facts showing that the money in the defendant's hands was a simple *depositum*, or naked deposit, for the sole benefit of the plaintiff, and that it was left with the defendant without any special undertaking on his part, as well as without expectation of reward, the principle applicable to, and which must govern the case, is at once indicated. In a bailment of this nature, the bailee is bound to exercise only slight diligence, and is responsible only for gross neglect. It is said this rule accords with reason as well as abundant authority, as in the case of bailments of this nature, the accommodation is on the bailor, and the entire advantage to him.[4]

[1] Rooth *v.* Wilson, 1 Barn. & Ald. 50.

[2] Doorman *v.* Jenkins, 2 Ad. & E. 256; *S. C.* 4 N. & M. 170; Tracy *v.* Wood, 3 Mason, 132.

[3] Spooner *v.* Mattoon, 40 Vt. 300.

[4] Foster et al. *v.* Essex Bank, 17 Mass. 479; Story on Bailments, § 23, 62; 1 Parsons on Contracts, 570, 571; 2 Kent's Com. 560.

§ 464. *Fraud as related to negligence in case of deposit.* — As has been already shown, the idea of fraud, according to Anglo-American law, is incompatible with that of negligence; and when fraud or evil intent is proved, then negligence cannot be maintained. Judge Story,[1] it is true, intimates that by the Roman law gross negligence is considered as *per se* fraud; but this arises from a misconception of the term *dolus*. *Dolus* is no doubt used in a limited sense as equivalent to malice or evil intent; and this is always the case when *dolus* is applied in opposition to *culpa*. But *dolus* is not unfrequently expanded so as to include such general recklessness as indicates a mind defiant of law, just in the same way that under the general head of "crimes" we sometimes include "misdemeanors," and then make misdemeanors include negligences. This is shown by the extract just given from Hasse, and is illustrated by a passage already quoted from Mr. Austin, in which he tells us that "by the Roman lawyers rashness, heedlessness, or negligence is in certain cases considered equivalent to *dolus*." So, also, Wening-Ingenheim, in a treatise already cited, tells us: "*Culpa* in the Roman law in its widest sense, sometimes includes *dolus;* in which case *culpa* superficially includes what in German we call *Schuld*, or guilt."[2] At the same time this learned expositor is careful to add, that when the classical jurists use *dolus* in opposition to *culpa*, the first implies evil intent; the second, such a withdrawal of attention from duty as produces, without positive intention, damage to another.[3]

§ 465. *Want of evil intent no defence.* — From what has been already seen, want of evil intent is no defence if negligence be proved, for the good reason that negligence does not exist when there is a positive evil intent.[4] Of this frequent illustrations may be drawn from our own adjudications. Thus, it has been held to be gross negligence for the depositary of a painted cartoon, pasted on canvas, to keep it so near a damp wall that the painting gradually, and it was presumed under the continuous inspection of the depositary, peeled of, though there was no ground for charging the depositary with bad faith, or with any other fault than that he omitted "intelligere quod omnes intelligunt."[5] Yet,

[1] Bailments, § 66.

[2] Wening-Ingenheim, Schadenersatze, § 38. Supra, § 7.

[3] See supra, § 11.

[4] See supra, § 11.

[5] Mytton *v.* Cook, 2 Str. 1099. Judge Story justly excepts to Sir W. Jones's commentary on this case, that the depositary would be exculpated if it appeared that he kept his own

if the cause of the peeling was something that persons not experts would not detect, then the depositary (supposing the deposit to be gratuitous and free) would not be liable for gross negligence. For slight or special negligence (*culpa levis*) he could only be held liable, in case it should appear that he was an expert, undertaking the bailment for hire as one versed in the business.

§ 466. *Deposits as affected by special contracts, and herein of "safe keeping."* — Of course, as has been already noticed, where there is a special contract, this absorbs the ordinary common law engagement of a depositary. Of such special contracts, the most familiar case is that of the statutory receiver of public money; an officer who, as has been seen, is usually, under his bond or statutory appointment, treated as an insurer.[1] If, indeed, in any case a binding contract is made to keep in a particular way, then the goods must be kept in this way; and the depositary is liable not only for gross negligence, but for such special negligence (*culpa levis*) as consists in his not keeping his engagement as a good business man should.[2]

But a contract for "safe keeping," or "to securely keep," is not to be strained to mean a degree of diligence beyond the depositary's opportunities;[3] for this, if there be a special trust based upon the depositary's peculiar facilities and modes of doing business, is one of the cases in which the test *diligentia quam suis* must rule.[4]

§ 467. *Cannot evade liability for gross negligence by special agreement.* — Nor can a depositary who undertakes to hold a deposit from another relieve himself from liability for gross negligence by special agreement. However indulgently such an agreement might be regarded in England, in this country it falls within the scope of the well established line of decisions which prescribe that a carrier cannot by special agreement be absolved from proper diligence. With depositaries, even though gratuitous,

pictures of the same sort in the same way.

[1] See supra, § 290.

[2] See Co. Lit. 89 *a*; Story, Bailments, § 68–9.

[3] Ross *v.* Hill, 2 C. B. 877; Eddy *v.* Livingston, 35 Mo. 487.

[4] Giblen *v.* McMullen, L. R. 2 P. C. Ap. 317; Foster *v.* Essex Bk. 17 Mass. 479; Whitney *v.* Lee, 8 Metc. 91; Smith *v.* First Nat. Bk. 99 Mass. 605; Knowles *v.* Atlant. & St. R. R. 38 Me. 55. See, however, Kettle *v.* Bromsall, Willes, 118, and Southcote's case, 4 Rep. 83 *b*–84 *a*.

the policy of the law requires that negligence should not be by private agreement licensed; and indeed, if such an agreement does not spring from fraud, it is likely to induce fraud.[1]

§ 468. *Gross negligence to be graded by the nature and value of the thing deposited.* — This is evident from the very definition of gross negligence, or *culpa lata; non intelligere id quod omnes intelligunt.* Everybody knows that a bank note is more liable to accident and theft than a bag of corn. A degree of negligence, therefore, that would not be gross with a bag of corn would be gross with a bank note.[2] If an article deposited has a high value, then the depositary is obliged to bestow on it particular care whenever he has notice of such value. Of the kind of diligence, the absence of which constitutes gross negligence, the jury, under direction of the court, are to judge.[3]

§ 469. *Special deposits of money or securities.* — Ordinary deposits of currency, to be repaid in an equal amount of currency, fall under the head of *mutuum*, or loan, consisting of a deposit of a fungible article, such as gold or other money, with the obligation that the value should be returned in equal quantity and quality.[4] Of course in this case, the question of negligence does not arise, as the depositary is virtually a debtor, bound absolutely for the whole of the debt. It is otherwise in case of a special gratuitous deposit of bullion or securities with a banker to be gratuitously kept by him. This is the case of an ordinary depositum which the depositary is bound to restore intact, but in the keeping of which he is only liable for gross negligence. Hence in such case the bank is not liable for an embezzlement of the deposit by a cashier or other officer, provided due care was used in selecting such officer, and precautions such as to an ordinary observer would appear adequate were taken for the keeping of the deposit.[5]

§ 470. *Bankers not liable to gratuitous special depositors, except for gross negligence.* — As, however, the practice of depositing money and securities with bankers is not uncommon, it is proper here to consider it more minutely, and at the outset one

[1] See Lancaster Bk. *v.* Smith, 62 Penn. St. 47; infra, § 663.

[2] Giblen *v.* McMullen, L. R. 2 P. C. App. 317; Ross *v.* Hill, 2 C. B. 877.

[3] Doorman *v.* Jenkins, *ut supra.*

[4] D. XII. 1 — de rebus cred. Cod. IV. 1. *co tit.*

[5] Giblen *v.* McMullen, L. R. 2 P. C. Ap. 317; Foster *v.* Essex Bank, 17 Mass. 479; Smith *v.* First Nat. Bk. 99 Mass. 605; Johnson *v.* Reynolds, 3 Kansas, 257; Jennings *v.* Reynolds, 4 Kansas, 110.

or two considerations should be kept in mind. The first is that the keeping of such special deposits is not a banker's distinctive business. The securing of such deposits belongs to a special branch of business, the managers of which keep capacious vaults, fire-proof and well guarded, suited for this particular business and for no other. On the other hand, banks, conducting the ordinary banking business, are supposed to invest their funds or loan them to their customers, keeping only a small portion in their vaults. Hence, when a person takes a package of money or securities to a bank, and says, "Keep this for me," he asks the bank to do something not in its particular line of business, and something, therefore, as to which he cannot claim the diligence of a business man when exercising his particular branch of business (which, as has been seen, is equivalent to the *diligentia boni et diligentis patrisfamilias*), but simply the diligence which a person of common sense, not a specialist in a particular department, should exercise in such department. Secondly, it is of the essence of special deposits such as those of which we now speak, that not only should it be understood on both sides that the receiving of such deposits is an extra business act, but that the service should be gratuitous. The obligation of the banker in fact is, "I take no risk and receive no pay." Nor can such a practice be regarded as against public policy. Public policy, in fact, should invite rather than discourage the separation of banking business from that of what is called "safe deposit" insurance. The interests of the community are best subserved when branches of business so distinct, and requiring such distinct kinds of apparatus, are kept in separate hands. And even though no safe deposit company be accessible in the place where the deposit is made, yet, as the two kinds of business are in their nature distinct, the bank cannot be considered, unless it make a special contract to the contrary, as bound to treat a special deposit in any other way than would any other bailee whose business is not that of receiving and keeping of deposits for hire.[1]

§ 471. To this conclusion, though by a line of reasoning somewhat distinct from that in the text, arrived in 1869 the English privy council, in a case already cited, on the following facts:[2]

[1] Hale *v.* Rawaillie, 8 Kans. 136; Johnson *v.* Reynolds, 3 Kans. 257; Lebenstein *v.* Pritchell, 8 Kans. 213.

[2] Giblen *v.* McMullen, L. R. 2 P. C. App. 317.

Certain debentures *payable to bearer* were deposited with a bank as a special deposit without pay, and these debentures were placed by the bank in its strong room, where it kept valuable papers and specie belonging to itself and its customers. The debentures were stolen by a clerk of long standing, whose character had previously been excellent, and who had given no cause to suspect either his fidelity or diligence. One point only was made to show negligence by the bank. The clerk in question had been permitted to go to the strong room alone. After the discovery of the loss, the bank made arrangements by which the strong room could only be visited by two officers in company. The supreme court of Victoria, in which colony the deposit was made and the case tried, held that there was no evidence of negligence to go to the jury, and this was affirmed by the privy council. "It is clear, according to the authorities," said Lord Chelmsford, "that the bank in this case was not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which *a man of common prudence generally exercises in his own affairs.*" It would be more correct to have said, in place of the words italicized, "a person of common prudence, not a specialist, is accustomed to exercise as to matters committed to his charge." And indeed Lord Chelmsford brings us to this point by saying that "it may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence."

§ 472. In Massachusetts, in 1821, in a case of special deposit, the test of *diligentia quam suis* was advanced by the court, though obviously merely as evidential matter by which in the particular issue gross negligence could be negatived. For Parker, C. J., after stating this test, glances from it, and rests his judgment on the ground that unless there be gross negligence, no liability attaches to the depositary.[1] For the accepting of such a deposit, he argues, is outside of the usual business of the bank. "The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will

[1] Foster *v.* Essex Bank, 17 Mass. 479.

convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny, unless there has been gross negligence in taking care of the deposit."

§ 473. A similar case came before the supreme court of Pennsylvania in 1872.[1] Certain bonds were deposited as a gratuitous special deposit with the officer of a bank who was both clerk and teller, but who absconded after he had stolen and appropriated the proceeds of the bonds. Had there been gross negligence by the bank in the keeping of these bonds? This depended upon the question whether there was gross negligence in the bank in retaining the delinquent in office. This question was submitted to the jury by the court below, and a verdict found for the defendant, on evidence which Agnew, J., reviews as follows: —

"Under these circumstances, the only ground of liability must arise in a knowledge of the bank, that the teller was an unfit person to be appointed or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers should not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but on gross negligence in care taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care, higher than a gratuitous bailment can create. The question of the bank's knowledge of the character of the teller was fairly submitted to the jury.

"But it turned out that after the teller absconded, his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years, to an amount of about $26,000. It was contended that the want of discovery of the state of his accounts for such a length of time, especially as he

[1] Scott *v.* National Bk. of Chester Valley, 72 Pa. St. (22 P. F. Smith), 472.

had charge of the individual ledger, was such evidence of negligence as made the bank liable. The court negatived this position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor, whose loss arose not from the accounts as kept by him, but from a larceny, a transaction outside of his employment. We perceive no error in this. The negligence constituting the ground of liability must be such as enters into the cause of loss. But the false entries in the books, and the want of their discovery, was not the cause of the bailor's loss, and not connected with it. True, the same person was guilty of both offences, but the acts were unconnected and independent. True, the bank did not discover in time the injury he did to it; but the very fact that it did not discover his false entries and his peculations repels the knowledge of his dishonesty. The neglect was culpable, and might have led to responsibility to those with whom they had dealings, if they suffered from that neglect. But this neglect to examine into his accounts, was not the cause of the bailor's loss. His loss was owing to the immediate act of dishonesty of the teller, and not to his purloining the funds, or falsifying the accounts of the bank. The argument of the plaintiff simply results in this: that mistaken confidence is a ground of liability. But if this were the rule, business would stand still; for without a common degree of confidence in agents and officers, much of the business of the world must cease. The facts were fairly left to the jury, with the proper instruction.

"Another complaint is, that the teller was suffered to remain in employment after it was known that he had dealt once or twice in stocks. Undoubtedly the purchase or sale of stocks is not *ipso facto* the evidence of dishonesty, but as the judge well said, had he been found at the gaming table, or engaged in some fraudulent or dishonest practices, he should not be continued in a place of trust. So if the president of the bank, when he called on the brokers who acted for the teller in the purchase of the stock, had discovered that he was engaged in stock gambling, or in buying and selling beyond his evident means, a different course would have been called for. No officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species

of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step which ends in ruin to himself and to those whose confidence he has betrayed. Hence any evidence of stock gambling, or dangerous outside operations, should be visited with immediate dismissal. In this case, the operations of the teller in stocks as a gambler in them were unknown to the officers of the bank until after he had absconded."

§ 474. But if there be gross negligence, then the depositary is liable. A case of this kind was decided by the supreme court of Pennsylvania in 1869.[1] The evidence was that the teller of the bank delivered the special deposit to a wrong person. Was this gross negligence? Certainly no person would give a valuable package to a stranger without due inquiry; yet this was what was here done by the teller of the bank. He, therefore, did what no person of ordinary sense would ordinarily do, which is one of the definitions of *culpa lata*. Chief Justice Thompson, in giving the opinion of the supreme court, begins by recognizing the non-liability of the gratuitous special depositary, except for gross negligence. "The case on hand was a voluntary bailment, or more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence," and the bank, having been guilty, through its servant, of gross negligence, was held liable.

A still stronger case of negligence was adjudicated by the supreme court of Kentucky in 1873.[2] The suit was not against the bank, but against the defendants as directors of the bank. The plaintiffs in their petition alleged that certain bonds were specially deposited by them with the bank, in a certain package, and that all the aforementioned bonds, aggregating in value the sum of $55,660.40, were wrongfully taken from plaintiffs' package of special deposit by the officers of the Bank of Bowling Green, and by them converted to the use and emolu-

[1] Lancaster Bk. *v.* Smith, 62 Penn. St. (12 P. F. Smith) 47.

[2] United Soc. of Shakers *v.* Underwood, reported in Legal Gazette for Nov. 7, 1873.

ment of said bank by sale as aforesaid, without right or authority from these plaintiffs or any of them, *and of such wrongful conversion and appropriation, defendants, and each of them had, or could have had, by the most ordinary diligence* and investigation, ample notice. It was further alleged that the defendants, acting as directors, "did, on various occasions, declare dividends when the condition of the bank did not justify the same, and so appropriated to themselves, they being the largest stockholders, large sums of money actually realized from the conversion of the plaintiffs' property as aforesaid." To this a demurrer was filed, which was overruled by the supreme court, the petition being held to disclose a good cause of action.[1]

[1] "Upon the facts so alleged," says Lindsay, J., by whom the opinion is given, "this court must determine whether or not appellees, or any of them, are personally bound to make good the losses resulting to appellants from the unauthorized and wrongful conversion by the bank of their special deposits. In the adjudication of these causes it is not necessary that we shall critically inquire into the duties and obligations resting upon the bank directors to look after and protect the interest of special depositors, from whom the corporation, represented by the directory, receives no compensation. It is sufficient to say that special deposits are mere naked bailments, and that neither the bank, nor its directory, undertake to exercise any greater care in their preservation than the depositor has the reasonable right to suppose is exercised in keeping the bank's property of like description. It cannot be doubted, however, that if the deposit is lost by reason of the gross negligence, or the wilful inattention of the directors, the bank is responsible therefor, upon the well established doctrine that a mere depositary is liable for gross negligence. And as the directory is the corporate government of the bank, and in the legal sense is the corporation itself, the negligence or inattention of its members can, and ought to be, imputed to the bank. But the liability of the bank in these actions is not made to turn alone upon the want of fidelity and care upon the part of the directory. It is distinctly and clearly charged that the deposits were sold by the officers of the bank, and the proceeds of such sales converted to its use and emolument, and that this was done with the knowledge of the directors. This charge implies a conversion by the bailee of the bailor's goods, for which by the common law rules of pleading the bailors might maintain trover. The question presenting itself in these actions is, whether the directors, who had knowledge of these alleged wrongful sales, are personally liable for the value of the deposits so converted? It is insisted by the appellees that these actions cannot be maintained because of the want of privity between the depositors and the bank directors. They concede that if they have been guilty of gross mismanagement of the affairs of the bank, and that its insolvency and bankruptcy are the consequence of such mismanagement, they may be held to account to the corporation, whose officers and agents they were; but urge that inasmuch as their under-

§ 475. *Liability of finder for negligence in keeping goods*

taking was to the bank, they can only be proceeded against by it, the party with whom they contracted, and that these appellants must look to the corporation and not to them. This assumption is plausible, but it cannot be supported. Bank directors are not mere agents like cashiers, tellers, and clerks. They are, in a certain sense, trustees for the stockholders; and as to mere dealing with the bank they not only represent it, but for all legal consideration are in fact the bank itself.[1] Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and if they fail in either they violate a duty they owe not only to the stockholders but to the creditors and patrons of the corporation.[2] An honest administration of the affairs of the bank, and slight diligence at least in preventing special deposits from being wrongfully converted to its use, were legal duties which the directors were under obligation to the special depositors to perform; and as these obligations grew out of their implied contract that they would perform such duties, there is a legal privity between the parties. This doctrine was recognized by this court in the case of the Lexington & Ohio Road Company *v.* Bridges, 7 B. Monroe. 556, in which case it was held that the directors of that corporation, by accepting their positions, assumed the discharge of certain duties not only to the company, but to persons dealing with it, and that if they misappropriated the funds intrusted to their control, and a creditor was damaged by the act, he had a right of action against them for the injury resulting from their illegal conduct. Whenever there exists a legal duty to perform or omit to do an act, the law will imply a promise by the person upon whom the duty rests that he will discharge it, and between him and all persons having the legal right to demand its performance a privity of contract exists.[3] These actions, however, are not based upon the contract of bailment to the bank, nor upon the implied contract of the appellants that they would not by gross negligence or tacit acquiescence permit the deposits to be converted to the bank's use. The appellants had the right to elect whether they would avail themselves of the remedies prescribed by law for the breach of contract, either upon the part of the bank or of these appellees, and they have elected to waive their right of action upon these contracts, and sue for the joint tort of the bank and the appellees, committed by the wrongful and unauthorized conversion of their deposits. Treating the bank as the bailee, and the directors as its mere agents, it is perfectly clear that, if they permitted the subordinate officers to sell the special deposits, and then acting for the bank assented to the money arising therefrom being used for the purpose of the bank, they are parties to the tort. . . . . These appellants allege that their bonds were sold by the officers of the bank, and the proceeds paid out in the satisfaction of claims against it, and in the payment of dividends to its stockholders, and that of all this appellees had notice. Having such notice, it was their duty

[1] Morse on Banking, p. 76.

[2] Hodges *v.* New England Sacred Company, 1 Rhode Island, 312.

[3] Chitty on Contracts, p. 1.

found by him. — It is said by Lord Coke,[1] "that if a man find goods, an action on the case lies for his ill and negligent keeping of them, but not trover or conversion, because this is but a nonfeasance." "This," adds Judge Story,[2] "seems to be the true doctrine of the law; for, although a finder may not be compellable to take goods which he finds, as it is a mere deed of charity for the owner; yet when he does undertake the custody, he ought to exercise reasonable diligence in preserving the goods." But though this is true in all cases where there are such earmarks or other signs attached to the found goods as raise an implied trust for the owner, the rule cannot be applied to the case of a *bonâ fide* finder and retainer of an article found by him, as to which no owner is discoverable. In such case there is no possible privity on which a bailment can be made to rest.[3]

(and they had full power in the premises) either to prevent the sale of the deposits or to hold the proceeds for the benefit of their owners. Their failure to discharge this duty must be regarded as wilful, and the conclusion cannot be escaped that by permitting the sales to be made, and the proceeds to be paid out as alleged, they made themselves parties to the unauthorized acts constituting the conversion. This conclusion is strengthened by the averment that they declared dividends when the condition of the bank did not justify it, and thus distributed to themselves portions of the moneys arising from the conversion of appellants' deposits. If such be the case, and they acted with notice of the wrongful sales, they not only participated in, but derived profit from the tortious conduct of the subordinate officers of the bank. It is objected that the allegation of notice is so far qualified as to destroy the sufficiency of the averment. It is alleged that the appellees, 'and each of them, had, *or could have had, by the most ordinary diligence and investigation, ample notice.*' It is certainly the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the corporation; and whatever information might be acquired by ordinary attention to their duties, they must, in controversies with persons doing business with the bank, be presumed to have. Public policy demands that they shall not be heard to say that by reason of their gross negligence and wilful inattention, they were not apprised of that which the ledgers, books, accounts, correspondence, reconcilements, and statements of the bank showed to be true. It is not necessary in actions like these to bring home to the directors actual knowledge of the fact that the special deposits held by the bank were being sold and converted to its use by the officers having them in custody. It must suffice to show that the evidences of the practice were such that it must have been brought to their knowledge, unless they were grossly or wilfully careless in the performance of their duties."

[1] Isaak *v.* Clark, 2 Bulst. 306; Roll. 126.

[2] Bailments, § 87.

[3] See supra, § 439.

§ 476. *Test of gross negligence. Not to see what everybody else sees.* — As illustrating this carelessness may be mentioned the cases elsewhere noticed, where a depositary places the deposit in a place which everybody sees to be unsafe. As giving a rule as to such carelessness may be mentioned a case already cited which was decided by the English privy council on an appeal from the supreme court of Victoria. Certain debentures, it will be remembered, were accepted by the depositaries, bankers in Victoria, on gratuitous deposit. These debentures were placed by them in a strong room, which was adequately guarded against thieves, where they kept their own securities and those of other customers. The debentures were embezzled by a clerk, who previously had borne a high character, and who, on account of this character, had been intrusted with the care of the strong room. The peril was evidently not one "quod omnes intelligunt." The case therefore was not *culpa lata* according to the Roman law, or gross negligence according to our own. And so was it adjudged.[1] With this may be taken Chancellor Kent's statement,[2] that "gross neglect is the want of that care which *every man of common sense, under the circumstances*, takes of his own affairs;" or, as it would be more proper to say, "in the affairs committed to him."

§ 477. *Burden of proof as to gross negligence.* — Even though the deposit be gratuitous, the burden has been said to be on the depositary, in case of loss, to prove that he was not guilty of gross negligence.[3] But this is on the assumption that some presumption of negligence arises from the plaintiff's case. The plaintiff must prove that he deposited the goods with the defendant, and that the goods were not restored by the defendant; and that this non-restoration was produced by a lack of diligence on part of the defendant. It is true that this lack of diligence may be inferred from the nature of the transaction; but still in some way must it be shown by the plaintiff to put the defendant on his exculpation.[4]

§ 478. *Gratuitous warehousemen.* — A man who receives goods

[1] Giblen *v.* McMullen, L. R. 2 P. C. Ap. 317. See also Sodowsky *v.* McFarland, 3 Dana (Ky.), 205.

[2] 2 Com. 560.

[3] Parry *v.* Roberts, 3 Ad. & El. 118; Beauchamp *v.* Powley, 1 Moo. & R. 38; Nelson *v.* Mackintosh, 1 Stark. 237. See supra, § 421–2.

[4] See Garside *v.* Proprietors, 4 T. R. 581; Lamb *v.* West. R. R. 7 Allen,

into his warehouse gratuitously is a bare depositary, and is consequently, on the strict rule which has been stated, liable only for *culpa lata*, or the negligence that consists in not seeing what every ordinary person sees.[1] Yet it is impossible to glance at depositaries of this class without seeing that there are few cases of warehousing which are really gratuitous. We can conceive, indeed, of a man owning a warehouse to say to a friend, "If you deposit your goods here, you must do so at your own peril; I will receive no compensation and take no risk." If such be the understanding between the parties, then he who thus receives goods can only be held responsible for the lack of those ordinary precautions which any person of common business capacity, not an expert in the particular department, would be expected to take. But it is absurd to speak of railroad warehousing as governed by an understanding such as this. Warehouses are as essential to railroads as are platforms; and a railroad which has no warehouses cannot expect to receive freight when in competition with a railroad which has warehouses. No forwarder would, if he had a choice, voluntarily send his goods by a railroad whose custom it is to discharge its loads, when they reach their destination, on an open street. That the railroad does not do this, but, on the contrary, has warehouses in which it deposits goods at their destination until called for, is part of the inducements it holds forth to receive freight. Warehousing, therefore, in such case, even though not specially charged for, is not strictly gratuitous. But even if it were, the warehouseman would be in the position of one undertaking to do a particular act in a particular way, making himself liable for negligence in failing to do such act in such a way. He is therefore, as will be seen, required in this respect to exercise the diligence of a good business man in this particular line.[2]

98; Cass *v.* Bost. & L. R. R. 14 Allen, 448; Harper *v.* Hartford & N. H. R. R. 37 Conn. 272.

[1] See Schmidt *v.* Blood, 9 Wend. 268. See infra, § 573.

[2] See post, § 573. See also Great N. R. R. *v.* Swaffield, L. R. 9 Ex. 132; Notara *v.* Henderson, L. R. 7 Q. B. 225; and on the question of lien, an article in London Law Times, reprinted in Chic. Legal News, Aug. 15, 1874.

CHAPTER III.

MANDATUM.

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§ 482. *Definition.* — A mandate is an obligation by which one person engages to perform a specific service either for the obligee or for a third person. Such is practically the definition of Gaius: —

"Mandatum consistit sive nostra gratia mandemus sive aliena, id est sive ut mea negotia geras, sive ut alterius mandem tibi, erit inter nos obligatio, et invicem alter alteri tenebimur, ideoque judicium erit in id quod paret te mihi bona fide praestare oportere." [1]

To express this concretely, a mandate (*mandatum*, Vollmachtsvertrag) is a consensual contract, in which one party (mandans, mandator, mandant, dominus *scil.* negotii) commissions another (mandatarius, procurator, in Anglo-American law the mandatary) to undertake a particular business for him, which commission the party so invited agrees to undertake.

The same definition appears, as will presently be seen, in several passages in the *Corpus Juris*.

As the definitions of Judge Story and Chancellor Kent differ from the above by inserting the qualification of gratuitousness,[2]

[1] De Mandato, § 155.

[2] By Kent (2 Com. 569), a mandate is "when one undertakes, without recompense, to do some act for another in respect to the thing bailed." By Story (Bailments, § 137), it is "a

it is necessary, since that question is of prime importance in the present discussion, to pause for a moment to consider how far the qualification is sustained by the authorities to which the illustrious jurists just cited appeal.

§ 483. *Scholastic jurists hold that mandates are necessarily gratuitous.* — It is admitted that the scholastic jurists, who wrote on the revival of learning in the twelfth and thirteenth centuries, unite in maintaining the affirmative. But in weighing the authority of these jurists, several important considerations, already cursorily noticed,[1] are to be kept in mind.

First, the text of the *Corpus Juris*, which contains the law established by the business jurists of Rome, remained in an unsettled state until the beginning of the present century. Then, again, it was not until the foundation under Savigny of the historical school of Roman jurisprudence, that any systematic attempt was made to get at the meaning of the terms used in the *Corpus Juris*, so far as concerns the *animus imponentis;* and even by Savigny, great as was his critical genius, this work of exegesis was only begun. And once more, it was not until 1816, that the Commentary of Gaius, so valuable as a classical exposition of the Digest, was, through the joint labors of Savigny and Niebuhr, recovered.

Secondly, while the genius of the Roman jurists, whose opinions are collected in the Digest, was eminently concrete, practical, and regulative, confining itself to questions actually arising in business litigation, that of the Bolognese and other *renaissance* glossators was eminently speculative and scholastic, occupying itself (in default of practical issues, which, in the slow revival of business, arose only in the rudest forms) with the discussion of imaginary and often frivolous distinctions such as no practical jurisprudence can enforce. To this tendency, which jurisprudence in that scholastic age shared with theology and ethics, we owe many copious and subtle disquisitions on alleged legal duties which in modern business life are as unknown as they really were in the business life of imperial Rome. Among these may be mentioned (1) the hypothesis of intense diligence (*diligentia diligentissimi*), with its antithesis of *culpa levissima*, or infinitesimal

contract by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward."

[1] See supra § 59–62.

negligence, which have been already discussed; (2) the rule immediately before us, expelling from the class of mandates all but gratuitous commissions, — an exclusion which, as Sir William Jones, followed by Judge Story,[1] remarks, practically makes the Roman law of mandates inapplicable to our modern jurisprudence.

Thirdly, the line of interpretation struck by the first scholastic commentators was naturally followed by a long procession of successors. Even Pothier (1699–1772), writing before renovative historical criticism began its work, adopted as authoritative the scholastic distinctions on the two topics just stated, though in both respects his opinions, as will be soon seen, have now ceased to be authoritative even in France.[2]

§ 484. *The views of the scholastic jurists were accepted in this respect by Lord Holt, by Sir William Jones, by Chancellor Kent, and by Judge Story.* — Still higher authority than even Pothier have we to set aside before we strike from the definition of mandates the qualification of "gratuitous." Lord Holt, in deference no doubt to Vinnius, one of the ripest of the scholastic jurists (1588–1657), whom he refers to by name, declares that a mandate must be without a reward,[3] and in this he is supported by Sir W. Jones.[4] Chancellor Kent, in a definition which Judge Story prefers to others as "more neat and distinct," [5] declares that a mandate; as has been already seen, "is when one undertakes, without recompense, to do some act for another, in respect to the thing bailed;" and this definition is defended by Judge Story at large. But if it can be shown that the qualification "gratuitous," or "without reward," is accepted by these high authorities simply on the faith of a gloss originating with the scholastic jurists, and that though it may be sustained by one or two classical fragments, torn from their context, it is inconsistent not only with the general scope of the *Corpus Juris*, when discussing this title, but with the necessary conditions of the mandate itself, as a leading business transaction; then the conclusions in this respect even of Lord Holt, Sir W. Jones, Chancellor Kent, and of Judge Story, illustrious as is the memory of these great jurists, must fall, for the reason that these conclusions are drawn from

[1] Bailments, § 218.

[2] See fully supra, § 59–62.

[3] Coggs *v.* Bernard, 2 Ld. Ray. 909, 913.

[4] Jones on Bailments, 521.

[5] Bailments, § 137.

erroneous postulates. Nor is this criticism merely destructive; for if so it would not be here undertaken. It is really constructive, for it brings to bear on our present practical jurisprudence what would otherwise have been either inapplicable or unintelligible, — the whole Roman law of mandates.

§ 485. *By the Corpus Juris mandates are not necessarily gratuitous; and the law declared in reference to mandates is applicable to every business commission which one person undertakes to transact for another at the latter's request.* — To establish this point it will be sufficient to appeal to the consent of present authoritative expositors of the Roman law.

§ 486. The first I would cite is Dr. J. Baron, because not merely of his high present authority, but of the freshness of his commentary.[1] Hiring (Dienstmiethe), so this jurist tells us, may be compared with the mandate, for each requires one person (in one case the operative, in the other case the mandatory) to work in the interest of another. The opinion once was that the two were distinguished by the fact that in the first case the labor was for reward, in the other case, without reward. No doubt some passages in the Digest suggest such a distinction.[2] In other passages, however, where a reward is clearly part of the contract, the transaction is spoken of as a mandate; the complaint by which this reward was to be recovered by legal process, being called sometimes *cognitio extraordinaria*, sometimes as *actio mandati*.[3] This apparent contradiction is to be explained as follows: Services may be performed by one person for another either without or with reward. In the first case (without reward) the contract (Vertrag) is unilateral (einseitig); in the second case (with reward) it is bilateral or mutual (gegenseitig). The forms or titles of the Roman law (mandate and hiring, *Dienstmiethe*) do not wholly correspond to this antithesis. Mandate includes unilateral contracts for gratuitous services. The *locatio cond. operarum* is a bilateral or mutual contract, confined to the services for reward of day laborers and other operatives. For contracts for services *with reward* in other relations (such as the services of scientific experts, of agents for the management of

[1] Pandekten von Dr. J. Baron, auserordentlichem Professor an der Universität zu Berlin, Leipzig, 1872, § 299, 306.

[2] L. 1. § 4. D. mand. 17. 1; L. 22. D. pr. V. 19. 5; § 13. I. mand. 3. 26.

[3] L. 6 pr. L. 7. L. 26. § 8. L. 56. § 3. D. mand. 171; L. 1. L. 17 C. eod, 4. 35.

property, of attorneys in fact) the Roman law had no distinctive title. All these agencies, with the exception of that of hiring (*loc. cond. operarum*), were included under the head of mandate. Some of the Roman jurists, in view of this inexactness, held that to recover the *honorarium* (in mandate) the *actio mandati* was unsuitable, and resorted to the *extraord. cognitio*, or special equitable remedy. Hence the difference between mandate and hiring exists not in gratuitousness, but in the nature of the work performed, — the latter, hiring (*loc. cond. operarum*), applying to day laborers and other operatives, — the former, mandate, to other kinds of agency.[1]

§ 487. As arriving at the same result, though by a distinct line of reasoning, may be cited a learned article on Mandate, in Holtzendorff's Encyclopædia, published in 1871; and the authoritative treatise of Koch on Obligations.[2]

§ 488. Ortolan, in his Explication Historique des Instituts de l'Empereur Justinian (eighth edition, published in 1870, § 1576), says: "L'admission d'une récompense pécuniare, dans le mandat, sous la qualification d'honoraires, n'a pas été restreinte des professions dites liberales. Elle a été étendue a toute sorte de mandat s'il s'agit d'un fait qui n'a pas coutume de faire l'objet d'un louage: '*Si tale est factum quod locari non possit*,' par opposition à: '*Si tale sit factum quod locari solet*,' et qu'un salaire ait été specialement convenu. Ce salaire pourou qu'il ne s'agisse pas d'une offre incertaine (*salarium incertae pollicitationis*) est dû par le mandant, et le payement peut en être poursuivi; mais le connaissance en appartient, comme dans le cas précédent, au magistrat, *extra ordinem*. '*De Salario quod promisit, apud praesidens provinciae cognitio praebebitur.*'" As giving an implied approval to the same view may also be cited Demangeat.[3]

[1] See infra, § 719.

[2] Koch, Forderungen, III. 524.

[3] Cod. 4, 35; Mand. 1. Const. Sever. et Anton; 17 Const. Dioclet. et Max. and other citations.

"Le mandat," says Demangeat (Cours de droit Rom. III. 333, Paris, 1866), "est un contrat consensuel par lequel une personne en charge une autre de faire quelque chose. Ce contrat implique de la part du mandant une confiance particulière dans la personne à qui il donne une mission. Le mot *mandatum* parait venir de *manus datio:* le mandant sevre dans sa main la main du mandataire pour exprimer qu'il se fie à lui. Aussi verrons-nous que le mandataire qui trahit cette confiance, qui est condamné comme infidèle, encourt par cela même l'infamie, ignominiosus fit. Inst. § 2, *De poenâ t emerè litig.* (IV. 16).

"Les rédacteurs des Instituts," he

§ 489. By recent English commentators on the Roman law this view is now accepted. Thus Mr. Poste, in commenting on the definition of Gaius, says: "The gratuitous character of mandatum [1] is rather nominal than real. The professor of a liberal art could receive a remuneration, which, however, was disguised under the name of *salarium* or *honorarium*, and could not be sued for by action of mandate before an ordinary judge, but was a matter for the extraordinary cognizance of the praetor or chief minister of justice." To the same effect is the translation of Gaius with notes, by Dr. Abdy and Dr. Walker, published in Cambridge in 1874.[2] As omitting the term "gratuitous" from the definition of mandate, may also be mentioned the definition of Erskine, as cited by Judge Story.[3]

proceeds to say, "commencent par nous annoncer que le mandat peut être contracté de cinq manières, *quinque modis*. Pr. *De mandato* (III. 26).

"Étant posée la question de savoir dans l'intérêt de qui intervient le mandat, on reconnaît qu'à cet égard cinq combinaisons sont possibles. En effet, le contrat de mandat peut se former: —

"Dans l'intérêt seulement du mandant,
Dans l'intérêt à la fois du mandant et du mandataire,
Dans l'intérêt seulement d'un tiers,
Dans l'interêt à la fois du mandant et d'un tiers.
Enfin dans l'intérêt à la fois du mandataire et d'un tiers.

"Que si un mandat vous était donné uniquement dans votre intérêt, il serait nul, *supervacuum est mandatum*, en ce sens qu'il ne pourrait en résulter aucune obligation, aucune action *mandati*. Inst., pr. *in fine De mandato*."

In another passage: "Tels services peuvent être l'objet d'un mandat et ne pourraient pas être l'objet d'un louage, *locari non solent*: tel serait l'affranchissement d'un esclave. D'autres peuvent être l'objet soit d'un mandat, soit d'un louage, et alors, pour savoir quel contrat est intervenu, il faut voir si le service est rendu gratuitement ou moyennant une *merces*. Ainsi, je remets une pièce de drap à un tailleur pour qu'il m'en fasse un habit: suivant les cas, il y aura là un mandat ou une *locatio operarum*, ou enfin un contrat innomé pouvant donner lieu à l'action praescriptis verbis.— Les trois cas sont prévus dans la L. 22, D., *De praescr. verb.* (19, 5.) Comp. Inst. § 13 *De mandato*, et § 1 *De locat et conduct* (III. 24). Le service n'étant pas de ceux *quae locari solent* et un mandat étant intervenu, on a pu convenir qu'un salaire serait fourni, le n'est point par une action, par l'action *mandati contraria*, que le salaire pourra être réclamé, mais par une *cognitio extraordinaria*. Sévère et Antonin, L. 1. C., *mandati* (4, 35).

"C'est aussi de cette maniere que peuvent être réclamés les honoraires des avocats, des médecins, des professeurs. Voy., au Digeste, le Titre *De extraordin. cognit.* (50. 13)."

[1] Gaius, Inst. Poste's ed. Oxford, 1871, p. 353,

[2] P. 227 *et seq.*

[3] Bailments, § 137. In the Prussian and Austrian codes (A. L. R. I. 13, § 5; and L. 11 § 869, 870; Oesterr. G. B. § 1004) no trace of gratuitousness

§ 490 *What kinds of business mandates include.* — Every lawful kind of business may be the subject of a mandate. It includes for instance, to take some of the illustrations of the Roman law, the management of a suit at law, the erection of a building, the manufacture of raw material.[1] At this point the boundary between Mandatum and the hiring of labor (*locatio conductio operarum*) becomes indistinct. It is true that the scholastic jurists distinguish by saying that Mandatum is by its nature gratuitous, and is capable of being rewarded only by a voluntary *honorarium*. But we have already seen that this distinction, like others based on the supposed gratuitousness of the *honorarium*, is fictitious ; this being illustrated by the fact that in Mandatum the *honorarium* could be recovered by an equitable process, the *extraordinaria cognitio* of the Praetor. The true distinctive feature of the hiring of labor (*locatio conductio operarum*) is, that by the *Corpus Juris* it is regarded as for a specific period or specific work to the limits of which both parties are bound, and is for manual service.

§ 491. *Classification of Mandates.* — It is only by accepting the views just expanded that we can comprehend the classification of Mandates given in the Digest. This classification, to adopt the rendering in Holtzendorff, is as follows : —

Mandates may be, —

I. For the interest of the mandant (employer) or of a third party ; *mandatum mea* or *aliena gratia*.

II. For the interest both of mandant and mandatary (employer and employee) ; *mandatum mea et tua gratia*, words which would be meaningless if we should accept the scholastic idea that all mandates are gratuitous.

III. For the interest of one of the contracting parties and a third person ; *mandatum mea et aliena* or *tua et aliena gratia*.

§ 492. Baron gives the following, which he fully substantiates, though on one point, it will be seen, his exegesis varies from that in Holtzendorff, and in other respects his analysis is more exhaustive : —

is retained ; and even the French Civil Code declares, to adopt Judge Story's translation, that " a mandate or procuration is an act by which one gives to another a power of doing something for the mandant and in his name." Bailments § 137.

[1] L. 12. § 13. 17. D. mand. XVII. 1.

Mandates must be —

I. *Lawful;* a mandate *contra bonos mores* is void.[1]

II. *Practicable;* a mandate to attend to business already completed is void.[2]

III. *Not exclusively in the interest of the mandatary*, but in the interest of the Mandant (or employer) or of a third person, or of such third person (or of the mandant) in connection with the mandatary; *mandatum inter nos contrahitur sive mea tantum gratia tibi mandem sive aliena tantum sive mea et aliena sive mea et tua sive tua et aliena; quodsi tua tantum gratia tibi mandem, supervacuum est mandatum, et ob id nulla ex eo obligatio nascitur.*[3] The inoperativeness of the *mandatum tua gratia* arises from two causes: First it is mere *advice.* Secondly, the advisor (Rathgeber) declines to enter into an obligation binding either on himself or another, and hence he is only liable (*a*) when his advice is fraudulently given for the purpose of misleading another, and who thereby suffers damage;[4] or, (*b*) when by special contract he agrees to bear the consequences of submission to his advice.[5]

§ 493. *Nature of diligence exacted from the mandatary* (agent or employee) *and degree of negligence for which he is responsible. Roman law.* — If the definition of mandate above given be correct (a contract in which one person commissions another person to conduct a particular business, which commission such other person accepts) then there is no difficulty in reconciling with sound jurisprudence, and with the exgencies of modern business life, the conclusions of the Roman jurists as to the degree of diligence to be exhibited by the mandatary, and the degree of negligence for which he is liable. These conclusions, as given by Baron,[6] are as follows: The mandatary is bound to carry out his instructions so as best to subserve the interests of the mandant;[7] he is liable for the negligence of his subalterns on the ground of *culpa in eligendo*, supposing that he knows, or could in any way know, their inadequacy;[8] and he is liable not merely for gross negligence, but for that form of special negli-

[1] L. 6. § 3. L. 22. § 6. D. h. t. 17. 1. § 7. I. h. t. 3. 26.

[2] L. 12. § 14. D. h. t. 17. 1.

[3] L. 2. pr. D. h. t. 17. 1. § 1–7. I. h. t. 8. 26. L. 2. § 1–6. § 4. 5. L. 8. § 6. D. h. t. 17. 1.

[4] L. 47 pr. D. de r. j. 50. 17.

[5] L. 6. § 5. D. h. t. 17. 1.

[6] Baron's Pandekten, Leipzig, 1872, § 306.

[7] L. 5. L. 46. D. h. t. 17. 1.

[8] L. 8. § 13. D. h. t. 17. 1. L. 21 § 3. L. 28 D. neg. gest. 3. 5; and other passages cited by Baron.

gence (culpa levis) which is the antithesis of appropriate diligence, and which is always included when *culpa* as distinguished from *dolus* is used. Thus in the Codex, under the title of *Mandati*, we have the following from Gaius: —

"Procuratorem (which word is used as convertible with Mandator) non tantum pro his; quae gessit, sed etiam pro his quae gerenda suscepit, et tam propter exactam ex *mandato* pecuniam quam non exactum, tam dolum, *quam culpam* sumptuum ratione bona fide habita, praestare necesse est." [1]

And so from Zosimus: —

"A procuratore dolum *et omnem culpam*, non etiam improvisum casum praestandum esse, juris autoritate manifeste declaratur." [2]

The same view is taken in the article already quoted from Holtzendorff, citing passages from the Digest which are directly in point.[3]

§ 494. Nor is this conclusion (that the mandatary, procurator, or employee is, by the Roman law, liable for special negligence, *i. e.* for the want of that diligence which a good business man would show under the particular circumstances) peculiar to those who hold that by the *Corpus Juris* "gratuitousness" is not an essential element of the mandate. Hasse was unwilling to break through the traditionary rule that to mandates gratuitousness is usually incident; yet according to Hasse, nothing is plainer than that the *Corpus Juris* makes the mandatary liable for *culpa levis* as well as *culpa lata*. I proceed to condense his argument in this respect, for the reason that it is as applicable to the scholastic as to the classical definition of Mandates.

In discussing the question immediately before us, Hasse begins by calling attention to the passages from the Codex already cited, coupling them with L. 21, in the same title and book. It is clear, he argues, that in these passages something more than *culpa lata* or gross negligence is charged to the employee or mandatary. It is true that it may be objected that the words *tam dolum quam culpam* leave it undecided what grade of diligence is required. This, however, is supplied by L. 23. D. de R. I. Blending the two we have the following: As to mandates, "dolum *et omnem culpam*, *non etiam improvisum casum* praestandum esse, juris autoritate manifeste declaratur;"

[1] L. 11. C. mand. 4. 35.
[2] L. 13. C. mand. 4. 35.
[3] L. 8. § 10. L. 10. § 1. D. mand. 17. 1.

casus (accident), in other words, he is not liable for, but he is liable for fraud and for all phases of negligence. That there is here no conflict, but that the expression before us was part of an intelligent and harmonious system, we see from the conclusion of the rescript. From L. 21 this is clearly to be shown. It is true that for the position that the bailee in mandatum is liable only for *culpa lata* or gross negligence, are cited L. 8. § 7. 8. 10. L. 10. pr. L. 29. pr. D. mand. But to give such a meaning to these fragments we must resort to an *argumentum ad contrarium;* but this cannot be done in face of direct and explicit contradictory conclusions. But all doubt vanishes when these fragments are rightly analyzed. In L. 8. 10, it is necessary for this purpose to call in the context. In § 7, Ulpian discusses the question whether, when those who have gone security for others pay a debt already cancelled *ex substantia debitoris*, they are liable *ex mandato*. This he denies, on the ground that they did it ignorantly. In § 8 he advances to the further inquiry, What if they paid without contest the debt under an unjust decree of court? Here is a case in which liability would attach only in cases of *dolus* and *culpa lata;* it is therefore natural that Ulpian in such case should limit the liability of the securities to *dolus* and *culpa lata*. In § 9–10, a new case of *dolus* is proposed. A mandatary (procurator, employee) has something in his hands which it is his duty to deliver to its owner. For him not to deliver the article is *dolus*. Should he retain the article from lack of common care, then he is guilty of *culpa lata*, or gross negligence. Should he retain the article from a want of the diligence belonging to a *diligens paterfamilias* or good business man, while at the same time not guilty of gross negligence, then he is chargeable with *culpa levis*. The first test is (waiving the question of fraud), is the mandatary in such case guilty of gross negligence? If so he is liable for any damage in the mandatum. But he may be innocent of gross negligence, and yet be guilty of neglecting to apply to the transaction the diligence of a *diligens paterfamilias*. In this case he is liable for the *culpa levis* involved in such negligence.

§ 495. We may safely assume, concludes Hasse, that by the Roman law *diligentia* and *custodia plena* are to be exhibited in mandates; and the question next arises how is this position to be reconciled with other views adopted in relation to the same

subject matter. The classification the Romans here accepted seems based exclusively on the benefit the contracting parties derived from the contract. If the contract was for the benefit of the person sued, he was liable for *culpa* (negligence) as well as *dolus* (fraud); if it was not for his benefit, then he was liable only for *dolus*, and *culpa* so gross as to be assimilated to *dolus*. This view underlies the whole of L. 5. § 2, commod., as well as of the passages relating to the negotiorum gestio, and to the tutel. The same test is applied in L. 17. § 2, *de praescript. verb.* to the several cases of *contractus innominatus;* and the distinction is reiterated in L. 108. § 12. D. de legat. I. Commodatum demands *diligentia*, whenever, as is usually the case, the benefit is exclusively for the commodatar or borrower. (In such case the commodant is responsible for *culpa levis.*) On the other hand, when the contract is for the exclusive use of the commodant, or lender, then the commodatar or borrower is responsible only for *culpa lata.*

§ 496. But it may be asked, in view of the fact that the depositary, in depositum, is usually liable only for *dolus* and *culpa lata* because he usually receives no compensation for his care, and is only liable for *culpa levis* when he receives compensation, why does not the same distinction hold good in mandatum? Hasse answers this by reverting to an important distinction between *depositum* and *mandatum.* It is this: When I give my goods to another to take care of, this is a *depositum.* If, however, I commission the same person to dwell in my house during my absence, and watch over my goods, this is a *mandata custodia.* Hence in *mandatum* the employee represents the person of his employer; while in *depositum* he simply takes his employer's goods without any such confidential relations. Now there is a radical difference, both according to the Roman conception of law and our own, between these two cases. When goods are given to me to be placed among my own goods, then the goods placed with me are simply placed under the same guard that exists as to my own. . . . . It is entirely different where as a business matter I am put in the place of one intrusting me with his affairs. I can hence, in the latter case, free myself from liability only by showing the carefulness of a *diligens paterfamilias* or good business man; and it would be absurd, when I take another's place, to assume as my standard the negligence I show in my private affairs. The dis-

tinction between the different degrees of diligence thus required rests on the representative character of the mandate. This clearly appears in the following passage from the Codex (L. 21. c. mand.): "In re mandata non pecunia solum, cujus est certissimum mandati judicium, verum etiam existimationis periculum est. Nam suae quidem quisque rei moderator atque arbiter non omnia negotia, sed pleraque ex proprio animo facit; aliena vero negotia exacto officio geruntur, nec quicquam in eorum administratione neglectum ac declinatum culpa vacuum est."

§ 497. Every head of a family can conduct his own household affairs, and watch over his own stores and servants, according to his own notions of carefulness. To no one is he required to render an account in this respect. He, however, who undertakes to manage another's affairs, acts as accountable to that other. He cannot without liability omit precautions which his principal, or another agent whom that principal might have appointed, might have applied. Between the two cases just supposed the *depositum* takes an intermediate position. If I give my goods in deposit to another, I can only hold him liable for damage if I can show that he acted unconscientiously to me, and was either grossly negligent, or did not bestow on my goods the care which, as an ordinary non-expert, he bestowed on his own. The depositary pursues his own mode of business. If he takes the goods of another person, he does not in any way represent that other person. He is not selected, it may be added, because of any peculiar business gifts he possesses; for if such special gifts are involved in the contract, then the contract is not depositum, but a special contract, imposing special duties on the obligee. He is simply a cipher, — a person, so far as this particular transaction is concerned, with no special characteristics, except those of taking ordinary care of a deposit, and he is therefore simply to apply the diligence which any ordinary person applies, and to see the dangers which any ordinary person sees. It is true that if he treats the deposit with greater negligence than he treats his own goods, then he is chargeable with *dolus*. But ordinarily his liability is simply for *culpa lata*. On the other hand, the employee, in mandatum, even in cases where he receives no remuneration, (and cases, where there is no remuneration, indirect or direct, are in mandatum very rare, and a case in which an action would not lie for such remuneration is scarcely suppos-

able),[1] is liable for special negligence, or the want of the diligence of a good business man, not merely because the employee can receive compensation for his services, but because, by undertaking the work, he assumes to be a good business man capable of doing the work well. For his negligence either in not acting as a good business man should, or for in advance not disclosing his inability so to act, he is liable for *culpa levis*.

§ 498. To Bethmann-Hollweg, well known as a distinguished Prussian jurist and statesman, we owe the following additional observations, given in an Appendix to Hasse's treatise. It will be observed that he adopts Hasse's results, though by a distinct process: —

"If we ask why depositum and mandatum are placed in distinct classes, the answer is to be found by recalling the peculiar characteristics of the two transactions. The depositary simply consents that the thing deposited should rest under the same protection as the other things under his custody; he binds himself to no positive affirmative exertion (*diligentia*) but simply to honesty in returning the thing. Hence he is liable only for dishonesty (defect of *bona fides*), fraud (*dolus*), gross negligence (*culpa lata*), and exposing the thing left to him in the way he does not expose his own (*culpa in concreto*). The mandatary, on the other hand, undertakes the management of a business transaction, and binds himself to show a positive energy (*diligentia*) in this management commensurate to its needs. This obligation to exertion in a specific line and in reference to one or more special objects, seems to me the real and simple reason, as distinguished from those of Hasse, why mandatum is in this way liable for *culpa*."[2]

[1] It must be remembered that in the Roman law there was a special equitable process to recover the *honorarium* even in the nominally gratuitous mandates. Supra, § 486.

[2] "To the general rules above laid down," says Mr. Campbell, in his Treatise on the Law of Negligence, § 8, "there is one notable exception, and it is one curiously illustrative of the exact business habits of the ancient Roman. In the transaction of *mandatum* (mandate) the benefit may be on the side of either party solely, or it may be common to both. But in *mandate* the degree of care required from the person undertaking the commission does not depend upon the benefit. The law says: If you undertake to do a thing, you must do it. Neither the circumstance of the service being gratuitous, nor any careless habits in which you are accustomed to indulge in your own affairs, will excuse you for carelessness in business which is another's. C. IV.

§ 499. *First impression of Anglo-American cases is that mandatary is only liable for culpa lata or gross negligence.* — Undoubtedly, if we take a superficial view of Anglo-American decisions on this point, we would hold that a mandatary is only responsible for gross negligence.[1]

35. 11. 13. It was your own choice to undertake it, and if you had not done so the mandant might have done it himself, or found some one else to do it. Inst. III. 26. 11."

[1] See particularly McCombs *v.* N. C. R. R. 67 N. C. 193; Southern Exp. Co. *v.* McVaigh, 20 Grat. 264; Percy *v.* Millaudon, 20 Martin, 75; Shields *v.* Blackburne, 1 H. Black. 158; Richardson *v.* Futrell, 42 Missis. 525. In the latter case, we have the following opinion by Shackleford, C. J.: —

"This is an action of assumpsit in the first district circuit court of Hinds County, founded upon the following receipt, or instrument of writing: 'Yazoo County, January 23, 1863. Received of M. J. Futrell, six thousand eight hundred and fifty dollars, to be invested for him in negroes, as my judgment may direct, and to be accounted for by me. E. Richardson.'

"There was also a second count in the declaration for work and labor as overseer, and the money counts.

"An account for overseer's wages before January, 1863, for $4,050, also for money collected of Mrs. Robinson in February, 1859, amounting to $2,800.

"Defendant pleaded 'non-assumpsit' and 'payment,' with special notice that 'proof would be given that the money received by Richardson was' Confederate money; 'that part of it was invested in slaves for plaintiff Futrell, and the remainder kept by Richardson for plaintiff at his request, and which defendant was always ready and willing to pay over and account for, when called upon by Futrell.'

"Issues were made, and the case submitted to a jury, and verdict rendered for defendant in error for the sum of $5,207.41, and judgment rendered thereon.

. . . . "The next instruction objected to is the *second*, which is in these words: 'If the jury believe from the evidence, that by the statements made between plaintiff and defendant in January, 1863, the defendant agreed to invest the sum, he was found to be indebted to plaintiff in negroes, and that by the terms of that agreement, defendant was to exercise that discretion in good faith, and to exercise care and prudence in the matter, and consult the real interest of plaintiff; and if the jury believe from the evidence, that defendant did make a partial purchase of negroes for plaintiff under such agreement, yet, if defendant managed the matter in so negligent a manner as that plaintiff realized no advantage from the purchase, the defendant is not entitled to charge plaintiff with the amount of such purchase.'

"The receipt of Richardson to Futrell for the money to be invested in negroes for Futrell creates a case of *bailment* known as a *mandate*, which is defined to be 'a contract by which a lawful business is committed to the management of another, and by him undertaken to be performed without reward.' Story on Bailments, ch. 3, § 137, pp. 130 *et sequiter*. According to the general principles regulating contracts of this kind, 'a mandatary,

§ 500. *But the weight of authority is that the mandatary is required to exercise diligence commensurate to his undertaking: if an expert, the diligence of an expert; if a non-expert, the diligence of a non-expert.* — Yet when we come to scrutinize more closely the cases, we find that instead of differing with the authoritative Roman law on this interesting issue, they repudiate the scholastic glosses, based on the fiction of non-remuneration, and hold to the position that a mandatary, even though he agrees to act without pay, is liable, if he claim to be an expert, to act with the diligence belonging to his assumed profession. Whatever he claims to do, that he must do. If he claim to be a business man in the particular specialty, then he must act with the diligence of a good business man in such specialty. If he claim to be inexperienced in the specialty, then he must act with the diligence of a good business man inexperienced in the specialty. Indeed, when we examine Judge Story's exposition [1] as modified in his second edition, we will find that he retreats from the predicate of gross negligence, so far as to make it applicable only in those cases in which the mandatary claims to have no special aptitude for the particular work.[2]

as the contract is wholly gratuitous, and for the benefit of the mandator, is bound only to slight diligence, and of course is responsible only for gross neglect. This is the doctrine of the common law universally applied to mandates." The error of this is shown in the text.

[1] Bailments, § 182 *a*.

[2] "The true rule of the common law," he says, "would seem, therefore, to be, that a mandatary who acts gratuitously in a case, where his situation or employment *does not naturally or necessarily imply any particular knowledge or professional skill*, is reponsible only for bad faith or gross negligence. If he has the qualifications necessary for the discharge of the ordinary duties of the trust which he undertakes, and he fairly exercises them, he will not be responsible for any errors of conduct or action, into which a man of ordinary prudence might have fallen. *If his situation or employment does imply ordinary skill, or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge.* If he is known to possess no particular skill or knowledge, and yet undertakes to do the best which he can under the circumstances, all that is required of him is the fair exercise of his knowledge, and judgment, and capacity." [1]

[1] See 2 Kent Comm. Lect. 40, p. 571, 572, 573, 4th edit.; Percy *v.* Millaudon, 20 Martin, 75 to 79; Shields *v.* Blackburne, 1 H. Black. 158; Tompkins *v.* Saltmarsh, 14 Serg. & Rawle, 275; Foster *v.* Essex Bank, 17 Mass. 479. "Mr. Chancellor Kent," adds Judge Story, has well observed: 'It is a little difficult to reconcile the opinions on this point of a gratuitous undertaking to do some business for another; but the case of Shiells *v.* Blackburne contains the most authoritative declaration of the law, in favor

§ 501. *By Anglo-American law pecuniary consideration no longer essential.* — A common carrier who receives no pay is, on

"*This general reponsibility*," Judge Story proceeds, "*may be varied by a special contract of the parties, either enlarging, or qualifying, or narrowing it; and in such cases the particular contract will furnish the rule for the case.*"

"The great distinction, then," says Sir W. Jones, "between one sort of mandate and a deposit is, that the former lies in feasance, and the latter simply in custody; whence, as we have already intimated,[1] a difference often arises between the degrees of care demanded in the one case and the other. *For a mandatary being considered as having engaged himself to use a degree of diligence and attention adequate to the performance of his undertaking*, the omission of such diligence may be, according to the nature of the business, ordinary or slight neglect; although a bailee of this species ought regularly to be answerable only for a violation of good faith. This is the common doctrine taken from the law of Ulpian. But there seems in reality to be no exception in the present case from the general rule; for since good faith itself obliges every man to perform his actual engagement, it of course obliges the mandatary to exert himself in proportion to the exigence of the affair in hand; and neither to do anything, how minute soever, by which his employer may sustain damages, nor omit anything, however inconsiderable, which the nature of the act requires.

"Nor will a want of ability to perform the contract be any defence for the contracting party; for though the law exacts no impossible things, yet it may justly require that every man should know his own strength before he undertakes to do an act; and that if he deludes another by false pretensions to skill, he shall be responsible for any injury that may be occasioned by such delusion. If, indeed, an unskilful man yield to the pressing instances of his friend, who could not otherwise have his work performed, and engage reluctantly in the business, no higher degree of diligence can be demanded of him than a fair exertion of his capacity." [2] In other passages he enlarges on the same point.[3]

And again: "A bailment without reward to carry from place to place is very different from a mandate to perform work. And there being nothing to take it out of the general rule, I cannot conceive that the bailee is responsible for less than gross neglect, unless there be a special acceptance, &c. Everything, therefore, that has been expounded in the preceding article concerning deposits, may be applied exactly to this sort of bailment, which may be considered as a subdivision of the second species." [4]

"It is worthy of remark," says Judge Story, on commenting on the above (Bailments, § 177), "that the whole reasoning of Sir William Jones

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of the more limited responsibility of the bailee. There are, however, a number of instances, in which such a mandatary becomes liable for want of due care and attention. Thus it has been held to be an act of negligence, sufficient to render a gratuitous bailee responsible, for him to have turned a horse after dark into a dangerous pasture, to which he was unaccustomed, and by which means the loss of the horse ensued.'" 2 Kent Comm. Lect. 40, p. 572, 4th edit.; Rooth v. Wilson, 1 Barn. & Ald. 59.

[1] Jones on Bailm. 22.

[2] Jones on Bailm. 53; Pothier, Contrat de Mandat, p. 49.

[3] Jones on Bailm. 22, 61, 98, 120.

[4] Ibid 62, 63; Saltus v. Everett, 20 Wend. 267.

the definition of Judge Story, a mandatary; yet a common carrier on the point is derived exclusively from the views taken of the civil law by the able commentators already referred to. But they apply the rule to all cases of mandates whatsoever, and by no means limit it to cases where work is to be performed. So far as their authority goes, then, it repudiates the distinction; and so far as their reasoning goes, it proceeds on a basis applicable to every species of mandate.[1] And indeed it is very difficult to perceive, in common sense, or in legal principles, any ground upon which the distinction can be maintained. A mandate to carry a thing from one place to another may properly enough be deemed a mandate to perform work; and it imports, just as much as a mandate to do any other work, an engagement to perform the undertaking, and to exercise due diligence and care about it.

"If A. undertakes gratuitously to carry B.'s goods from one place to another, *does not good faith oblige him to perform his undertaking, and to exert proper diligence in proportion to the exigence of the affair?* Does not the bailor trust to his fidelity in performing it, with as much confidence as when he undertakes to do work, strictly speaking, upon the same goods?

"Why should he not be under the same obligation to carry safely as to do the work well? When he undertakes to carry, does he not, by necessary implication, engage that he has ability to do so, and that he will exercise all reasonable diligence to accomplish his undertaking? To do work on goods is not, or may not be, more important, than to carry them to another place.

"To carry jewels safely may be a far more valuable service, and require far more vigilance, than to clean the gold which enchases them. The same reasoning, then, seems applicable to all classes of mandates; and it is applied in the text of the civil and foreign law, from which the rule is borrowed, indiscriminately to all. *Where the act to be done requires skill, and the party who undertakes it either has the skill, or professes to have it, there he may well be made responsible for the want of due skill, or for the neglect to use it.* In such cases the undertaking may well be deemed a special undertaking to exercise due skill; and the omission of it imports, in all such cases, at least ordinary negligence; and in many cases, operating, as it must, as a fraud upon the party, it may well be deemed gross negligence. But this class of cases stands, not as an exception from the general law, but as a qualification of it from the implied engagement of the mandatary. It is only deciding that the parties may vary the responsibility, implied by law, by an express or implied contract for this purpose. Sir William Jones himself puts a case, which shows the propriety of admitting this doctrine; for he agrees, that if an unskilful man, who is known to be so, does the work at the solicitation of a friend, with such ability as he possesses, he stands excused, although it is unskilfully done; for it is the mandator's own folly to trust to him, and the party engages for no more than a reasonable exertion of his capacity.[2] It is apparent then that the fact of skill, or of want of skill, as known or unknown to the bailor, or professed or not professed by the bailee, constitutes

[1] Pothier, Contrat de Mandat. n. 46, 47, 48, 49; Las Siete Partidas, liv. 5 tit. 12, 1, 50 to 25.

[2] Jones on Bailm. 53, 98. Pothier asserts the same doctrine. Pothier Contrat de Mandat. n. 49.

who receives no pay is required, as has been fully exhibited,[1] to show the same degree of diligence, so far as the preservation of life and limb is concerned, to the passenger who does not pay at all, as to the passenger who pays third class, second class, or first class. Of course when we come to diligence in the accumulation of comforts, gradation is allowed; but as to diligence in respect to the safety of the passenger, and his punctual transportation, which is the only diligence which is the correlative of negligence, we will be driven, if we graduate the degree of diligence by the money paid, to hold that the carrier is to graduate his care of his passengers in proportion to what they pay. This, however, the policy of the law precludes. Whatever may have been the early speculations on the subject, it is now settled that the same grade of neglect, so far as concerns life, limb, and punctual transportation, which makes the carrier liable to a first class passenger, makes him liable to the passenger whom he undertakes to carry free;[2] and that, to adopt another illustration, the same grade of neglect, so far as concerns the essentials of recovery, which makes a physician liable to his richest patient, makes him liable to the pauper in the hospital.[3]

§ 502. *Inoperativeness of the terms "recompense" and "reward."* — Indeed when we come to examine the terms "recompense" and "reward," as used by Chancellor Kent and Judge Story, we will see that these terms, if meant to limit the Roman definition of mandatum, are inoperative. Why not say "pecuniary consideration," unless to include a kind of recompense or "reward" that is not pecuniary? Is not an interchange of kind offices a "recompense" and a "reward?" Are not services of some kind generally expected in return for free passes; or, in a service purely charitable, is there not, to revert to the case of medical attendance, experience gained by the practitioner, and an advance in the confidence of the community? Indeed, if we take reward in the large sense used by Locke, there is scarcely any performance of an assumed duty which is without reward.[4]

a material ingredient in construing the engagement, and qualifies or enlarges it. In other terms, it varies the presumption as to the actual contract, according to the express or implied intention of the parties. It is not so much an exception from the common rule, as a waiver or limitation of it."

[1] Supra, § 355, 438; infra, § 641.

[2] See cases cited, § 355.

[3] See infra, § 730–7.

[4] "Which good and evil, pleasure

And if we scrutinize the motives of human action, we must conclude that there is no act done by a reasonable man without the expectation of some good consequences; to his mind, an adequate recompense and reward.

§ 503. *Confidence a sufficient consideration.* — But waiving this criticism, we are entitled to plant ourselves on the position heretofore more fully declared, that a confidence bestowed and accepted is a sufficient consideration to support an action for neglect.[1]

§ 504. Indeed, the leading case of Shields *v.* Blackburne,[2] which has been so often cited as confining the mandatary's liability to gross negligence, will be found, on examination, to sustain the position just declared. In that case, to adopt Judge Story's statement, a merchant had undertaken gratuitously, but not, as it should seem, officiously, to enter certain goods of the plaintiff at the custom-house, with his own goods of the like kind; and by mistake he entered them by a wrong name, so that all the goods were seized and lost, both the plaintiff's and his own. An action was brought by the plaintiff to recover damages for this misfeasance; and upon full consideration the court held, that, as there was not any gross negligence, the action would not lie. "The defendant," said Heath, J., acted *bonâ fide*. "*If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence, if he undertook gratis to attend a sick person, because his situation implies skill in surgery. But if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable.* It would be attended with injurious consequences, if a gratuitous undertaking of this sort should subject the person who made it, and who acted to the best of his knowledge, to an action." "A wrong entry at the custom-house,"

and pain, attending our observance or breach of the law, by the decree of the lawgiver" (moral or legal), "is what we call reward or punishment." Hum. Understand. b. 11, c. 27.

[1] See Smith's note to Coggs *v.* Bernard, Smith's Lead. Cas. 6th ed. 193; Ames, J., in Gill *v.* Middleton, 105 Mass. 479; Benden *v.* Manning, 2 N. H. 289; Mobile & Ohio R. R. *v.* Hopkins, 44 Ala. 486; Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 483; Durnford *v.* Patterson, 7 Martin (La.), 460; Shillibeer *v.* Glynn, 2 M. & W. 145, and supra, § 438.

[2] 1 H. Black. 158.

said Wilson, J., "cannot be considered as gross negligence, when, from the variety of laws, &c., reliance must be placed on the clerks in the office." So Lord Loughborough professed to agree with Sir William Jones, "that where a bailee undertakes to perform a gratuitous act, from which the bailor is alone to receive benefit, then the bailee is only liable for gross negligence." "But," added Lord Loughborough, "if a man gratuitously *undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If in this case a ship-broker, or clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries. But when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom-house, such a mistake as this is not to be imputed to him as gross negligence.*" It will be seen, therefore, that the departure of the judges in the opinions just quoted from the Roman law, as held by the Justinian jurists of business Rome (as distinguished from the subsequent scholastic jurists), is purely verbal. The special negligence of an expert in his specialty is described by the great Roman jurists first referred to as *culpa levis*. It is called "gross negligence" by the judges in Shields *v.* Blackburne. But the doctrine set forth in Shields *v.* Blackburne is precisely that both of the Justinian jurists, and of the jurists of Germany and France at the present day.

§ 505. So, also, with Coggs *v.* Bernard.[1] In that famous case the defendant undertook to carry without pay some hogsheads of brandy from one cellar to another; but through his negligence one cask was staved and the brandy lost. The court, though the mandate was "gratuitous" and the defendant not a common carrier, held, that as he held out to be a person fit for the particular business, he was liable for negligence in failing to do what he undertook.

§ 506. So, also,[2] where a master of a ship had gratuitously taken charge of and received on board of his vessel a box containing doubloons and other valuables belonging to a passenger

[1] See fully Smith's Leading Cases, 6th ed., for this case, with admirable notes by both English and American editors.

[2] Nelson *v.* Macintosh, 1 Stark. 237.

who was to have worked his passage, but who failed to arrive in time to join the ship. The captain, after the voyage began, opened the box in the presence of the passengers, to ascertain its contents, and whether there were contraband goods in it or not; and he placed the valuables so taken in a bag in his own chest in his cabin, where his own valuables were kept. After his arrival in port, it was found that the bag was missing. He was held responsible for the loss, on the ground that he had imposed upon himself the duty of carefully guarding against all perils to which the property was exposed; and undertaking to carry the goods, he was bound to carry them prudently.

§ 507. So, in an analogous case decided by Judge Story.[1] A. undertook gratuitously to carry two parcels of doubloons for B., from New York to Boston, in a steamboat, by the way of Providence. A., in the evening (the boat being to sail early in the morning), put both bags of doubloons, one being within the other, into his valise with money of his own, and carried it on board the steamboat, and put it into a berth in an open cabin, although notice was given to him by the steward that they would be safer in the bar-room of the boat. A. went away in the evening and returned late, and slept in another cabin, leaving his valise where he had put it. Early the next day, however, just as the boat was leaving the wharf, he discovered, on opening his valise, that one bag was gone; and he gave an immediate alarm, and ran up from the cabin, leaving the valise open there with the remaining bag, his intention being to stop the boat. He was absent for a minute or two only, and on his return the other bag also was missing. An action being brought against him by the bailor for the loss of both bags, the question was left to the jury whether there was not such negligence as gave the plaintiff the right to recover. Under the instruction of the court, the jury found a verdict for the plaintiff for the first bag lost, and for the defendant for the second.

§ 508. So, also, in the case heretofore cited, where a gratuitous mandatary undertook the care of a horse, and turned him out in a dark night on a dangerous and strange pasture. For injuries produced by this negligence the mandatary was held responsible, on the ground that one undertaking the care of a horse should, unless accepted by the owner as unacquainted

[1] Tracy *v.* Wood, 3 Mason, 132.

with the duty, be capable of applying, and should apply such care.[1]

§ 509. So, generally, receiving money to collect or pay, or letters to deliver, implies not merely capacity for the duty but a pledge of diligence; and the mandatary who neglects to apply such diligence is liable, though his offer was gratuitous.[2]

§ 510. *Directors of banks and other corporations.* — Here arises the important question, What is the liability of the unsalaried directors of banks and other corporations for negligence in the performance of their trust? Now, if the argument of the preceding sections be correct, the issue is not affected by the absence of money salary. Whatever be the consideration which induces a person to undertake the control of another's affairs, he is required, if there is confidence bestowed and accepted, to show the diligence a good business man is accustomed to show in the exercise of such a trust. A man holding himself out to the public as a business man, capable of properly acting as a bank director, is liable for *culpa levis* in not showing the diligence a good bank director should. What this diligence is, is of course determined in part by the charter of the bank, in part by general commercial law, in part by business usage. This doctrine is virtually the same with that adopted by the supreme court of Louisiana in an interesting case.[3] "The directors of banks, from the nature of their undertaking, fall within the class of cases where ordinary care and diligence only are required. It is not contemplated that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly, must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become

[1] Rooth *v.* Wilson, 1 Barn. & Ald. 59.

[2] Shillibeer *v.* Glynn, 2 M. & W. 145; Durnford *v.* Patterson, 7 Mart. (La.) 480.

[3] Percy *v.* Millaudon, 20 Martin 68.

acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." "Upon the ground, however," comments Judge Story, "of gross negligence or wanton disregard of duty, the directors of a bank were, in the same case, held responsible to the stockholders for losses to the bank occasioned by acts of the following character: (1.) Permitting the president and cashier to discount notes from the funds of the bank, without the assent and intervention of five directors, as required by the rules and regulations of the bank. (2.) Permitting purchases to be made of the stock of the bank out of the funds of the bank by the president and cashier, at a rate above the known true value thereof, or allowing them to take and use the money of the bank, contrary to the rules and regulations thereof. (3.) Not opposing an illegal measure of the board of directors to discharge the cashier and his sureties from the responsibility on the official bond of the former? How far similar doctrines will be adopted in courts sitting under the jurisprudence of the common law remains for future discussion in those courts, as I am not aware that the question has as yet been directly litigated therein. But there can be little doubt that these doctrines are just conclusions from the general law of mandates."[1]

If we substitute "culpa levis" or "special negligence" for "gross negligence" in the last passage, we will find that it coincides with the views as heretofore expressed as those of the authoritative jurists of business Rome. In short, to repeat once more the rule, a mandatary, whether with or without pay, who accepts and undertakes to perform a trust or mandate must exhibit diligence proportioned to what he undertakes. If he claims to be a business man, experienced in the specialty, he must show the diligence a good business man in such specialty is accustomed to show. If he disclaims having such special business capacity, he is liable only for lack of the diligence which a good non-expert in such cases is accustomed to show.[2]

§ 511. *Mandates of nonfeasance and mandates of misfeasance.* — As a general rule, a mandatary is liable for nonfeasance; *i. e.* for not exercising the care he is bound to exercise.

[1] Percy *v.* Millaudon, 20 Martin, 68, 79, 80, 81, 92.

[2] See supra, § 45, 410–15.

Questions, however, frequently arise, whether a person who loosely engages to do an act for another, and then forgets to do it, there being no reward, is liable for injuries arising from his failure to do the thing promised. The question here is whether a confidence was offered and accepted, and whether the mandant, on this confidence, omitted to attend to the commission personally. If so, notwithstanding some intimations to the contrary in an able New York opinion,[1] the mandatary is liable for any damage he causes, by his neglect, to the mandant. But for a fuller examination of the principles on which this conclusion rests, we must revert to a prior section.[2]

[1] Thorne *v.* Deas, 4 Johns. 84. See also Elsee *v.* Gatwood, 5 T. R. 143.

[2] Supra, § 442.

CHAPTER IV.

TRUSTEES, ASSIGNEES, ATTORNEYS IN FACT, GUARDIANS, EXECUTORS, AND OTHER AGENTS.

General characteristics of liability of, § 515.
Test of *diligentia quam suis* not applicable, § 516.
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As to special lines of business general agents bound to diligence in selection of subordinates, § 519.
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TRUSTEES, ASSIGNEES, ATTORNEYS IN FACT, GUARDIANS, AND EXECUTORS.

§ 515. *General characteristics of.* — Trustees, assignees, attorneys in fact, and executors are, in the view already expressed, mandataries, and are hence subject generally to the law that obtains as to mandates. They are distinguished, however, from special mandataries (*i. e.* persons employed to do a particular work) in this; that the special mandatary is, as a rule, required to be an expert in his specialty, whereas the general mandatary is only to be expected to be a good business man in general, one whose duty is, in specialties in which he is not an expert, judiciously to select specialists as sub-agents.

§ 516. *Trustees, assignees, attorneys in fact, guardians, and executors not governed, as to diligence, by the test diligentia quam suis.* — It was frequently said by the scholastic jurists that agents are governed by the test of *diligentia quam suis;* in other words, an agent, it was maintained, is only required to show in his principal's affairs the same diligence as he shows in his own. But not only is this in conflict with the Roman standards, but it militates against all sound business instincts. A trustee, for instance, may speculate with his own funds, and this may turn out for his good; but whether unsuccessful or successful, he cannot be per-

mitted to speculate with his principal's funds.[1] So a trustee may be so timid as to his own affairs that rather than expose his money to risk he holds it locked up in his safe; but the fact that he thus locks up his own money will be no defence when he is charged with negligence in not investing the money of his principal. So a trustee may in his own affairs exhibit a nervous abhorrence of litigation, and may prefer to lose rather than sue; but this supine timidity will not be excusable if exercised in the discharge of his trust.[2]

§ 517. By Mommsen, a distinguished contemporary German jurist, whose essays on negligence have been already frequently quoted, this position is vindicated by reasons which, though bearing equally on special agencies, are not out of place here. No matter, he argues, how shrewdly sagacious and how brilliantly successful a trustee may be in his own affairs, he discharges his duty when conducting the affairs of others if he exhibits in them the diligence which a good business man (not an extraordinary business man) is accustomed to show in the same specialty. And this accords with right reason. A man may venture boldly in his own affairs, but he is not justified in venturing boldly in the affairs of others. Again, as Hasse well argues, we are bound to put out of the question, in all continuous agencies, the idea of continuous extraordinary and exceptional exertion. It is conceded that this is the case when we take the diligence of others as the standard; for, to other persons, taking them as an aggregate, extraordinary genius is not to be attributed. The same rule is to be applied when the standard is the person employed, viewing him concretely. *Diligence* is what is to be exacted from him; not *genius*. For diligence, if rightly exercised, enables him to bring his faculties into play, not tumultuously, not under such excitement or precipitancy as to exhaust him, but in an orderly way, and at the right season. His performance must be adapted to his capacity; it is negligence for him to undertake more than he can do, but not negligence to do only what he can do safely. His duty is not to expend in a single effort his strength, but to husband it so that it may be sufficient for the whole of the undertaking assumed by him. If his capacity is of a high order, then

[1] Ihmsen's Appeal, 43 Penn. St. 431; Norris's Appeal, 71 Penn. St. 106.

[2] See, however, Blosser *v.* Harshbarger, 21 Grat. 214, as to how far this last point may be affected by circumstances.

undoubtedly this capacity must be used, for he is not diligent unless it be so used. I may lawfully in my own affairs alternate intense exertion with languor, and engage in bold speculations with their contingencies of success and failure, but I cannot do this in the affairs of another. For in conducting another's affairs I must show uniform diligence and fidelity, not being permitted to compensate deficient diligence at one time by excessive diligence at another. A single negligence makes me liable to my principal though in a thousand other points my diligence is unquestioned. I may, for instance, guard a deposit of money with adequate care for a year, yet if in a single half hour I am negligent and it is in consequence stolen, I am liable for the whole. But to expect me to guard this deposit for the whole time by precautions such as the most suspicious vigilance would suggest, for a period of peculiar excitement and danger, is absurd; and hence what I am chargeable with as a continuous thing, is the duty which alone I am capable of discharging, — the *diligentia diligentis patrisfamilias*, — in other words the diligence a good business man is accustomed to use when dealing with the particular speciality.[1] Hence, as Hasse justly concludes, two points, in deciding such a question, are to be kept in mind. First, did the party charged do what a good business man under the circumstances is accustomed to do; for this, as a rule, is sufficient. But, secondly, if he possesses peculiar aptitude for the particular work, the question is, what would a good business man, *with this peculiar aptitude*, under the circumstances do?[2] If I employ an eminent architect to plan and superintend a building, then I can with right require that he should employ his peculiar talent in the work. If he fails to do this, he fails to act as a *homo diligens et studiosus paterfamilias*, and by this failure he makes himself liable to me for the accruing loss. Yet at the same time I cannot require from him an activity beyond his strength, though in his own affairs such an activity may sometimes be exceptionally exhibited by him. In fine, a person whose manner of work is peculiarly neat, rapid, and persistent must exhibit this manner of work when employed by others, not because he does so in his own affairs, but because he must when working for another employ *diligentia diligentis;* and if he fails to use the strength which he is capable of using without ex-

[1] See to same effect Wood *v.* Cooper, 2 Heisk. 441. [2] Supra, § 32.

traordinary effort, then the *diligentia diligentis* is not applied by him. He cannot excuse himself on the ground that he works as well as others, because they work according to their gifts, and he must work according to his. Hence we must conclude: (1) that an employee is not required, because sometimes he shows exceptional and extraordinary diligence in his own affairs, to show in his employment anything more than the diligence which a good business man would exercise in such specialty; but (2) that if he possesses certain aptitudes, he must diligently employ these aptitudes, and a failure to do so makes him liable for damages resulting from such failure.

§ 518. *Proper test is, the diligence shown by a good business man when exercising a trust such as that under discussion.* — Hence, rejecting the test of *diligentia quam suis*, we must fall back on that which has already been established as obtaining in mandates generally, — that of the *diligens paterfamilias*, or, to adopt the rendering already vindicated, that of the good and conscientious business man. What are good and conscientious business men accustomed to do when charged with trusts of this class? This, in all cases of general agency, whether that agency be by general deed of trust or assignment *inter vivos*, or by testamentary appointment, is the only rule that either reason or authority sustains.[1] Hence an agent acting in good faith is not to be made

[1] Jones on Bailm. 9, 10, 23; Ibid. 86, 119; 1 Bell Comm. § 389, p. 364; Ibid. § 411, p. 387 (4th ed.), § 10; Chitty on Com. & Manuf. 215; Chapman *v.* Walton, 10 Bing. 57; 1 Liver. on Agency, 331–341 (ed. 1818); Paley on Agency, by Lloyd, 77, 78; Madeira *v.* Townsley, 12 Martin, 84; Leverick *v.* Meigs, 1 Cowen, 645; Drousard *v.* Declouet, 18 Martin, 260; Lawler *v.* Keaquick, 1 John. Cas. 174; Savage *v.* Birckhead, 20 Pick. 167; Johnston *v.* Newton, 11 Hare, 160; Com. *v.* McAllister, 6 Casey, 536; Fant *v.* Miller, 17 Grat. 187; Kerns *v.* Wallace, 64 N. C. 187; State *v.* Robinson, 64 N. C. 698; McCants *v.* Wells, 3 Richards. 569; Miller *v.* Proctor; 20 Oh. St. 442; Ihmsen's Appeal, 43 Penn. St. 431; Twaddle's App. 5 Barr, 15; Springer's Estate, 51 Penn. St. (1 P. F. Smith) 342; Matthews *v.* Discount Corp., L. R. 4 C. P. 228. In Chambersburg Sav. Bk. *v.* McLellan, Sup. Ct. of Penn. July 2, 1874, the law is thus succinctly stated by Mercur, J.: —

"It is well settled that a trustee shall not be surcharged by a court of equity for a loss which has occurred, in case he has exercised common skill, common prudence, and common caution; but for supine negligence, or for wilful default, he shall be held responsible. Twaddle's Appeal, 5 Barr, 15; Moore's Appeal, 10 Barr, 435; Springer's Estate, 1 P. F. Smith, 342.

"Then the liability of the appellee must be determined by an examination

personally responsible, if in times of danger and difficulty he makes the best disposition in his power for the preservation of moneys in his charge, though it involve the exchange of funds of a less portable for those of a more portable kind, as of small bills for large ones.[1]

§ 519. *As to special lines of business, a general agent, unfamiliar with such specialties, is bound only to diligence in selection of proper sub-agents, and general supervision of them when appointed.* — A general agent may have under his control a variety of specialties with which he is practically unacquainted. An assigned estate, for instance, may include within its assets a manufacturing concern, or a ship at sea, or a country store. Now there may be cases in which a general agent is selected because he is an expert in some particular specialty, and when, therefore, he is expected to give his particular attention to such specialty. Such cases, however, in general agencies, are exceptional; and the rule is that general agents, who have special branches of business passing to them in the trust, must conduct such special branches of business through experts in such business, and exhibit negligence if they fail so to do. This may be illustrated by two conditions so familiar as to attend almost all general agencies. A general agent, be he assignee, trustee, guardian, or executor, has currency in hand belonging to his trust. Is he to keep this in his own house? This would be negligent, and would make him

of the testimony and the ascertainment on which side of the line of separation his conduct has placed him.

"In considering whether a trustee has made himself liable for a failure to collect and convert the assets in his hands, regard must be had to the character of the trust. Thus, a guardian would not be held to such prompt action in enforcing the collection of securities as an executor, administrator, or assignee for the benefit of creditors would be. The duty of the former is to hold and retain; that of the latter to collect and prepare for distribution. Charleston's Appeal, 10 Casey, 473; Neff's Appeal, 7 P. F. Smith, 91.

"It was then the duty of the appellee within a reasonable time to make proper efforts to convert all the assets and securities into money for distribution. If he failed to make such efforts, he was guilty of gross negligence and became liable for any loss thereby sustained. Johnson's Estate, 9 W. & S. 107. There an administrator, upon a sale of assets at vendue, took a note with security, payable in six months, and when it fell due the payors were able to pay it, but the administrator made no effort to collect it within six months after maturity, and by the subsequent insolvency of the makers it was lost; the administrator was held to be chargeable with the loss. That was a case of omission only."

[1] Wood *v.* Cooper, 2 Heisk. 441.

liable in case of loss, except under extreme circumstances of *vis major*. His duty is to deposit such funds in bank; and this duty is satisfied, apart from statutory limitations, if the bank, at the time of deposit, is in good reputation, and if there is nothing in way of public rumor subsequently occurring which would lead a good business man to withdraw his funds.[1]

§ 520. So with regard to lawsuits. A general agent is not usually a practising lawyer; and if he be so, it is not always prudent for him to act as the exclusive counsel of his principal. His duty, however, is complied with, if he select for such business competent counsel in good standing; and if he follow their opinion, and commit himself to their directions, he having no notice requiring him to dismiss them, he is absolved, even though their views of the law are erroneous, and their conduct negligent, as to matters under their control.[2]

The maxim that every person is presumed to know the law, is not always applicable to trustees; on the contrary, they may be exonerated from losses resulting from their ignorance of the law, in cases where they exercise proper diligence and precaution, and act upon the advice of counsel.[3]

§ 521. *General agent liable for his negligence in dealing with his principal's funds.* — A general agent is liable for negligence in dealing with his principal's funds in the following cases: —

§ 522. *When he invests them in a manner contrary to law.* — In many states a trustee is forbidden by statute to invest in any except certain enumerated securities. If, in defiance of this provision, he invests in extra-statutory securities, he is liable for any loss thereby accruing to his principal, while to his principal he is responsible for any profit so made.[4] The same rule applies as to investments which by the law determined by courts are improvident.[5]

[1] Heckert's Appeal, 69 Penn. St. 264; Johnston *v.* Newton, 11 Hare, 160; Wilks *v.* Groom, 3 Drew, 584; 3 Leading Cases in Equity, *740; 2 Story's Eq. Jur. § 1269, 1270; Commonwealth *v.* McAllister, 4 Casey, 480; *S. C.* 6 Ibid. 536; Bile's Appeal, 12 Harris, 337; Yoder's Appeal, 9 Wright, 394; McElhenny's Appeal, 10 Wright, 347. See Miller *v.* Proctor, 20 Oh. St. 442.

[2] Miller *v.* Proctor, 20 Oh. St. 442.

[3] Miller *v.* Proctor, supra. See supra, § 414.

[4] See Norris's Appeal, 71 Penn. St. 106.

[5] Hemphill's Appeal, 18 Penn. St. 303; Worrell's Appeal, 23 Penn. St. 447; Ackermann *v.* Emmott, 4 Barb. S. C. 626; Ihmsen's Appeal, 43 Penn. St. 431.

§ 523. *When he is negligent in the choice or retention of sub-agents through whom the funds are impaired.* — Here we fall back on the general law of mandates as already exhibited. A general mandatary, whether with or without reward, is required to show the diligence of a good business man in the choice of subalterns. If he fail to do this, and there is a consequent loss to his principal, then he is liable for such loss.[1]

§ 524. *When neglecting to invest.* — So, the usage being for trustees to invest funds in their hands when proper to be capitalized, a trustee is liable for neglect in making such investment.[2] So where he omits to invest, in mixing the money with his own, or in keeping it carelessly, he is chargeable with interest.[3] In cases of gross negligence, interest may be compounded.[4]

§ 525. *When he speculates with his principal's funds.* — In such case he is liable for any profits made by the speculation if successful, and for the sum lost with interest if the speculation be disastrous.[5]

[1] See Miller *v.* Proctor, 20 Oh. St. 442; Foster *v.* Preston, 8 Cowen, 198; Taber *v.* Perolt, 2 Gal. 565; Commercial Bank *v.* Martin, 1 La. An. 344; Macdonnell *v.* Harding, 7 Sim. 178; Matthews *v.* Brise, 6 Beav. 239; Massey *v.* Banner, 4 Med. 419.

[2] Challen *v.* Skippam, 4 Hare, 555; Robinson *v.* Robinson, 1 De G., M. & G. 247.

[3] Manning *v.* Manning, 1 John. C. R. 527; Mumford *v.* Murray, 6 John. C. R. 1; Jacot *v.* Emmett, 11 Paige 142; De Peyster *v.* Clarkson, 2 Wend. 77; Peyton *v.* Smith, 2 Dev. & Bat. Eq. 325; Dyott's Estate, 2 W. & S. 565; Merrick's Est. 2 Ashm. 485; Lomax *v.* Pendleton, 3 Call, 538; Graver's App. 50 Penn St. 189; Handley *v.* Snodgrass. 9 Leigh, 484; Yundt's App. 13 Penn. St. 575; Lane's Appeal, 24 Penn. St. 487; Kerr *v.* Laird. 27 Miss. 544; Turney *v.* Williams, 7 Yerg. 172; Ringgold *v.* Ringgold, 1 H. & G. 11; Williamson *v.* Williamson, 6 Paige, 298. See fully Hill on Trustees (4th Am. ed.), 572–7.

[4] Barney *v.* Saunders, 16 How. U. S. 342. See Hill on Trustees (4th Am. ed.), 344, for cases at large; though see Norris's App. 71 Penn. St. 123, where Paxson, J. (affirmed by supreme court) says: "I know of no instance in which any man has ever yet paid compound interest by judgment of a court of this state."

[5] Hockley *v.* Bantock, 1 Russ. 141; Robinson *v.* Robinson, 1 De G., M. & G. 256; Docker *v.* Somes, 2 M. & K. 655; Palmer *v.* Mitchell, 2 M. & K. 672; Chedworth *v.* Evans, 8 Ves. 46; Oliver *v.* Piatt, 3 Howard. 333; Wiley's Appeal 8 W. & S. 244; Hart *v.* Ten Eyck, 2 Johns. C. 62.

The law in this respect is well stated by Paxson, J., in an opinion adopted by the supreme court of Pennsylvania in Norris's Appeal, 71 Penn. St. 106: . . . . "It is a well settled rule that where a trustee speculates with the trust funds he may be held to profits or interest, at the option of the *cestui que trust*. Profits, if the investment has been successful, and interest, if it has been disastrous. In no event will

§ 526. *Decree of court having jurisdiction a protection to the trustee so investing.* — By the usual chancery practice a trustee is entitled, in matters of doubt, to obtain a decree of the court having jurisdiction of his accounts as to the propriety of an investment; and a decree so made will be a protection to him in case of loss, if it appear that the case was fairly presented to the court.[1]

the trustee be allowed to make a profit out of the trust fund. The law holds out no inducements to trustees so to misapply the estate. He may lose, but he cannot make by so doing. It is equally clear that when the trust funds can be fairly traced into the purchase of any particular stock, the latter shall be held to belong to the estate, if the *cestui que trust* so elect. The cases upon this point are numerous and strong. Among them may be mentioned Hall's Appeal, 4 Wright, 409; Miller's Appeal, 6 Casey, 478, 493; Robinett's Appeal, 12 Ibid. 191; Oliver *v.* Piatt, 3 Howard, 333; Callaghan *v.* Hall, 1 S. & R. 241: Wiley's Appeal, 8 W. & S. 244; Emeret's Estate, 2 Pars. 195; Docker *v.* Somes, 2 Myl. & K. 655; Attorney General *v.* Alford, 4 De Gex, McN. & G. 843; Hart *v.* Ten Eyck, 2 Johns. Ch. R. 62; Lupton *v.* White, 15 Ves. 432; Chedworth *v.* Evans, 8 Ves. 46."

[1] See Hill on Trustees, 4th Am. ed. 579.

An exception to this rule was declared in the supreme court of the United States in Horn *v.* Lockhart, October term, 1873, where it was held that an executor is personally liable for funds invested by him in Confederate bonds, even though such investment was made by direction of the court having jurisdiction of the executor's accounts. Judge Field, in giving the opinion of the court, said: "Upon the accounts presented by the executor of the probate court in Alabama for settlement, it appears that he received moneys from the sales of property belonging to the estate of the testator amounting to over $7,000, and invested the same in bonds of the Confederate States. By the decree of the probate court this investment was approved, and the executor was directed to pay the legatees their respective shares in those bonds. Now, the question is, whether this disposition of the moneys thus received, and the decree of the court, are a sufficient answer on the part of the executor to the present suit of the legatees to compel an accounting and payment to them of their shares of those funds.

"It would seem that there could be but one answer to this question. The bonds of the Confederate States were issued for the avowed purpose of raising funds to prosecute the war when waged by them against the government of the United States. The investment was, therefore, a direct contribution to the resources of the Confederate government; it was an act giving aid and comfort to the enemies of the United States; and the invalidity of any transaction of that kind, from whatever source originating, ought not to be a debatable matter in the courts of the United States. No legislation of Alabama, no act of its convention, no judgment of its tribunals, and no decree of the Confederate government could make such a transaction lawful.

"We admit that the acts of the several states in their individual capacities, and of their different depart-

§ 527. *Special agents bound to diligence of good business men qualified in the particular specialty.* — The law as to special

ments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the Constitution. The validity of the action of the probate court of Alabama in the present case, in the settlement of the accounts of the executor, we do not question, except so far as it approves the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity, and can afford no protection to the executor in the courts of the United States.

"The act of Alabama, which the executor invokes in justification of the investment, has been very properly pronounced unconstitutional by the highest tribunal of that state,[1] and the attempt of its legislature to release executors and trustees from accounting for assets in their hands invested in a similar manner rests upon no firmer foundation.

"Had the legatees of the testator voluntarily accepted the bonds in discharge of their respective legacies, the case would have presented a very different aspect to us. The estate might then have been treated as closed and settled, but such is not the fact. The bonds were never accepted by the legatees, nor does it appear that the executor even went so far as to offer the bonds to them.

"It is urged by counsel for at least a modification of the judgment of the circuit court, that the money received by the executor was in Confederate notes, which at the time constituted the currency of the Confederate States. It does not appear, however, that he was under any compulsion to receive the notes. The estate came into his hands in January, 1858, and no explanation is given for his delay in effecting a settlement until the war became flagrant. And even then he was not bound to part with the title to the property in his hands without receiving an equivalent in good money, or such, at least, as the legatees were willing to accept."

To this opinion Swayne, Davis, and Strong, JJ., excepted, and with good reason. Undoubtedly, as the facts of the case show, the executor was guilty of laches in delaying the settlement of the estate until, in the confusion produced by the war, it was impossible for such settlement to be satisfactorily concluded. For such laches

[1] Houston *v.* Deloach, 43 Ala. 364; Powell *v.* Boon & Booth, Ibid. 459.

agents has been already partially anticipated.[1] To special as well as to general agencies we may apply the rule that *diligentia quam suis*, or the degree of diligence shown by the agent in his own affairs, is not the standard to be applied to him when managing the affairs of his principal.[2] He may choose to exhibit a super-business intensity in his own affairs (*e. g.* when his own business requires, giving up his hours of sleep); but he is not bound to exhibit this super-business intensity in the affairs of his principal. So he may choose to neglect his own affairs (which is frequently the case with lawyers, as will presently be more fully seen); but this will not excuse him for neglecting the affairs of his principal.[3] He is bound, on the principles heretofore fully exhibited, to display, as a specialist, selected as such, the diligence of a good specialist in his specialty.[4] He is liable, therefore, not only for *culpa lata*, or gross negligence, but for *culpa levis*, or special negligence, which is the negligence of a specialist in his specialty. Illustrations to this effect will be presently discussed more fully when we examine the duties of lawyers and physicians. At present the following cases may be incidentally noticed.

§ 528. *Person searching for taxes.* — An agent is specially appointed to search for taxes. He is required, in such case, to apply to the work the diligence of a good and faithful expert in such specialty.[5]

he could, no defence being shown, be made properly liable, for no man can take advantage of a necessity induced by his own wrong. But if an executor, guilty of no laches in retaining the funds, had been required by a court having jurisdiction over his person to invest such funds in particular bonds, such investment was made by him under compulsion. And it is hard to except such a case from the general principle, that no liability attaches for acts done under compulsion from a government *de facto*.

[1] See supra, § 515.

[2] See Ihmsen's Appeal, 43 Penn. St. 431.

[3] Davis *v.* Garrett, 6 Bing. 716; Max *v.* Roberts, 12 East, 89; Jones *v.* Hoyt, 25 Conn. 386.

[4] See Lee *v.* Walker, Law Rep. 7 C. P. 121.

[5] See supra, § 297; Morange *v.* Mix, 44 N. Y. (5 Hand) 315.

"In Scotland," says Mr. Campbell (Negligence, § 22), "the security of title to land in question between purchasers for value depends on the accuracy of the records, which are under the charge of certain public officers, whose duties are defined by statute, and who are by the statute declared to be liable to the parties prejudiced by the not due observance of the act. The responsibility of these officers is illustrated by the case of Davidson *v.* McKenzie, Court of Session, Dec.

§ 529. *Patent agents.* — Here the agent undertakes to be familiar with and diligently to exercise the function of patent agency. Hence he is "bound," says a learned English judge in a trial in the common pleas, in 1872, "to bring reasonable and ordinary care and knowledge to the performance of his duty as such skilled agent."[1] "He is not bound to be accurately acquainted with the whole law of patents; but I think he is bound to know the law as to the practice of obtaining patents." And in consequence of this an agent who, in ignorance of such practice, negligently delayed perfecting a patent until too late, was held liable to his principal.[2]

§ 530. *Insurance agents.* — The liability of insurance agents is to be gauged by the same tests. The agent is not liable for that *levissima culpa* which consists in not obtaining the most favorable terms possible.[3] But he is bound to exercise the diligence and sagacity accustomed to be shown by a good business man in his specialty.[4]

20, 1856, 19 D. 226. The principle seems to be that the keepers of the registers guarantee that the entries in their respective departments are made with exact accuracy."

[1] Brett, J., in Lee *v.* Walker, Law Rep. 7 C. P. 125.

[2] Ibid.

[3] Moore *v.* Morgue, Cowp. 479; Comber *v.* Anderson, 1 Campb. 523.

[4] Park *v.* Hammond, 6 Taunt. 495; *S. C.* 4 Camp. 344; Story on Agency, § 191; Smith *v.* Lascelles, 2 T. R. 189; Morris *v.* Summerl, 2 W. C. C. R. 203; De Tastet *v.* Crousillat, 2 W. C. C. R. 136.

"Another illustration," says Judge Story (Agency, § 187), "may be derived from the case of insurance brokers, or agents employed to procure insurance. Their duty is to take care that the policy is procured in such a manner, and in such terms, as to cover the contemplated voyage and risks; and they are bound to possess reasonable skill on this subject. So, they are to take care that the underwriters are persons in good credit at the time of the insurance, otherwise, they must bear the loss arising from their insolvency.[1] But if the underwriters are in good credit at the time, their subsequent insolvency will not make the broker responsible to his employer.[2]

"But new cases and new exigencies are perpetually arising, in which it is not easy to say that there is any established general rule; or that, if a general rule is established, it can with propriety govern such new cases, under all their circumstances. Resort must then be had to the general principle of law on the subject, aided by a search into those kindred doctrines, which may furnish analogies to guide or instruct us in arriving at the proper conclusion. It may, however, be generally stated, that where an agent has used reasonable diligence and skill he is not liable for accidents, or losses, or damage, happening without his de-

[1] 1 Story Ag. § 171.

[2] 1 Valin, Comm. Lib. 3, tit. 6, art. 3, p. 33.

§ 531. *Commission merchants.* — So is a commission merchant bound to the diligence customary among good business men of his department, and he is liable for any failure to come up to this standard.[1]

fault, such, for example, as for losses by robbery, by fire, or by other accident, either at sea or on the land.[1] There are special exceptions: such, for example, as the case of common carriers; and other exceptions may arise, from the particular contract or dealing between the parties, which may enlarge or narrow the duty and responsibility of the agent.[2]

"What is the proper exercise of due diligence and skill, in obtaining insurance, is, in some cases, a matter of great nicety and difficulty. On the one hand, an agent who acts *bonâ fide* in effecting an insurance for his principal, using reasonable skill and diligence, is not liable to be called upon because the insurance might possibly have been procured from other persons upon better terms, or to include additional risks, by which the principal might, in the event of loss by those risks, have been indemnified.[3] On the other hand, an agent, in a like case, is bound to have inserted in the policy all the ordinary risks and chances which are usual and proper, to secure the principal for the contemplated voyage. And if he omits to have them inserted, when a reasonable attention to the facts stated in his orders, or the nature of the voyage, or the state of the property, or the objects intended, would have induced other insurance agents, of reasonable skill and diligence, to have had them inserted, he will be liable, in case of any loss, for his negligence.[4] The same rule will apply, if such an agent negligently or wilfully conceals a material fact, or affirms a false fact, whereby the policy is avoided; for his duty in each case is violated.[5] So (as we have seen) it is the duty of an agent, procuring insurance, to ascertain whether the underwriters are in good credit or not at the time of procuring the policy; and if he negligently omits this duty, and a loss occurs from the insolvency of the underwriters at the time of subscribing the policy, he will be liable to pay it." [6]

[1] Caffrey *v.* Darby, 6 Ves. 496; Littlejohn *v.* Ramsay, 16 Mart. 655; Hosmer *v.* Beebe, 14 Martin, 368; Leveriek *v.* Meigs, 1 Cowen, 645; Russell *v.* Hankey, 6 T. R. 12.

"Whether the proper degree of diligence and skill," says Judge Story (Agency, § 185), "which the law requires of agents in performing their

[1] Paley on Agency, by Lloyd, 4, 5, 15–17; 1 Domat, b. 1, tit. 15, § 3, art. 4; Ersk. Inst. b. 3, tit. 1, § 21; Coggs *v.* Bernard, 2 Ld. Raym. 917; Story on Bailm. § 23, 25–31; Jones on Bailm. 44, 119–122; 1 Liverm. on Agency, ch. 8, § 2, pp. 357, 358 (ed. 1818); Molloy, b. 3, ch. 8, § 7

[2] Jones on Bailm. 120–122; Story on Bailm. § 25–38.

[3] Moore *v.* Morgue, Cowp. 479; Comber *v.* Anderson, 1 Camp. 523; 1 Liverm. on Agency, 344–347 (ed. 1818).

[4] Park *v.* Hammond, 6 Taunt. 495; *S. C.* 4 Camp. 344; Mallough *v.* Barber, 4 Camp. 150; Farren *v.* Oswell, 3 Camp. 359; 1 Livermore on Agency, 352, 353, 372–374 (ed. 1818); Paley on Agency, by Lloyd, 18.

[5] Mayhew *v.* Forrester, 5 Taunt. 615. See Wake *v.* Atty, 4 Taunt. 493; 1 Liverm. on Agency, 335 (ed. 1818); Seller *v.* Work, 1 Marsh. on Ins. b. 1, ch. 8, § 2, p. 300; Ibid. ch. 11, § 1, p. 466; Paley on Agency, by Lloyd, 257–260.

[6] 1 Liverm. on Agency, 354 (ed. 1818); Valin, Comm. tom. 1, liv. 3, tit. 6, art. 3, pp. 32, 33.

§ 532. *Agents appointed to collect particular funds.* — So is it where an agent undertakes the collection of a particular debt. Thus where an express company received, for a collection, for which it was to be paid the usual commission, a bill of exchange drawn in one state and payable in another, and which required, therefore, demand and protest on the day of payment in order to charge the drawer or indorsers; the company was held liable for negligence in making the demand and protest, whereby the other parties were discharged.[1] And no doubt the standard of diligence in such a case is that which would be exercised by a good and experienced business man in such department of business when charged with a duty such as that in litigation.

duties, has been applied in a particular trade, employment, or business, is for the most part a matter of fact, open for inquiry, and sometimes involving points of great delicacy and difficulty. The general usages of trade, the common habits of the particular business, and the special mode of dealing between the principal and agent, will often explain and expound the duties, required of the agent, as to diligence and skill.[1]

"The case of a factor, employed to make sale of goods on consignment, may furnish a fit illustration of the general doctrine. He is bound, not only to good faith, but to reasonable diligence. It is not sufficient that he has been guilty of no fraud, or of no such gross negligence as would carry with it the insignia of fraud. He is required to act with reasonable care and prudence in his employment, and to exercise his judgment after proper inquiries and precautions. If he shut his eyes against the light, or sell to a person without inquiry, when ordinary diligence would have enabled him to learn the discredit or insolvency of the party, he will not be discharged from responsibility to his principal. [He is also bound, in absence of any special directions as to price, to sell for the fair market value.][2] So also he will not be permitted to sell his own goods to a purchaser, and take security for the price, and at the same time to sell the goods of his principal to the same party without any security. For he is bound to exercise at least as much diligence and care, as to his factorage transactions, as he does to his own private concerns.[3] And, in the supposed case, it would afford ground for presumption that the factor had knowledge of some latent defect of credit, although in the commercial world in general the purchaser stood with a fair character. But this presumption would not ordinarily arise from the mere fact of the factor's taking security for advances made to the same purchaser in money, or even receiving a premium for such advances. He may well refuse to lend his own money without security, or a premium, upon grounds altogether distinct from any doubt of the solvency of the party."

[1] Am. Exp. Co. 21 Ind. 4; Whitney *v.* Merch. Un. Ex. Co. 104 Mass. 152.

[1] 1 Liverm. on Agency, ch. 8, § 2, pp. 336–341 (ed. 1818); Nichols *v.* House, 2 La. 382; 3 Chitty on Com. & Manuf. 215–218.

[2] Bigelow *v.* Walker, 24 Vt. 149.

[3] Deshler *v.* Beers, 32 Ill. 368.

§ 533. *Contractor undertaking to erect building.* — So it has been properly ruled in Illinois,[1] that a contractor who undertakes to erect a building for another must exercise skill, judgment, and vigilance, and if from a want of skill, or from carelessness, the building falls or becomes injured, or is delayed in its completion beyond the time agreed upon, he is liable, though he is not required to guard against unusual and extraordinary tempests and inevitable accidents produced by the uncontrollable action of nature. Thus where a contractor engaged to do the brickwork upon a building under the plan and direction of an architect, and before the walls were completed they were blown down in a storm, the architect having previously directed the mason to more securely brace them, which he neglected to do; it was held that if the direction was feasible, and if complied with would have saved the building, the contractor would be liable for the injury; but if the injury was produced by an inevitable accident, over which he had no control, and would not have been prevented by reasonable efforts to further brace the walls, then he would not be liable.

§ 534. *Volunteer agency.* — *Negotiorum gestio*, in its narrow sense, exists, according to the Roman law, when the agent (*negotiorum gestor*) undertakes the business of another (*dominus*) without invitation from the latter, or without being bound so to act by official duty. Cases of this character arise: (1) when the owner or principal (*dominus*) is absent, and has left no one in charge of his affairs;[2] (2) when the intervener acts at the solicitation of a third party; (3) when he takes charge of certain property erroneously believing it to be his own; and (4) when he takes a business upon him *de son tort*, from a mistaken belief that he was appointed so to do.[3] When he officiously forces himself into the agency to the exclusion of another, he is liable for all losses occurring through his mismanagement.[4] It is otherwise, however, when his intervention is benevolent and necessary to prevent impending loss, in which case he is only liable for *dolus* or *culpa lata*.

§ 535. *Liability of agents to third persons.* — The mere fact

[1] Schwartz *v.* Daegling, 55 Ill. 342.

[2] L. 1. 2. D. h. t. 3. 5.

[3] See these cases given in D. 3. 5. Cod. II. 19. tit. de neg. gest.; and see particularly Vangerow, § 664, 666; Baron, § 309.

[4] See supra, § 69.

that I am the agent, in doing the injurious act, of another, does not relieve me from liability to third persons for hurt this act inflicts on them.[1] Judge Story,[2] indeed, tells us, that for *omissions* of the agent the principal alone is liable, while for misfeasances the agent is also liable; but this distinction, as has been already shown, can no longer be sustained.[3] The true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is primarily due to the agent's negligence;[4] the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct centre of legal responsibilities and duties.[5] But wherever there is no such interruption of causal connection; in other words, wherever the agent's negligence directly injures a stranger, then such stranger can recover from the agent damages for the injury.[6] Some difference of opinion exists, it is true, as to whether the agent and the principal can be jointly sued for injuries caused by the agent's negligence when acting within the scope of his authority. In Massachusetts it has been held that a master and servant are not jointly liable, in an action on the case, for hurt done by the servant in negligently driving the master's carriage in the master's absence.[7] In New York, such joinder is allowed.[8]

[1] Witte *v.* Hague, 2 D. & R. 33; Cary *v.* Webster, 1 Strange, 480; Hewett *v.* Smith, 3 Allen, 420; Mitchell *v.* Harmony, 13 How. U. S.) 115; Richardson *v.* Kimble, 28 Me. 463; Hawkesworth *v.* Thompson, 98 Mass. 77; Wright *v.* Wilcox, 19 Wend. 343; Phelps *v.* Wait, 30 N. Y. 78; Montfort *v.* Hughes, 4 E. D. Smith, 591; Johnson *v.* Barber, 5 Gilm. 425; Harriman *v.* Stowe, Sup. Ct. of Mo. 1874, reported in Cent. L. J. Aug. 13, 1874, and cases cited infra, § 579–584.

[2] Agency, § 308.

[3] See supra, § 78–83.

[4] See cases cited, supra, § 439–41.

[5] See supra, § 148.

[6] See infra, § 780; Harriman *v.* Stowe, *ut supra*, a case in which a husband, acting as his wife's agent, was held liable for his negligence in the construction of a trap-door on the wife's house, through which trap-door the plaintiff fell.

[7] Parsons *v.* Winchell, 5 Cush. 492; though see Hewett *v.* Swift, 3 Allen, 420; infra, § 580.

[8] Suydam *v.* Moore, 8 Barb. 358; Wright *v.* Wilcox, 19 Wend. 343; Phelps *v.* Wait, 30 N. Y. 78. See supra, § 395; infra, § 577–9.

CHAPTER V.

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Carrier liable for baggage carried by passenger in car with himself, § 600.
So for baggage placed in special car by passenger, § 601.
Agreement exempting carrier from liability invalid, § 602.
Proof of loss throws burden on carrier, § 603.
Liability for negligence in connecting roads, § 604.
Carrier without notice not liable for merchandise taken as baggage, § 606.
What articles constitute baggage, § 607.
Money or bullion, § 608.
When carrier's liability merges in that of warehouseman, § 609.
Owner may separate from but cannot abandon baggage, § 611.
Carrier liable for its porter's negligence in delivery, § 612.
Owner's claim not based on consideration of contract, § 613.
Notices restrictive of liability, § 614.
X. Live-stock, § 615.
Live-stock not subject to the incidents of "goods" in common carriage, § 615.
Duties of persons conveying live-stock not identical with those of common carrier's, § 616.
Hence not an insurer, but a special agent bound to transport with suitable and safe carriage and motive power, § 617.
By special agreement owner or agent may take charge of feeding and caring for cattle, § 618.
If carrier undertakes care of cattle he must exercise due diligence, § 619.
Illustrations of such diligence, § 620.
[*As to carrier's liability when animals are vicious or restive, see* § 565.]
[*As to validity of contracts throwing on owner risks from over-crowding, see* § 597.]
XI. Gratuitous parcels, § 621.

I. GENERAL PRINCIPLES.

§ 545. *Definition.* — A common carrier of goods is one who undertakes to transport from place to place for reward the goods of such as choose to employ him.[1]

§ 546. Hence we may class as common carriers: —

Stages, plying between different places, and transporting goods for hire.[2]

Omnibuses, under the same conditions.[3]

Street as well as steam railway companies if they allow their servants to carry trunks and parcels for hire.[4]

[1] Story on Bailments, § 495; 2 Kent Com. Lect. 40.

[2] Coggs *v.* Bernard, 2 Ld. Ray. 909; Forward *v.* Pittard, 1 T. R. 27; Gordon *v.* Little, 8 S. & R. 533; Beckman *v.* Shouse, 5 Rawle, 179; Powell *v.* Myers, 26 Wend. 591.

[3] Dibble *v.* Brown, 62 Georg. 217.

[4] Levi *v.* Lynn & Bost. Horse R. R. 11 Allen, 300; Blumenthal *v.* Brainard, 38 Vt. 402; Farmers' & Mech. Bank *v.* Champ. Trans. Co. 23 Verm. 186.

Ferrymen.[1]

Porters, teamsters, and wagoners who carry parcels for hire, for all who apply, from point to point, though this is not their principal business.[2]

Boatmen on canals under the same limitations.[3]

Steamboat companies who allow their officers to carry parcels, when such carrying is within the range of the charter of the company.[4]

And expressmen.[5]

II. LIABILITY BASED ON DUTY.

§ 547. *Foundation of action is duty.* — Whether the railroad's liability rests primarily on the duty to carry a passenger and his luggage safely, or upon the contract entered into as evidenced by the ticket, has been in England the subject of some doubt. In the court of common pleas,[6] it is held that an action for a loss of luggage through the defendant's negligence is based not on the contract specifically, but on the defendant's duty. The case was one of a servant suing in an action on the case for loss of luggage, the master having paid for the ticket; and Jervis, C. J., said: "But upon what principle does the action lie at the suit of the servant for his personal suffering? *Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely.* If, under the circumstances of the case, the plaintiff could have recovered in respect of a personal injury sustained by him, there is no reason why he should not also in respect of the loss of his luggage. If the liability of the defendants arises, not from the contract, but from a duty, it is perfectly unimportant by whom the reward is to be paid; *for the duty would equally arise, though the payment was by a stranger.*"[7]

§ 548. In the same case, Williams, J., said: "It seems to me that the whole current of authorities, beginning with Govett *v.*

[1] Infra, § 706.

[2] McClure *v.* Richardson, 1 Rice, 215; Gordon *v.* Hutchinson, 1 Watts & S. 285; Gisbourne *v.* Hurst, 1 Salk. 249; Robertson *v.* Kennedy, 2 Dana, 431.

[3] Arnold *v.* Halenbake, 5 Wend. 33.

[4] Farmers' & Mech. Bk. *v.* Champ. Trans. Co. 23 Vt. 168; Bennett *v.* Filyow, 1 Flor. 403; Hall *v.* Connecticut River St. Co. 13 Conn. 319; Saltus *v.* Everett, 20 Wend. 267; Harrington *v.* McShane, 2 Watts, 443.

[5] See infra, § 697.

[6] Marshall *v.* Newcastle & Berwick Ry. Co. 11 C. B. 655, in 1851.

[7] See supra, § 436–7.

Radnidge,[1] and ending with Pozzi *v.* Shipton,[2] establishes that an action of this sort is, in substance, not an action of *contract*, but an action of *tort* against the company, as carriers. The earliest instance I find of an action of this sort is in Fitzherbert's Natura Brevium, writ de trespass on the case, in which it is said, 'If a smith prick my horse with a nail, &c., I shall have my action upon the case against him, without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract." [3]

§ 549. So in 1867, in the queen's bench, in a case where a company was held liable for injuries to a child, who had paid no fare, when in his mother's custody, though he was a few months over the age at which children travelling with their parents cease to go free of charge (there being no fraud on the mother's part, and she having paid her own fare),[4] Blackburn, J., said: "I think that what was said in the case of Marshall *v.* Newcastle & Berwick Railway Co. was quite correct. It was there laid down, that the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely." By Cockburn, C. J., Shee, J., and Lush, J., the case was rested on the ground of contract, without, however, negativing the liability on ground of duty.[5]

III. WHEN INSURERS OF GOODS.

§ 550. *Roman law.* — By the Praetorian edict, common carriers, as well as innkeepers, are liable for the *custodia*, in its narrow sense, of goods given to their charge by travellers.[6] Nor is it necessary that the carriage should be for pay; the same rule

[1] 3 East, 62.

[2] 8 Ad. & E. 963; 1 P. & D. 4.

[3] See also Wyld *v.* Pickford, 8 M. & W. 443; Gladwell *v.* Steggall, 5 N. C. 733; 8 Scott, 60; Pippin *v.* Sheppard, 11 Price, 400; Great Northern Railway *v.* Harrison, 10 Exc. 376; Great West. Ry. Co. of Canada *v.* Braid, 1 Moo. P. C. N. S. 101.

[4] Austin *v.* Great West. Ry. Co., L. R. 2 Q. B. 442; supra, § 436–7.

[5] "It seems to me, therefore, that although the law will raise a contract with a common carrier, to be answerable for the careful conveyance of his passenger, nevertheless he may be charged in an action on the case for a breach of his duty." Holroyd, J., Ansell *v.* Waterhouse, 6 M. & S. 393.

[6] Vangerow, § 646, 848; Baron, § 298.

applies when it is gratuitous.[1] Actual delivery into the carrier's hands is unnecessary; if the traveller brings his goods to the carrier's boat or carriage for transport, this is enough.[2] Whether the edict applies to carriers by land as well as those by water, has been much discussed; though if the carrier by land is liable for *custodia* in its narrow sense, as has been already declared, the question is merely verbal.[3] As to all matters of *casus*, the carrier of goods must exercise the *diligentia* of a *bonus et diligens paterfamilias*.[4]

§ 551. As to misfortunes by water carriage, the Roman law adopts the Rhodian Code,[5] which, when a peril of the sea requires that certain goods should be thrown overboard, averages the loss among all who are benefited by the act. The principle is extended by the jurists to losses through piracy; and even to injuries to the ship itself.[6]

§ 552. *By Anglo-American law common carriers are insurers of goods.* — It has been just seen that by the Roman law a common carrier's duty as to goods as well as persons, in cases of *casus*, is simply that of a good business man in his particular department, and hence that the common carrier can defend himself, in such cases, by setting up such casualty as a good business man in such department is not likely to foresee and avert. To impose a higher liability than this, it is argued by modern German and French jurists, who adopt the same rule, would be to require an intensity of exertion, the strain of which no business could bear; would shift upon particular industries the load of *casus* which should be distributed on all industries alike; would confuse the business of common carrying with that of insurance; and would add a purely speculative factor in the adjustment of freights. That there is force in this reasoning is shown not only by its acceptance throughout the Continent of Europe, but by the fact that our Anglo-American common carriers now almost universally limit by special contracts their liability to the extent just specified, and that these special contracts have been, as will be seen, sustained by the courts. At the same time, it may not be out of place here to observe that by the present North German

[1] L. 6. pr. D. 4. 9.
[2] L. 1. § 8. D. 4. 9.
[3] See to this point, Baron, § 298.
[4] See supra, § 31, as defining this.
[5] Tit. D. 14. 2; *de lege Rhodia de jactu*.
[6] L. 2. § 3; D. h. t. 14. 2.

Code, while a railroad's liability for goods is qualified in the mode just stated, its liability, in case of injury to passengers, is absolute. Unless such injury is caused by the passengers themselves, the railroad is obliged to compensate them according to a fixed scale. For our immediate purposes, in this section, however, it is sufficient to state that by our Anglo-American common law, the common carrier of goods is responsible for all losses except those caused by the act of God, or by *vis major*.[1]

IV. ACT OF GOD; INEVITABLE ACCIDENT; VIS MAJOR.

§ 553. "*Act of God.*" "*Inevitable accident.*" — So far as these terms are coincident with *casus*, they have been already discussed.[2] Their technical and distinctive meaning, in our own law, has been the subject of much consideration. "I consider," said Lord Mansfield,[3] "it" (the act of God) "to mean something in opposition to the act of man." "The law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests."[4] But are "act of God," and "inevitable accident," convertible terms? No doubt they were so viewed by Sir William Jones, who introduced the second phrase in order to avoid the difficulty of particularizing certain eminently unexpected events as God's acts, leaving all other events to be viewed as human. But cases have not been infrequent in which this paraphrase has been rejected, and in which accidents which have been supposed to be inevitable have nevertheless been held not to be "acts of God," and hence not grounds on which the liability of the carrier could be discharged.[5]

§ 554. *Fire not "Act of God."* — Thus it has been held that fire, though part of a general conflagration such as no prudent business man could have expected, is no avoidance, unless it was caused by lightning.[6]

[1] See Story on Bailments, § 489; Condict *v.* R. R. 54 N. Y. 500.

[2] Supra, § 116.

[3] Forward *v.* Pittard, 1 T. R. 27.

[4] See, to same effect, Proprietors of the Trent & Mersey Nav. Co. *v.* Wood, 3 Esp. Cas. 127, 131; 4 Doug. 289; McArthur *v.* Sears, 21 Wend. 190; Richards *v.* Day, 415.

[5] See McArthur *v.* Sears, 21 Wend. 198; Merritt *v.* Earle, 31 Barb. 38; *S. C.* 29 N. Y. 115; Hays *v.* Kennedy, 41 Penn. St. 378.

[6] Forward *v.* Pittard, 1 T. R. 27; Hyde *v.* Trent Co. 5 T. R. 389; Mershon *v.* Hobensack, 2 Zab. 372; Gatliffe *v.* Bourne, 4 Bing. N. C. 314; Gilmore *v.* Carman, 1 Sm. & M. 279;

§ 555. *Nor hidden rocks known to navigators.* — Nor is the carrier relieved by proof of a hidden rock against which a ship founders, unless it appear that such rock was unknown to navigators.[1]

Nor thefts of servants or strangers. — So, also, the carrier is liable for losses to the goods through thefts either by his servants or by strangers, though he may have exercised all practicable diligence to prevent such loss.[2]

§ 556. *But hidden unknown rocks and snags are to be so considered.* — Yet on the other hand, where the rock is unknown to navigators, and could not, by the exercise of the diligence belonging to good seamen of the class in question, have been known by those navigating the particular ship, it is viewed as the act of God;[3] and so where a vessel is damaged by running against a snag recently brought up by a freshet, of which snag the officers of the vessel had no notice.[4]

And so of storms and the extremes of heat and cold producing extraordinary impediments. — "A common carrier is in most respects an insurer; but he is not such in respect to what is called the *vis major* or act of God. For example, he does not insure against storm or lightning, or the perils of the sea. The same principle has been held to apply to delays in transportation caused by the freezing of canals or rivers."[5] And so the carrier is not liable for injury to goods through freezing, if he use due care;[6] nor for injury produced by breakage of rails through extreme cold.[7]

Potter *v.* McGrath, Dudley, 159; Hollister *v.* Nowlen, 19 Wend. 234; Am. Trans. Co. *v.* Moore, 5 Mich. 568; Cox *v.* Peterson, 30 Alab. 608; Hibler *v.* McCartney, 31 Alab. 502; Condict *v.* R. R. 54 N. Y. 500. But see Ins. Co. *v.* Ind. & Cin. R. R. Disney, 480; Lamb *v.* R. R. 46 N. Y. 271.

[1] See Williams *v.* Grant, 1 Conn. 487.

[2] Story on Bailments, § 528, citing Jones on Bail. 107; De Rothschild *v.* Royal Mail, 7 Exch. 734; King *v.* Shepherd, 3 Story, 356; Trent & Mersey Nav. Co. *v.* Wood, 3 Esp. 127; *S. C.* 4 Doug. 287; Barclay *v.* Cuculla, 3 Doug. 389; Schieffelin *v.* Harvey, 6 Johns. 170; Watkinson *v.* Langton, 8 Johns. 213; Gibbon *v.* Paynton, 4 Burr. 2298.

[3] Penneville *v.* Cullen, 5 Harrington, 238; Williams *v.* Grant, 1 Conn. 487.

[4] Smyrl *v.* Niolan, 2 Bailey, 421; Faulkner *v.* Wright, 1 Rice, 108.

[5] Chapman, C. J., in Swetland *v.* Boston & A. R. R. 102 Mass. 282, citing Parsons *v.* Hardy, 14 Wend. 215; Bowman *v.* Teele, 23 Wend. 306; Harris *v.* Rand, 4 N. H. 259.

[6] Swetland *v.* Boston & A. R. R. 102 Mass. 276. See Crosby *v.* Fitch, 12 Conn. 410.

[7] McPadden *v.* N. Y. C. R. R. 44 N. Y. 478. Infra, § 633.

§ 557. *Ambiguity of terms "act of God," and "inevitable accident."* — No doubt, as we have already noticed many learned judges have contended that the words "inevitable accident," which were suggested by Sir William Jones as a more respectful mode of expressing the act of God, do not, in fact, have the same import; and no doubt the distinction thus made rests on the position above quoted of Lord Mansfield, that we are only to regard an event as, in the eye of the law, the act of God, when it has in no way been induced by the act of man.[1] But are there any events which the law has to investigate of which this can be predicated? And if there are, is not the range of such events narrowing in such a marked way from age to age that the test is incapable of fixed and definite application? Are not many occurrences which once were held out of the orbit of human calculation now shown to be within such orbit? Has not science been steadily contracting the domains of the pseudo-supernatural? We may take, for instance, the very cases of storm and of inundation, which Lord Mansfield speaks of as eminently the act of God as distinguished from the act of man. Science has not yet told us how to create a storm; but science has taken some steps towards telling us how to prognosticate a storm. If a rock that may be prognosticated is not "an act of God," why is a storm that may be prognosticated? If only an event which no human foresight could anticipate is an act of God, why is a hurricane an act of God, when by our weather signals we are able to anticipate hurricanes? So with regard to inundations, which have, with storms, been singled out as acts of God. But if an act of God is something that no human intervention could either forecast or prevent, can we say this of inundations, which, by extraordinary labor and cost might be stopped before they could reach a railway track? If only such acts of God as neither human effort could avert nor human foresight anticipate can excuse carriers, then, with our present opportunities, a carrier cannot be said to be excusable by any *casus* that is not a miracle. And the same objection exists to the use of the term "inevitable accident." If we suppose the highest exertion of scientific research, and the extremest caution, to be applied, there is no accident that is "inevitable." Certainly there is no acci-

[1] See Redfield on Railways, § 167.

dent that could not be averted by the mere passive policy of declining to go to the spot where such accident might occur.

§ 558. *Tendency is to treat as inevitable such disasters caused by storms and sudden extremes of temperature as could not have been averted except by an intensity of diligence beyond that which is usually exerted by a common carrier who brings to the duties in question experience and capacity adequate to their discharge.* — Of this the following cases may be taken as illustrations : —

A freshet occurs by which a road is flooded. Undoubtedly, by extreme precautions, the road could have been protected by banks which no possible flood could have beaten down. This is not done, and the goods are damaged by a flood higher than any previously recorded. Excessive diligence, *diligentia diligentissimi*, could no doubt have prevented this loss ; but excessive diligence, the employment of which would obstruct rather than promote business enterprise, the law, even as to common carriers, does not exact. Hence the flood, under such circumstances, is held to be a defence, on the ground that not to have anticipated it was not negligence.[1]

A sudden frost closes the navigation of a river a month earlier than in any prior recorded seasons. Excessive diligence might have guarded against this, and it cannot be regarded as an act of God in Lord Mansfield's sense, or an inevitable accident ; yet, if it is not such a casualty as a good business man, versed in this particular department, would have guarded against, the carrier, notwithstanding the idea of insurance, can set it up as a defence.[2]

A sound rail on a railway is broken by extreme and unlikely cold. This cold is a defence to a suit for an injury produced by the breaking of the rail, though it is possible to conceive of a rail so constructed that it cannot break.[3]

[1] Read *v.* Spalding, 5 Bosw. 395 ; *S. C.* 30 N. Y. 630 ; Michaels *v.* N. Y. Cent. R. R. 30 N. Y. 564 ; Morrison *v.* Davis, 20 Penn. St. 171 ; M. & C. R. R. *v.* Reeves, 10 Wall. 176 ; Withers *v.* N. K. R. R. 3 H. & N. 969 ; infra, § 634.

[2] Crosby *v.* Fitch, 12 Conn. 410 ; Bowman *v.* Teal, 23 Wend. 306 ; Swetland *v.* B. & A. R. R. 102 Mass. 276 ; Wing *v.* N. Y. & E. R. R. 1 Hilton, 235.

[3] Infra, § 634–5.

" Where, however," says Mr. Broom, in the 5th edition of his Legal Maxims, p. 239, " such loss, damage, or delay arises from the act of God, as storms, tempests, and the like, the maxim under consideration applies, and the loss must fall upon the owner,

§ 559. *But no accident is a defence if induced by the carrier's negligence.* — This is a familiar principle of the Roman law, which has been already noticed.[1] In our Anglo-American jurisprudence the distinction has been repeatedly affirmed. Such has been held to be the case where a ship has defective appointments, or a negligent crew, in consequence of which she cannot breast a storm, or fails to avoid a collision;[2] where a proper chart is not taken, in consequence of which neglect the vessel founders upon a rock;[3] where a water-power company aggravates a drought by a wasteful discharge of water;[4] where a boiler is negligently filled over night in consequence of which a steam-pipe is cracked with frost, and floods the goods;[5] where the carrier wantonly deviates from the usual course, and when out of the course encounters the disaster;[6] where articles frozen by an unusual and sudden snap of cold could have been preserved by the exercise of

and not upon the carrier:[1] in this case, *res perit suo domino*.[2] For damage occasioned by accidental fire resulting neither from the act of God nor of the king's enemies a common carrier, being an insurer, is responsible.[3] But where an injury is sustained by a passenger, from an inevitable *accident*,[4] as, from the upsetting of the coach in consequence of the horses taking fright, the coach-owner is not liable, provided there were no negligence in the driver.[5] And the breach of a contract to convey a passenger from A. to B., if caused by *vis major*, would be excusable." [6]

[1] Supra, § 123–7.

[2] Backhouse *v.* Sneed, 1 Murphy, 173; Converse *v.* Brainard, 27 Conn. 607; Bailiffs of Romney Marsh *v.* Trinity House, L. R. 5 Exch. 208, and other cases cited supra § 123–7.

[3] See Williams *v.* Grant, 1 Conn. 487.

[4] Supra, § 127.

[5] Siordet *v.* Hall, 4 Bing. 607; *S. C.* 1 M. & P. 561.

[6] Davis *v.* Garrett, 6 Bing. 716; *S. C.* 4 M. & P. 540; Crosby *v.* Fitch, 12 Conn. 410; Powers *v.* Davenport, 7 Blackf. 497; Hand *v.* Baynes, 4 Whart. 204.

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[1] Amies *v.* Stevens, Stra. 128; Trent Navigation *v.* Wood, 3 Esp. 127; per Powell, J., Coggs *v.* Bernard, 2 Lord Raym. 910, 911; per Tindal, C. J., Ross *v.* Hill, 2 C. B. 890; Walker *v.* British Guarantee Society, 18 Q. B. 277, 287.

[2] As to this maxim, see Bell Dict. and Dig. of Scotch Law, 857; Appleby *v.* Myers, L. R. 2 C. P. 651, 659, 660; Bayne *v.* Walker, 3 Dow R. 233; Payne *v.* Meller, 6 Ves. 349; Bryant *v.* Busk, 4 Russ. 1; Logan *v.* Le Mesurier, 6 Moo. P. C. C. 116.

[3] Story on Bailments, 5th ed. § 528; Collins *v.* Bristol & Exeter R. C. 1 H. & N. 517.

[4] As to the meaning of this word, see Fenwick *v.* Schmalz, L. R. 3 C. P. 313; Readhead *v.* Midland R. C., L. R. 4 Q. B. 379.

[5] Aston *v.* Heaven, 2 Esp. 533; per Parke J., Crofts *v.* Waterhouse, 3 Bing. 321. See Sharp *v.* Grey, 9 Bing. 457; Perren *v.* Monmouthshire R. & Can. Co. 11 C. B. 855.

[6] Per Lord Campbell, C. J., Denton *v.* Great Northern R. C. 25 L. J. Q. B. 129; *S. C.* 5 E. & B. 860; Briddon *v.* Great Northern R. C. 28 L. J. Ex. 57; Great Western R. C. of Canada *v.* Braid, 1 Moo. P. C. C. 101, and cases there cited. See Hearon *v.* Pearson, 7 H. & N. 386.

proper care when the cold began;[1] and, generally, whenever the *casus* was encountered by the carrier's negligence or error.[2]

§ 560. *Vis major, meaning of.* — *Vis major* is frequently used as equivalent to "superior force of public enemy." It is clearly a defence that the goods were seized by a public enemy, or by a pirate appearing in sufficient force to command submission.[3] But, as has been seen, it is no defence that the goods were stolen,[4] nor that they were left behind in consequence of a strike among the defendants' employees.[5]

§ 561. If the exposure to a public enemy was in any way brought about by the carrier's negligence, the excuse of *vis major* is of no avail.[6]

[1] Wing *v.* N. Y. & E. R. R. 1 Hilton, 235.

[2] Seigel *v.* Eisen, 41 Cal. 109; Condict *v.* R. R. 54 N. Y. 500.

[3] Magellan Pirates, 25 Eng. L. & E. 595; *S. C.* 18 Jur. 18; Lewis *v.* Ludwick, 6 Cold. 368.

[4] De Rothschild *v.* Royal Mail Co. 7 Exch. 734; Schieffelin *v.* Harvey, 6 Johns. 170. Supra, § 556.

[5] Blackstock *v.* N. Y. & E. R. R. 1 Bosw. 77.

[6] See Colt *v.* McMechen, 6 Johns. 160; Railroad *v.* Reeves, 10 Wallace, 176. Thus in Holladay *v.* Kennard, 12 Wall. 254, it was held, that when goods in the hands of a common carrier are threatened to be destroyed or seized by a public enemy, he is bound to use due diligence to prevent such destruction or seizure.

Bradley, J.: "The effect of the charge, as delivered, was, that although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is nevertheless bound to use due diligence to prevent such destruction or loss. If his negligence or want of proper attention contributed thereto he would be liable therefor. It was not necessary, in this case, that there should have been fraud or collusion with the Indians, or wilful negligence on the part of the defendant or his agents, to render him liable. Supposing the express agent to have been a suitable person for the duty he had to perform, all that the charge exacted of him was, such care and attention as he naturally would have taken of his own goods; that is, ordinary care and attention.

"Surely, the law requires this degree of diligence, and would make the defendant liable for the want of it, that is, for ordinary negligence. Whether such negligence was or was not proved, was fairly left to the jury?

"The only point, it seems to us, on which any doubt could arise as to the entire accuracy of the charge, is as to the degree of care and attention required of the defendant himself in the selection of the agent. The court held that it was his duty to provide for this hazardous business a cool, self-possessed, prudent man, of good judgment and forethought. Now, surely, no one would think of employing a man wanting in any one of these qualifications to carry his own goods across the plains at that time. Ordinary prudence would dictate that such a man was essential for that hazardous service. Here, again, the charge really requires of the defendant to do nothing more than, as a prudent man,

§ 562. *Carriers by water relieved by statute from liability for losses by fire.* — "In the case of sea-going vessels, Congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of the ship and freight, where losses happen by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by state legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this it is seen, that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and

he would do in the transaction of his own business; in other words, it only exacts ordinary diligence and attention at his hands. Ordinary diligence, like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed. It would not be want of ordinary care or diligence to intrust the shoeing of a horse to a common blacksmith, but it would be gross negligence to intrust to such a person the cleaning or repair of a watch. A man who would be perfectly competent to perform the duties of an express messenger now on the Union Pacific Railroad, with a commodious express car at his service, might have been a very unfit and incompetent agent in 1865, when nothing but a mail-coach traversed the prairie, and roving bands of hostile Indians infested the route.

"Now, whether the agent in charge of the line, on this occasion, was such a man as should have been employed, could only be judged of by what he did, or what he neglected to do; and it was fairly left to the jury to say whether his conduct was such as a proper and competent man would have pursued; or whether it was wanting in that respect; and the court took the pains to warn the jury that the result is not always a true criterion whether a man pursued a prudent course or not. They must judge fairly in reference to all the circumstances."

"We do not mean to be understood as laying down any different rule from that which was laid down by this court in the late case of Railroad Company *v.* Reeves (10 Wallace, 176), namely, that ordinary diligence is all that is required of the carrier to avoid or remedy the effects of an overpowering cause. We think that when this case, with all its circumstances, is fairly considered, this was all that the judge who tried the cause exacted of the defendant, and that the question of negligence was fairly left to the jury."

freight for the negligence and misconduct of his employees, and liable without limit for his own negligence." [1]

Under this act, it is held in New York, there is no question of partial or limited liability in case of loss by fire. The first section relieves the owner from all liability where the loss is not caused by his "design or neglect." If it is so caused, his common law liability remains intact, and he is liable for the whole loss.[2] The provisions of the third section limiting the liability of the owner to the amount of his interest in the ship and her freight for the voyage, and those of the fourth section, which, in case of a loss by several freighters exceeding such amount, authorize the taking of proceedings to apportion the sum for which the owner is liable among the parties entitled thereto, have reference solely to losses occasioned otherwise than by fire happening without "the knowledge or privity" of the owner. Hence, when the plaintiffs shipped a quantity of goods on board one of the defendant's ships at Providence for New York, and after the arrival of the ship at New York it was destroyed by fire, together with its cargo, upon which the plaintiffs brought action to recover for their loss, alleging it to have been occasioned by "the mere negligence and carelessness of the defendant;" and the defendant thereafter libelled the ship in the district court of the United States, in accordance with the act of Congress and the rules of the United States supreme court, for the purpose of having the value of his interest in the vessel and freight appraised and the appraised value distributed among the freighters, and obtained an injunction in said district court staying all proceedings in this action; and the plaintiffs moved to vacate the injunction, which motion was denied, and the defendant thereupon moved for a stay of proceedings in this action, which was granted: it was ruled that the plaintiffs' claim was not within the provisions of the act, and that therefore their action was not affected by the order of the district court, and that they were not estopped from questioning the proceedings in that court by their motion therein to vacate the injunction.[3]

[1] Bradley, J., in New Y. Cent. R. R. *v.* Lockwood, 17 Wall. 357; reported 1 Am. Law Times, 21.

[2] See to this point, Michael *v.* R. R. 30 N. Y. 564; Condict *v.* R. R. 54 N. Y. 500.

[3] Knowlton *v.* Prov. & N. Y. S. S. Co. 53 N. Y. 76.

V. CARRIER NOT LIABLE FOR DAMAGES TO GOODS ARISING FROM THEIR INHERENT DEFECTS, OR FROM BAD PACKING.

§ 563. *Inherent defects.* — A carrier is not liable for losses to goods arising from their inherent defects. "This is well explained," says Willes, J., in a late English case,[1] "in Smith's Mercantile Law, 8th ed. 354, where it is said: 'The underwriters are not liable for a loss which is necessarily incidental to the property rather than occasioned by adventitious causes, such as loss by worms,[2] or rats,[3] or the self-ignition of damaged hemp.'[4] So, in Brass *v.* Maitland,[5] goods of a dangerous nature were delivered to a ship-owner to be carried, but were so packed as to conceal their real character, and in consequence of the insufficiency of the packages, other parts of the cargo were injured, and it was held by a majority of the court of queen's bench that an action lay against the shippers. That case was followed by Hutchinson *v.* Guion,[6] and Hearne *v.* Garton;[7] and the same law was laid down in Alston *v.* Herring,[8] with regard to goods causing corruption to themselves. The rule is very accurately laid down to the same effect in Story on Bailments, § 492 *a*, where the authorities are all collected: 'Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the king's enemies; yet it is to be understood in all cases that the rule does not cover any losses not within the exceptions which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the

[1] Blower *v.* Great W. R. R., L. R. 7 C. P. 662.

[2] Rohl *v.* Parr, 1 Esp. 444.

[3] Hunter *v.* Potts, 1 Camp. 203.

[4] Boyd *v.* Dubois, 3 Camp. 133.

[5] 6 E. & B. 470; 26 L. J. (Q. B.) 49.

[6] 5 C. B. N. S. 149; 28 L. J. (C. P.) 63.

[7] 2 E. & E. 66; 28 L. J. (M. C.) 216.

[8] 11 Ex. 822; 25 L. J. (Ex.) 177.

ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from the spontaneous combustion of goods, or from their tendency to effervescence or acidity, or from their not being properly put up and packed by the owner or shipper; for the carrier's implied obligations do not extend to such cases.'" [1]

§ 564. In conformity with this view, it is held that a shipowner is not liable for injury to goods arising from some inherent and undisclosed dangerous or destructive quality.[2] If such were not the law, the owner of an explosive compound could obtain its value by putting it on board a railway train in which the compound would be sure to explode. To create the carrier's liability in such case, there should be notice to him of the peculiar characteristics of the thing shipped.

§ 565. *Vicious and restive animals.* — So, *a fortiori*, the owner of vicious live-stock who delivers them without notice of their viciousness to a common carrier, for transport, cannot recover for damages caused by their viciousness. Should the cattle be injured, and should the injury be caused directly by their viciousness, and not by any fault of the carrier, the carrier is not liable.[3] Nor is it necessary that the plaintiff should have known their viciousness; for it is negligence in him not to know it. But if the cause is the defendant's negligence, the fact of the cattle being restive or vicious is no defence; for the carrier is liable for any damage that could have been averted by the exercise of such diligence in his particular duty as a good business man in his special department would adopt.[4] So, also, the animal's viciousness is no defence when such restiveness or viciousness was provoked by the negligence of the defendant.[5]

§ 566. *Bad packing.* — The owner or consignor of goods sent

[1] See also Rixford *v.* Smith, 52 N. H. 355.

[2] Brass *v.* Maitland, 6 E. & B. 470; Hutchinson *v.* Guion, 5 C. B. (N. S.) 149; Talley *v.* Great W. Ry. Co., Law Rep. 6 C. P. 44, 51; Gorham Manf. Co. *v.* Fargo, 35 N. Y. Super. 454.

[3] Angell on Carriers, §§ 210, 211, 212; Redfield on R. R. § 186, and cases there cited; Clarke *v.* R. & S. R. R. 14 N. Y. 570; Hall *v.* Renfro, 3 Metc. (Ky.) 51; Rixford *v.* Smith, 52 N. H. 355; infra, § 907.

[4] Conger *v.* Hudson R. R. 6 Duer, 375. See supra, § 345.

[5] Gill *v.* Manchester R. R., L. R. 8 Q. B. 186; Phillips *v.* Clark, 2 C. B. (N.S.) 156. See Blower *v.* Great West. R. Co., Law Rep. 7 C. P. 655; Kendall *v.* S. W. Ry. Co., Law Rep. 7 Ex. 373; Rooth *v.* N. E. R. R., Law Rep. 2 Ex. 173; infra, § 619.

in package to a common carrier is bound to pack them securely. If he fail to do so, and they are consequently damaged in consequence of such bad package, then he cannot recover against the carrier.[1] But the mere fact that goods are packed so closely in a railroad car that they cannot be unloaded quickly in case of fire, is in itself no conclusive proof of negligence in packing.[2] If, however, notwithstanding this negligence, the carrier could, by the exercise of the diligence belonging to a careful and diligent business man in his particular department, have averted the mischief, the plaintiff is entitled to recover, as the carrier has no right negligently to injure even things negligently packed.[3] Eminently is this the case with the packing of live-stock. The owner or his agent may acquiesce in their being packed negligently, but the carrier, who should be an expert in packing, is bound to know whether the packing is negligent or not, which the owner cannot be expected to know accurately; and hence, if from negligence which the carrier knows and accepts, the cattle are injured, the carrier is liable.[4]

§ 567. *Decay of perishable articles.* — Whoever sends perishable articles by a carrier does so voluntarily subject to the vicissitudes to which they may be exposed. Hence the owner of such articles cannot recover from the carrier for decay with which the carrier's negligence had nothing to do, even though such decay was precipitated by delay of a voyage caused by stress of weather.[5] *A fortiori* is this the case when the articles were in bad condition at the beginning of the carrying.[6]

§ 568. *Leakage and breakage.* — It is possible for a consignor so to pack his wares that there shall be no leakage or breakage; and hence, perhaps, comes the ordinary proviso in bills of lading, that for leakage and breakage the carrier shall not be responsi-

[1] See cases cited in 2 Redfield on R. R. § 186; Ohio & M. R. R. *v.* Dunbar, 20 Ill. 623; Rixford *v.* Smith, 52 N. H. 355; Culbreth *v.* Phil., W. & B. R. R. 3 Houston, 392; Whalley *v.* Wray, 3 Esp. 74; Brind *v.* Dale, 8 C. & P. 207; Brown *v.* Clayton, 12 Georg. 566.

[2] Pemberton Co. *v.* N. Y. C. R. 104 Mass. 144.

[3] Hudson *v.* Baxendale, 2 H. & N. 575; Phillips *v.* Clark, 5 C. B. (N. S.) 882; Breggs *v.* Taylor, 28 Vt. 180.

[4] Retz *v.* Penn. R. R. 3 Phil. Rep. 82; Powell *v.* Penn. R. R. 32 Penn. St. 414. Infra, § 617–20.

[5] Brig Collenburg, 1 Black, 170; Nelson *v.* Woodruff, 1 Black, 156; Clark *v.* Barnwell, 12 Howard U. S. 272; Powell *v.* Mills, 37 Miss. 691.

[6] Ship Howard *v.* Wiseman, 18 Howard (U. S.), 231.

ble. But this does not relieve the carrier from due diligence in stowage, which he owes under all circumstances, no matter how imperfectly the thing carried may be packed.[1]

VI. DUTY OF CARRIER AFTER ARRIVAL OF GOODS, AND HEREIN OF WAREHOUSEMEN.

§ 569. *Risks of warehousing of a distinct class from those of carriage.* — Carriage, whether by land or by water, has its risks peculiar to itself. The ordinary carrier by water has to provide a seaworthy vessel and competent crew and officers, so as to protect the goods from the ordinary dangers of the seas. The steam carrier by land or water is bound to extraordinary skill and vigilance, such as are imposed on no other bailee, in order that the extraordinary risks of steam transportations may be properly met. On the one hand, the carrier by land or by water is in little danger of fire communicated from outside by the negligence of strangers. On the other hand, this is one of the chief dangers to which the warehouseman is exposed. Warehouses are necessarily in places where other buildings, often of a class which readily take fire, are numerous; and from which fire could be readily caught without any fault of the warehouseman. It is true that from fire the warehouseman can protect himself to a certain extent by precautions he is bound to adopt in proportion to the importance and value of the goods of which he takes charge. His building should be in this proportion strong and fire-proof;[2] and, in order to defend the property committed to him from depredations, it should be adequately guarded.[3] It is also necessary that he should have a supply of servants adequate to the prompt delivery of goods.[4] But in order that the ware-

[1] Phillips *v.* Clark, 5 C. B. (N. S.) 882; Nelson *v.* Woodruff, 1 Black, 156.

[2] If by the negligence of a warehouseman the goods are injured while in his possession, he will be responsible therefor, notwithstanding the goods are subsequently wholly lost or destroyed while in his possession, without his fault, as by a flood or fire, or other inevitable accident. Powers *v.* Mitchell, 3 Hill (N. Y.), 545.

[3] It is the duty of the carrier to use reasonable care in storing and securing the goods. Notara *v.* Henderson, L. R. 7 Q. B. 225; 39 L. T. 167; Cargo ex Argos, L. R. 5 P. C. 134; Great N. R. R. *v.* Swaffield, L. R. 9 Exch. 132. Infra § 609.

[4] So, if by the negligence of the servant of the warehouseman, the goods are not delivered when called for by the consignee, and the goods be destroyed by an accidental fire, the warehouseman is responsible. Stevens *v.* Boston & Maine Railroad, 1 Gray,

house should be accessible, it is necessarily exposed to risks of fire by contagion which cars when on transit or ships when at sea do not ordinarily encounter. And a necessary risk, such as is incident to the nature of the service, a bailor cannot throw upon a bailee, unless the latter undertakes to carry it by a special contract in the nature of insurance.

§ 570. *No sound reason exists for extending the specific liability of common carriers (e. g. liability for fire caused by the negligence of strangers), after the carriage has ceased, and the goods have arrived at their destination.* — The insurance feature, which the English common law, in this respect differing from all other juridical systems, has grafted on the contract of common carriage of goods, is, it must be recollected, not only exceptional, but so onerous that the courts have permitted it to be discharged by agreements, now almost universal, between the consignor and the carrier. As to passengers, this feature has been abandoned; and though as to goods there may be reasons for its retention when the parties do not agree to the contrary, yet these reasons belong exclusively to the transit condition of goods. Then, indeed, loss from fire is hardly supposable, except through a relaxation of that vigilance on the carrier's part which should increase in intensity in proportion to the perils of the service. But at depots, and in warehouses, fire is readily communicated, in spite of every precaution from the warehouseman, from buildings from which, from the nature of the case, the depot or warehouse cannot be detached; and to throw upon the warehouseman the burden of such risks would be to throw an unnecessary burden on transportation itself, and require the exaction of insurance prices. Then, again, by the usages of business, fire insurance is a distinct business, which persons having goods exposed to fire are expected to resort to, failing to do which, they may be supposed to take the risk on themselves. Then, once more, it is important for the general interests of transportation, that goods, when they reach

277. On the other hand, warehousemen are not responsible for the neglect of their servants to rescue goods from destruction by an accidental burning of the warehouse in the night-time, at which such servants are casually and voluntarily present, and not then in the employment of the defendants. Such persons are not then servants, in the meaning of the law, but only individuals, neighbors, citizens. Aldrich *v.* Boston & Worcester Railroad Co. 100 Mass. 31 (1868). See Henshaw *v.* R. R. 54 N. Y. 242; Great N. R. R. *v.* Swaffield, L. R. 9 Exch. 132. Infra, § 649.

their place of destination, should be promptly called for; that the consignor should notify the consignee, and the consignee should at once take measures for their delivery to himself, so that transportation should not be clogged by the accumulation of goods at termini. And finally, because there is so great a difference between the duty of the carrier and that of the warehouseman, it is important that the line should be strictly drawn on the merits, and that goods on transit should be placed under the protection of the first class of duty, while those which have reached their terminus should be placed under the protection of the second class of duty.[1]

§ 571. *Time when liability of carrier passes into that of warehouseman.* — It has been undoubtedly held by high authority that when the consignee, in the exercise of the diligence of a good business man, has not had reasonable opportunity of removing the goods, the liability of the carrier as such, as the insurer of the goods, does not merge in the liability of the warehouseman.[2] But supposing it to be the duty of the consignee, as is declared by Judge Hubbard in a leading Massachusetts case, to call for the goods "on their arrival at the places of destination;"[3] the arrival at the place of destination, when followed by unlading and warehousing, shifts the burden of mere *casus* from the carrier to the consignee.[4] At the same time it must be remembered that this is a question respecting the general relations of carriers and consignees which varies greatly with local law and usage,

[1] See supra, § 478; infra, § 609.

[2] Winslow *v.* Vt. R. R. 42 Vt. 700; Wood *v.* Crocker, 18 Wisc. 348; Derosia *v.* Winona R. R. 18 Minn. 133; Pinney *v.* St. Paul R. R. 19 Minn. 253; Jeffersonville R. R. *v.* Cleveland, 2 Bush, 468; Ala. & Tenn. R. R. *v.* Kipp, 35 Ala. 209; Mich. Cent. R. R. *v.* Ward, 2 Mich. 538, where (under a statute) notice to the consignee was held necessary to terminate the carriage; and aside from statute, Moses *v.* Bost. & Me. R. R. 32 N. H. 523; Rome R. R. *v.* Sullivan, 14 Ga. 277; Graves *v.* Hartf. & N. Y. Steamboat Co. 38 Conn. 643. See Jeffersonville R. R. *v.* Cleveland, 2 Bush, 468; Smith *v.* Nash. & L. R. R. 7 Foster, 86.

[3] Thomas *v.* Boston & P. R. R. 10 Mete. 472.

[4] See to this effect, Norway Plains Co. *v.* B. & M. R. R. 1 Gray, 263; and see Porter *v.* Chic. & R. I. R. R. 20 Ill. 407; Davis *v.* Mich. S. R. R. 20 Ill. 407; Shepherd *v.* Brist. & Ex. R. R., Law Rep. 3 Exch. 189; Thomes *v.* Day, 4 Esp. 262; Quiggin *v.* Duff. 1 M. & W. 174; Culbreth *v.* R. R. 2 Houston, 392; New Alb. & Sal. R. R. *v.* Campbell, 12 Ind. 55; Morris & Essex R. R. *v.* Ayres, 5 Dutcher, 394; Francis *v.* R. R. 25 Iowa, 60; Hilliard *v.* R. R. 6 Jones (N. C.), 343; Pelton *v.* R. R. 54 N. Y. 214.

and which it is not within the scope of the present work to discuss.[1] And clearly the carrier cannot, by his own misconduct in misleading the consignee, relieve himself from his special liability in this respect.[2]

[1] See Gaff *v.* Bloomer, 9 Penn. St. 114; Kimball *v.* West. R. R. 6 Gray, 542. In Louisville, &c. R. R. *v.* Mahan, 8 Bush, 184; and Roth *v.* Buffalo & State Line R. R. 34 N. Y. 548 (see infra § 609), it was held that when a trunk was left over night by a passenger at the termination of the route, and the station, with the trunk in it, was burned during the night, without any fault of the company, the company was not liable. Here the passenger had notice of the arrival of the trunk. In Wisconsin, a company has been held liable for the loss of goods by fire, occurring without their fault, within a day after the arrival of the goods, the goods having arrived late on Saturday evening; it appearing, however, that the company's agent misled the agent of the owner, who called for the goods, and who was thus deterred from taking away the goods promptly on their arrival. Wood *v.* Crocker, 18 Wis. 345. See also Powell *v.* Myers, 26 Wend. 571; Ouimit *v.* Henshaw, 35 Vt. 605.

In Russell Manuf. Co. *v.* The New Haven Steamboat Co. 50 N. Y. 121, it was ruled by the appellate court that where it has been the long-continued practice of a manufacturing company to ship its goods daily by a regular line of steamboats, consigned to its agent for sale, and it has been part of the regular routine of business of the agent, without notice, to call for and receive the goods upon their arrival each day at the carrier's wharf at the place of destination, and to remove them, a specific notice from the carrier of the arrival of each parcel is not necessary. The duty of the carrier, as such, is performed when the goods are landed at the accustomed place and the consignee has had a reasonable time to remove them. But if the goods are received upon a holiday, and it has been the usage for the consignee not to receive goods upon those days, he is entitled to a reasonable time after that day to remove them. In this case the plaintiff's goods, while upon the defendant's wharf, were destroyed by fire occurring in the night-time, originating upon the wharf. A large quantity of other freight was upon the wharf and was also destroyed. Evidence was given tending to show that no apparatus or means for extinguishing fires were kept there. A private watchman was left in charge, with some colored men, but neither he nor any of them were produced as witnesses, nor did it appear that he was at his post, or that any person was upon the wharf when the fire broke out. *Held*, that the evidence was such as to require the submission of the question of negligence to the jury, and that a direction of a verdict for defendant was error. (The case of Lamb *v.* The Camden & Amboy R. R. Co. 46 N. Y. 271, distinguished.) See Pelton *v.* R. R. 54 N. Y. 214.

In Goodwin *v.* Balt. & Ohio R. R. Co. 50 N. Y. 154, it was held that, where bulky articles of freight are landed from a vessel in the customary manner upon a public wharf, with due notice to the consignee (he being the owner), who pays the freight and takes

[2] Stevens *v.* Bost. & Me. R. R. 1 Gray, 277; Wood *v.* Crocker, 18 Wisc. 345; The Peytona, 2 Curtis C. C. 21.

§ 572. *When common carrier becomes forwarder.* — Where a common carrier takes goods to forward and deliver, if within his

steps towards removing them, and is afforded a reasonable opportunity of doing so, the legal custody is transferred to him, and if he unnecessarily delays the removal, he does so at his own risk. It is his duty, not the carrier's, to protect them, and if they are injured by inclement weather, the carrier cannot be held responsible.

In Derosia *v.* The Winona & St. Peter Railroad Company, 18 Minn. 139; affirmed in Pinney *v.* St. Paul & P. R. R. 19 Minn. 253, the cases are thus satisfactorily classified by Ripley, Ch. J.: . . . "The jury were at the defendant's request instructed as follows, viz.: 'That while said goods were in transit, the defendant would be liable as a common carrier for any loss or injury to the property, not caused by the act of God, or the public enemy. But that after the goods had arrived at Waseca, and were deposited in defendant's warehouse or freight room, ready for delivery to the plaintiff, and a reasonable time thereafter for the removal thereof by the plaintiff had elapsed, the liability of the defendant as common carrier ceased, and it would be liable thereafter only as a warehouseman,' and the court so instructed the jury.

"This practically adopts the rule laid down in Moses *v.* Boston & Maine R. R. 32 N. H. 523. We have found no case which states the law more favorably for the respondent.

"The head note to Buckley *v.* Great Western R. R. Co. 18 Michigan, 121, is, that in the absence of any usage, special circumstances, or agreement, the liability of railway companies for goods in warehouses awaiting delivery is that of common carriers. But the opinion of the court by no means comes up to the head note. We cannot discover that it goes any further than that the fact that the goods in question in the case had reached the defendant's warehouse, at their place of destination, and had been by the defendant deposited therein, did not change its liability as carrier for that of warehouseman; whereas the head note is at least open to the construction, that the liability of carrier continues until delivery, without limitation as to time, — a proposition to which we could not assent.

"The New Hampshire doctrine is directly opposed to what may be called the Massachusetts rule, first laid down in Norway Plains Co. *v.* B. & M. R. R. 1 Gray, 263, viz.: that railway companies which transport goods over their roads for hire, and deposit them in their warehouses without additional charge until the consignee has a reasonable time to take them away, are not liable as common carriers for the loss of the goods by fire, without negligence or default on their part, after the goods are unladen from the cars and placed in the warehouse, but are liable as warehousemen only, for want of ordinary care, although the owner or consignee has no opportunity to take the goods away before the fire. So far as our observation goes, the New Hampshire decision has been approved in Vermont, Wisconsin, Kentucky, and Alabama. Winslow *v.* V. R. R. Co. 42 Vt. 700; Wood *v.* Crocker, 18 Wis. 345; Jeffersonville R. R. *v.* Cleaveland, 2 Bush, 468; Ala. & Tenn. R. R. *v.* Kipp, 35 Ala. 209. Redfield also thinks that there is no very good reason why the carrier's responsibility should not continue until the owner or consignee by the use of diligence might have removed the goods. 2 Redf. 4th ed. p. 67, 68.

route, if not, to deliver to the connecting express or a stage at the most convenient point, his liability as a common carrier ceases

"And a note to the last edition of Angell on Carriers states that the better view seems to be that there is no change in the nature of the liability of the carrier until the consignee has had reasonable opportunity to take the goods away. Ch. 8, p. 271, note a.

"A view of the law similar to that of the supreme court of Massachusetts has, however, been taken in Indiana, Iowa, New Jersey, and North Carolina. New Alb. & Salem R. R. *v.* Campbell, 12 Ind. 55; Morris & Essex R. R. *v.* Ayres, 5 Dutcher, 394; Francis *v.* Dubuque R. R. 25 Iowa, 60; Hilliard *v.* Weldon R. R. 6 Jones (N. C.), 343.

"In the latest case from Illinois that has come to our notice, the court say that the rule, though not the best that might be adopted in the premises, is well settled in this state, that a railroad company, to discharge its liability as carrier on getting the goods to their place of destination, is not bound to deliver them to the consignee personally, or give notice of their arrival; and after storing them in a suitable place to await the demand of the consignee, the liability is only that of a warehouseman. Chicago & H. R. R. *v.* Scott, 42 Ill. 132.

"In this conflict of authority, both parties agree that the railroad company is not obliged to give notice to the consignee of the arrival of the goods. From this, however, Prof. Parsons dissents, if the consignee's residence is known or can be found by any reasonable exertion. 2 Parsons on Cont. b. 3, ch. 11, § 9.

"In New York it has been recently held by the commissioners of appeals, that if the consignee lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods; but if the consignee is absent, unknown, or cannot be found, the carrier may place the goods in its warehouse, and after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If after the arrival of the goods the consignee has a reasonable opportunity to remove them and does not do it, he cannot hold the carrier as an insurer. Fenner *v.* Buffalo & State Line R. R. 44 N. Y. 505."

In Zinn *v.* N. J. Steamb. Co. 49 N. Y. 444. Allen, J., says: "Common carriers assume not only the safe carriage and delivery of property to the consignee, but also that merchandise and other property received by them for transportation shall be carried to the place of destination and delivered with reasonable dispatch; and for any unreasonable delay, either in the transportation or its delivery after its arrival at the terminus of the route, they are responsible. Hand *v.* Baynes, 4 Whart. 204; Raphael *v.* Pickford, 6 Scott Ch. N. R. 478; Blackstock *v.* N. Y. & E. R. Co. 20 N. Y. 48; Black *v.* Baxendale, 1 Exch. 410. The liability of the carrier to answer for the non-delivery of goods, or the want of reasonable expedition in their delivery, after their arrival at the place of their destination, was not controverted upon the trial.

"The defendant in this action was not bound to deliver the merchandise to the consignees at their place of business. A delivery or offer to deliver at the wharf would have discharged the carrier from all responsibility as such carrier. Carriers by water or railroad are not held to a delivery of goods to the consignees at any place other than at the wharf of the vessel or the railroad station, and a notice to

when the goods arrive at such convenient point of intersection. The common carrier then becomes a forwarder, and he ceases to be an insurer of the safety of the goods forwarded.[1]

the consignees of the arrival of the goods, and of a readiness to deliver, comes in place of a personal delivery so far as to release the carrier from the extraordinary and stringent liability incident to that class of bailees. Gibson *v.* Culver, 19 W. R. 305; Fisk *v.* Newton, 1 Den. 45; Fenner *v.* Buff. & St. L. R. Co. 44 N. Y. 505. If the consignee is present, the goods may be tendered or delivered to him personally, and he is bound to remove them within a reasonable time. If he is not present, he is entitled to reasonable notice from the carrier of their arrival, and a fair opportunity to take care of and remove them. If the consignee is unknown to the carrier, the latter must use proper and reasonable diligence to find him, and if, after the exercise of such diligence, the consignee cannot be found, the goods may be stored in a proper place, and the carrier will have performed his whole duty, and will be discharged from liability as a carrier. But for want of diligence in finding the consignee and giving notice of the arrival of the goods, the carrier is liable for the damages resulting from a delay in the receipt of the goods by the consignee, occasioned by such want of diligence. He can only relieve himself from liability by storing the goods, after, by the use of reasonable diligence, he is unable to find the consignee. Witbeck *v.* Holland, 45 N. Y. 13. A common carrier has not performed his contract as carrier until he has delivered or offered to deliver the goods to the owner, or has done what the law esteems equivalent to a delivery. Smith *v.* Nashua & Lowell R. R. Co. 7 Foster R. 86; Price *v.* Powell, 3 Comst. 322. When the consignee is unknown to the carrier, a due effort to find him is a condition precedent to a right to warehouse the goods; and as notice to the consignee takes the place of a personal delivery of the goods, and as a due and unsuccessful effort to find the consignee will alone excuse the want of such notice, it follows that if a reasonable and diligent effort is not made to find the consignee, the carrier is liable for the consequences of the neglect. What is a due, a reasonable effort, and what is proper and reasonable diligence, depends necessarily very much upon the circumstances of each case, and, in the nature of things, is a question of fact for the jury, and not of law for the court. What would be reasonably sufficient in one place might be entirely inadequate and insufficient in another, and the extent and character of the inquiries to be made, in the exercise of a reasonable diligence on the part of the carrier, cannot be regulated or prescribed by any fixed standard, as the standard must shift with the varying circumstances of each case."

In New York it was held in 1873, by the commissioners of appeals, that it is the duty of a consignee, whose residence is not known to the carrier, to give notice, before the arrival of the goods, of the place where he can receive notice; and if he fails to do this, and the carrier makes inquiry of persons likely to know of the consignee's residence, but fails to obtain information, the insurance liability of the carrier ceases upon his storing the goods. Pelton *v.* R. R. 54 N. Y. 214; relying on Fenno *v.* R. R. 44 N. Y. 505, 511.

[1] Plantation No. 40 *v.* Hall, 61 Me. 517.

§ 573. *The diligence required of a warehouseman is that which good and capable warehousemen are accustomed to show under similar circumstances.* — The diligence of the warehouseman, according to the Roman law, is the highest kind of diligence known to that law, and indeed known to our own, if we throw out of consideration the doctrine of constructive insurance, which is in no respect dependent on or connected with that of diligence.[1] The doctrine of *levissima culpa*, as we have already seen so frequently, is without authority either in the Roman law or our own. The utmost kind of diligence which the law requires or ought to require, aside from cases of special contract or confidence, is that which a good business man, experienced and faithful in his particular department, would exercise when undertaking a particular duty within the scope of that department.[2] Applying this test to the warehouseman, his duty is plain. He must erect a building strong, fire-proof, and watched, in proportion to the risks he is subject to and the value of the goods with which he is likely to be intrusted, having of course in view the position in which his building is to stand, and his capacity of thus burdening himself without incurring unjustifiable expense.[3] To require more of him than this, would be to oppose an unnecessary obstacle to the easy transport of goods. For him to apply a less degree of diligence will render him liable for any losses which his laches in this respect may produce.

§ 574. *This diligence is required from the railroad warehouseman, even though he receive no specific separate pay for it, as long as there is a known owner of the goods who can be held liable for the expenses of storage, or until it appears that such owner, on being notified of the arrival of the goods, refuses to take them.* — As to the first point, since a depot and a warehouse of some kind are essential to railroad business, the temporary storing of goods, until the consignee can call for them, is a necessary part

[1] See supra, § 31, 478.

[2] See supra, § 57.

[3] See Garside *v.* Trent & Mersey Nav. Co. 4 T. R. 581; Smith *v.* Nashua & L. R. R. 7 Foster, 86; Farm. & Mec. Bk. *v.* Champ. Transp. Co. 23 Vt. 211; Ostrander *v.* Brown, 15 Johns. 39; Eagle *v.* White, 6 Whart. 505; Hemphill *v.* Chenie, 6 W. & S. 62; Norway Plains Co. *v.* Bost. & Me. R. R. 1 Gray, 263; New Albany & Salem R. R. *v.* Campbell, 12 Ind. 55; Ala. & Tenn. R. R. *v.* Kidd, 35 Ala. 209; McCombs *v.* N. C. R. R. 67 N. C. 193; Southern Exp. Co. *v.* McVeigh, 20 Grat. 264; Kremer *v.* Smith, 6 Cold. (Tenn.) 356. Supra, § 478.

of railroad transport, which when this transport is paid for, as a whole, cannot be said to be gratuitous.[1] For, as has been well argued in Alabama,[2] though no charges for storage are demanded by the company, the accommodation is one that has a strong tendency to bring business to the company, because goods transported by them thus find a safe deposit until they can be removed by the owner. Hence, when such companies assume to act as warehousemen for their customers, they must be regarded as warehousemen for hire, and bound to use ordinary diligence in keeping the goods deposited in their warehouses.[3]

Should the goods be detained without fault of the carrier, beyond the period in which a good business man (for such the consignee is bound to be), would call for them, then, as the carrier can recover from the owner the expenses of warehousing and safe keeping,[4] the bailment continues to be one in which the diligence of a good warehouseman, as above expressed, is required.[5]

But when the goods are apparently abandoned by the owner, it stands to reason that the warehouseman cannot be expected to apply such high degree of diligence. From the period of such abandonment, he becomes only a depositary, liable simply for gross negligence.[6]

§ 575. *Liability of common carrier continues as to goods in depot or warehouse for the purpose of being forwarded by a connecting line to a final point of destination.* — It should be kept in mind that the distinction which has been just stated does not apply when the goods consigned are to a point *beyond* the company's route. In such case the company is bound as carrier, though the goods, at the time of the accident, were in its warehouse, from which it was the company's duty to transfer them to a connecting road.[7] When the goods are delivered to a dis-

[1] See supra, § 478.

[2] Mobile & Gerard Ry. Co. *v.* Prewitt, 46 Ala. 68.

[3] See Story on Bailments, § 3, 10.

[4] Great N. R. R. *v.* Swaffield, L. R. 9 Ex. 132.

[5] Illinois Cent. R. R. *v.* Alexander, 20 Ill. 23; Mobile & Gerard R. R. Co. *v.* Prewitt, 46 Ala. 63. Supra, § 478. Warehousemen are not responsible for neglect of their servants to rescue goods in the warehouse from being consumed in an accidental fire at night, at which such servants are present, though not in the course of their employment. Aldrich *v.* Boston & W. R. R. 100 Mass. 31.

[6] See Smith *v.* Nashua & Lowell R. R. 7 Foster, 86; Hough *v.* L. & N. W. R. R., L. R. 5 Exch. 51; Mobile & Gerard R. R. Co. *v.* Prewitt, 46 Ala. 63.

[7] McDonald *v.* W. R. R. 34 N. Y. 397; Goold *v.* Chapin, 20 N. Y. 259;

connected and subsequent carrier, then liability of any kind ceases.[1]

Van Santford *v.* St. John, 6 Hill, 167; Hooper *v.* Ch. & N. W. R. R. 27 Wisc. 81. See Morris & Essex R. R. *v.* Ayres, 29 N. J. L. R. (5 Dutch.) 393; Blumenthal *v.* Brainard, 28 Vt. 413; Moses *v.* R. R. 32 N. H. 523; McMillan *v.* R. R. 16 Mich. 100; Brintnell *v.* R. R. 32 Vt. 665; Parker *v.* M. & S. R. R. 30 Wisc. 689; Condict *v.* R. R. 50 N. Y. 500.

[1] Converse *v.* N. & N. Trans. Co. 33 Conn. 166.

In Railroad Co. *v.* Manuf'g Co. 16 Wall. 318, it was ruled that when goods are delivered to a common carrier to be transported over his railroad to his depot in a place named, and there to be delivered to a second line of conveyance for transportation further on, the common law liability of common carriers remains on the first carrier until he has delivered the goods for transportation to the next one. His obligation, while the goods are in his depot, does not become that of a warehouseman. It was further held that the section in the charter of the Michigan Central Railroad Company, providing that the company shall not be responsible for goods on deposit in any of their depots "awaiting *delivery*," does not include goods in such depots awaiting *transportation*, but refers to such goods alone as have reached their final destination.

In Irish *v.* Milwaukee & St. Paul R. R. 19 Minn. 376, the point is thus well argued by McMillan, J.: —

. . . . "We do not deem it necessary at this time to review the decided cases upon this question. It may suffice to say, we think, that the better rule as to the obligations of intermediate carriers is, that, in the absence of any special agreement or custom which enters into the contract, where goods are delivered to a common carrier for transportation, directed to a point beyond the terminus of his route, between which and the place of destination of the goods, there are other succeeding connecting lines of transportation by common carriers, the intermediate carrier is bound to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond, and in such a case he is not relieved from his liability as insurer of the goods, by simply unloading the goods at the end of his route, and storing them in a warehouse, without delivery or notice, or any attempt to deliver to the next carrier. This is substantially the rule laid down by the court of appeals of New York in McDonald *v.* Western Railroad Corporation, 34 New York, 497."

The following additional authorities support, more or less directly, the same rule: Goold *v.* Chapin, 20 N. Y. 259; Congar *v.* The Chicago & Galena Union R. R. Co. 17 Wis. 477; Hermann & another *v.* Goodrich, 21 Ibid. 536; 2 Redfield on Railways, § 157, subdiv. 12 and 13; 2 Parsons on Contracts, 197; Mich. Cent. R. R. Co. *v.* The Minn. Sp. Manuf. Co., U. S. Sup. Court, Dec. T. 1872 (reported in Chicago Legal News).

Smith, J., in his opinion in McDonald *v.* Western Railroad Corporation (supra), supports this rule by a line of argument which commends itself to us as very forcible. "The defendants were intermediate carriers. Their line of transportation was one of several, which together formed a continuous route, over which goods were transported for hire. We may judicially take notice of the fact that the vast business of inland transpor-

§ 576. *Burden of proof in suit against warehouseman.* — Some

tation of goods in this country is carried on mainly upon similar routes, formed by successive connecting lines of transit belonging to different owners, each of whom carries the goods over his own line and delivers them to the next, who in his turn takes them on till they reach the place of final destination.

"Now, it is apparent that to carriers thus situated, and to goods thus transported, the policy of the common law of liability applies with peculiar force. It is a public policy, springing from the public nature of the employment of carriers, and rendering their good conduct a matter of importance to the whole community. Many of the routes of transportation in this country, formed in the manner above stated, extend over thousands of miles. Their proprietors invite and receive goods for transportation upon the promise, express or implied, that they shall be carried safely to the place of delivery. The owner loses sight of his goods when he delivers them to the first carrier, and he has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination. At each successive point of transfer from one carrier to another, they are liable to be placed in warehouses, there, perhaps, to be delayed by the accumulation of freight, or other causes, and exposed to loss by fire or theft, without fault on the part of the carrier or his agents. Superadded to these risks are the dangers of loss by collusion, quite as imminent where the goods are thus stored at some point unknown to the owner, as while they are in actual transit. As a general rule, the storing under such circumstances should be held to be a mere accessory to the transportation, and the goods should be under the protection of the rule, which makes the carrier liable, as an insurer, from the time the owner transfers their possession to the first carrier till they are delivered to him at the end of the route." . . . .

So in Wisconsin, in Conkey *v.* Milw. & St. P. R. R. 31 Wisc. 619, it has been finally determined that when goods are shipped to be transported by several successive and connecting lines, they are to be considered *in transit* until they reach their final destination, and the peculiar liability of a common carrier exists *continuously*, although for the convenience of the successive carriers, the goods may be temporarily deposited in depots or warehouses on the route. And the carrier, *in whose possession they are* when destroyed or injured, is liable, as such, to the owner or consignee for the loss. Wood *v.* M. & St. P. Ry. Co. 27 Wis. 541, as to the above points, being overruled.

Dixon, C. J., said: . . . . "To admit such interruptions of the liability of the carrier would make clear the way for the grossest frauds and impositions, with no means of protection and no power of discovery on the part of the owner. He is always absent. He does not go with his goods, and cannot be permitted to do so. He must trust them absolutely and exclusively to the keeping of the carrier. Whether they were lost or destroyed when in motion or on the way, or while in a warehouse, he could not tell, and it would generally be a secret past his finding out. He would be wholly in the power and at the mercy of the carrier; and if the carrier said they were destroyed in a burning warehouse or depot, he must abandon all claim. This would be placing too

conflict of opinion exists as to whether, in a suit against a warehouseman for damages, the burden is on the plaintiff to prove

great power in the hands as well as too great temptations in the way of carriers.

"'It is well settled in this state,' says Mr. Commissioner Earl, in delivering the opinion of the commission of appeals in Fenner *v.* Railroad Co. 44 N. Y. 505 (4 Am. R. 710), 'that an intermediate carrier, one who receives goods to be transported over his route, and thence by other carriers to their place of destination, generally remains liable as a common carrier until he has delivered the goods to the next carrier. It was deemed wise policy that the principles of the common law should be so expounded and applied, that the liability of one carrier should continue until that of the next carrier commenced.' The learned commissioner cites Miller *v.* Steam Navigation Co. 10 N. Y. 431; Gould *v.* Chapin, 20 Ibid. 266; Ladue *v.* Griffith, 25 Ibid. 364; and McDonald *v.* Western Railroad Corporation, 34 Ibid. 497; and then proceeds with a quotation of the language of Chief Judge Johnson in Gould *v.* Chapin, as follows: 'No owner can be supposed to have an agent to superintend each transshipment of his goods, in the course of a long line of transportation; and if the responsibility of each carrier is not continued until delivery in fact to the next carrier, or at least until the first carrier, by some act clearly indicating his purpose, terminates his relation as carrier, we shall greatly diminish the security and convenience of those whose property is necessarily abandoned to others, with no safeguards save those which the rules of law afford.'

"And next the commissioner quotes the language of Judge Smith, in McDonald *v.* The Western Railroad Corporation, which is this: 'The owner loses sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination. At each successive point of transfer from one carrier to another, they are liable to be placed in warehouses, there, perhaps, to be delayed by the accumulation of freight or other causes, and exposed to loss by fire or theft, without fault on the part of the carrier or his agents. Superadded to these risks are the dangers of loss by collision, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing under such circumstances should be held to be a mere accessory to the transportation, and the goods should be under the protection of the rule which makes the carrier liable as an insurer, from the time the owner transfers their possession to the first carrier till they are delivered at the end of the route.'

"And here it occurs to me to observe, that among the great number of such cases which have arisen, and been adjudicated by the courts of New York, not one has yet been presented where the intermediate carrier has been exonerated from liability as a carrier for goods lost or destroyed while in store or on deposit by such carrier. The case of Mills *v.* Railroad Co. 45 N. Y. 672, cited by counsel for the plaintiff in this action, would seem to have been a pretty strong one for declaring an exception, but yet the court refused. The case of an *adjudicated* exception is yet to come, for thus far the doctrine rests upon mere suggestions or hints,

negligence.[1] But even if we follow the authorities requiring such proof from the plaintiff, yet a very slight presumption will throw the burden of exculpation on the defendant.[2] Thus in a Connecticut case, in assumpsit against a warehouseman for the value of certain bales of cotton deposited with the latter, the plaintiff having offered no proof of negligence except what was to be inferred from the receipt and non-delivery of the bales, and the defendants not having explained how the bales had been lost, or in any manner accounted for them, nor shown that they

vaguely thrown out, and nothing more.

"And the case of Nashua Lock Co. *v.* Railroad Co. 48 N. H. 339 (2 Am. R. 242), is a most elaborate and powerfully reasoned one, many of the arguments and views of which very strongly favor my conclusion. It contains a review and examination of most of the leading authorities, English and American, and a statement of the doctrines of the courts on both sides of the Atlantic. I must say that I think Mr. Chief Justice Perley performed a very great and valuable service, both for the profession and for the law, when he wrote that opinion.

"And the case of Barter *v.* Wheeler, 49 N. H. 9, is another case most elaborately considered, as is the manner of that court, which also favors my views. I need only refer to these two last cases for a full and ample vindication of the principles by which I think the present one ought to be governed.

"In England, the question presented in this case has never, to my knowledge, been considered, since, under the rule in Muschamp's case, 8 M. & W. 421, it could not well arise. The first carrier there is liable, as such, for the safety of the goods throughout the transit and until they are delivered at the place of destination, which is, of course, a sufficient protection of the rights of the owner or consignee. The English rule has also, I believe, been applied in Illinois." . . . .

So the doctrine of Wood *v.* Crocker, 18 Wis. 345, that the "liability of a railroad company as a common carrier, for goods transported over its road, continues until the goods are ready to be delivered at their place of destination on the road, and the owner or consignee has had a reasonable opportunity to take them away," is adhered to in Parker *v.* M. & St. P. R. R. Co. 30 Wis. 689.

In a New York case the defendants were common carriers, and also had, at one terminus of their route, an elevator through which they received merchandise for transportation, and which they also used as a warehouse for storage; having received at the elevator, from a connecting carrier, the plaintiff's grain, consigned to a point beyond the other terminus of their line, without directions or agreement for its storage. Held, that they were liable to the plaintiffs as common carriers and not as warehousemen. Rogers *v.* Wheeler, 6 Lansing, 420.

[1] Garside *v.* Proprietors, 4 T. R. 581; Lamb *v.* West. R. R. 7 Allen, 98; Cass *v.* Bost. & L. R. R. 14 Allen, 448. See supra, § 422, 477.

[2] Harper *v.* Hartford & N. H. R. R. 37 Conn. 272; Lechtenheim *v.* R. R. 11 Cush. 70; Brown *v.* Waterman, 10 Cush. 117. Supra, § 422, 477.

had exercised reasonable care to prevent their loss, the court ruled that the defendants, to deliver themselves from responsibility for the goods, were bound to prove either a delivery to the plaintiff, or that they had exercised ordinary care in keeping them, and that under the circumstances the burden was not on the plaintiff to show the manner of the defendants' negligence by means of which the loss occurred. It was held by the supreme court that this ruling, in the circumstances of the particular case, was correct.[1]

VII. AUXILIARY AND CONNECTING LINES.

§ 577. How far and to what extent one line of transportation is to be viewed as auxiliary to another, and what relations between two lines make them partners, depend upon considerations which it is out of the range of the present volume to discuss. It will at once be seen that in each case the question involves not merely the special contract between the lines in question, but the nature of the notice received by the owner; and therefore not only must each case be determined by the law to be drawn from a special and complicated collocation of facts, but the law to be so invoked must be remanded to the department of contracts, and not to that of torts. For our present purposes, the statement of a few leading principles must suffice.

§ 578. *Whenever the relation of partnership or agency between auxiliary lines is exhibited to a consignor or passenger, then the primary road is liable for negligence of the auxiliary roads within the scope of the contract.* — This is a familiar principle, which has been already abundantly discussed. Its application to the practice of modern transportation is obvious; and that it should be so applied is as much for the benefit of the line originally undertaking a contract for carriage, as it is for the consignor or owner of goods. Two competing lines of road, for instance, strike out westward from one of our eastern cities. One road says: "I have my agents who, when the goods reach my terminus, will take them up and transport them to St. Louis." Another simply says: "I will carry these goods to my chartered limits, and there you must find an agent who will represent you

[1] Harper *v.* Hartford & N. Y. R. R. 37 Conn. 272. See supra, § 422, 477. In a suit against a forwarder for negligence, the burden of proof is on the plaintiff to establish the same. Plantation No. 40 *v.* Hall, 61 Me. 517.

directly and carry your goods to St. Louis on a new and independent contract of carriage." So inconvenient is the latter course, that the road which is cut off from connecting agencies acting for its interest, finds its consignments limited to points on its own road, while the road that has the largest and most ramified connections absorbs the most extra-terminus freight. But this benefit carries with it its liabilities. *Jure naturae aequum est, neminem cum detrimento alterius et injuria fieri locupletiorem.* If business is obtained by holding out to the public that certain connecting carriers are partners or agents, then the carrier holding this forth is bound, to those committing goods to him on this representation, for losses occurring to such parties through the negligence of such connecting carriers. Thus, to take this relation in one of its most rudimentary shapes, the railroad company that employs porters to carry passengers' baggage to their cabs, and holds itself out, though only by usage, as employing these porters for this purpose, is liable for the negligence of such porters.[1] But what the porter does, in delivering a trunk from a baggage car to a cab, is on principle the same as is done by a connecting road, in carrying freight or luggage from the terminus of the contracting road to its final destination; the difference between the two cases being not in the law applicable to the relation of agency, but to the degree of proof by which this agency is made out. In the porter's case, the proof may be slight, consisting generally of local usage, and rarely of any public offer by the principal carrier. But in cases of connecting roads, this proof consists not merely of usage, but of specific contracts to forward over auxiliary lines, and often, in addition to these, of notices to this effect, conspicuously posted, on which the confidence of the business community is reposed. Hence it has been universally held, that where this relationship is either publicly proclaimed, or is specially set forth by the primary carrier undertaking to forward goods to a distant terminus through auxiliary carriers, and where an auxiliary carrier takes the goods from the primary carrier and injures them through negligence, then the primary carrier is liable for such negligence.[2]

[1] Butcher *v.* London & S. W. R. R. 16 C. B. 13; Richards *v.* London, B. & S. C. R. R. 7 C. B. 839. See infra, § 612

[2] Infra, § 604; Muschamp *v.* Lanc. & Prest. R. R. 8 M. & W. 421; Crouch *v.* London & N. W. R. R. 14 C. B. 255; *S. C.* 2 H. & N. 491; Scot-

In New York, however, where goods are delivered to the carrier marked for an ulterior point, but without any specific instructions or agreement beyond such mark, the carrier is bound, as

horn *v.* South Staff. R. R. 8 Exch. 341; Willby *v.* West Cornwall R. R. 2 H. & N. 703; Lock Co. *v.* W. & N. R. R. 48 N. H. 339; Baxter *v.* Wheeler, 49 N. H. 9; Noyes *v.* Rut. & B. R. R. 27 Vt. 110; Cutts *v.* Brainard, 42 Vt. 566; Weed *v.* S. & S. R. R. 19 Wend. 534; Wilcox *v.* Parmelee, 3 Sandf. 610; Ackley *v.* Kellogg, 8 Cowen, 223; Mar. Mut. Ins. Co. *v.* Chase, 1 E. D. Smith, 115; Wilbert *v.* N. Y. & E. R. R. 12 N. Y. 245; Foy *v.* Troy & B. R. R. 24 Barb. 382; Penn. R. R. *v.* Berry, 68 Penn. St. 272; Maghee *v.* C. & A. R. R. 45 N. Y. 514; Cary *v.* Cleveland & T. R. R. 29 Barb. 35; Root *v.* Great West. R. R. 45 N. Y. 525; Burnell *v.* N. Y. C. R. R. 45 N. Y. 184; Quimby *v.* Vanderbilt, 17 N. Y. 306; Balt. & Oh. R. R. *v.* Green, 25 Md. 72; C., H. & D. R. R. *v.* Pontius, 19 Oh. St. 221; Ill. Cent. R. R. *v.* Copeland, 24 Ill. 332; Ill. Cent. R. R. *v.* Johnson, 34 Ill. 389; Peet *v.* Chicago & N. W. R. R. 19 Wisc. 118; Angle *v.* Missis. R. R. 9 Iowa, 487; Cin., H. & D. R. R. *v.* Spratt, 2 Duvall, 4; King *v.* M. & W. R. R. 62 Barb. 160; Kyle *v.* Lawrence R. R. 10 Richards. 382; Bennett *v.* Filyaw, 1 Flor. 403. In Massachusetts, however, it is held that the bare receipting of goods to an extra-terminus point, and receiving the full freight to such point, does not bind the primary carrier beyond his own line. Gass *v.* N. Y., P. & B. R. R. 99 Mass. 220; Burroughs *v.* N. & W. R. R. 100 Mass. 26. But if there be an arrangement between the first and subsequent carriers for joint transport, then the subsequent carriers are to be regarded as agents of the first. Hill Man. Co. *v.* Boston & Lowell R. R. 104 Mass. 122.

Where there is such a contract, any stipulation in the contract, or notice to the other party, to the effect that the company will not be liable for losses or damage occasioned by negligence or fault while the goods are not upon its own road, is against public policy and void, equally as in case of transportation exclusively upon its own road. C., H. & D. R. R. Co. *v.* Pontius, 19 Oh. St. 221.

Section 2055 of the Code of Georgia, which provides that "when there are several connecting railroads, under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus; and until delivery to the connecting road, the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate liability," was evidently intended to limit the liability of a railroad company to its own terminus, where the contract is a general one, merely depending on delivery of the goods to be transported with directions to carry beyond such terminus. The general liability of a railroad company as a carrier of goods, independent of the statute of Georgia, where it receives and agrees to carry property to a place beyond the terminus of its own road, and such property is destroyed by fire while passing over a connecting road on the route to the place of delivery, has been repeatedly held, and has been lately recognized and adopted by the court of appeals, in Root *v.* The Great Western Railroad Company, 45 N. Y. 524, and

to auxiliary lines, only to the extent of the usage of the line, whether this be known to the consignor or not.[1]

§ 579. *The auxiliary carrier may make himself primarily responsible to the owner for his negligence.* — It is true that the English rule is that the primary carrier, when the fact of agency is made out, is solely liable, and that the owner can have recourse to him alone.[2] But the analogy of the law in other cases leads us to conclude that although there is no privity of contract between the auxiliary carrier and the owner of the goods, yet, when the auxiliary carrier undertakes the duty of transporting the goods, authorizing the primary carrier to sell tickets for him, though on an engagement by which he is to receive his pay from the primary carrier, then he is liable to the owner for negligence in discharge of the duty thus assumed by him.[3]

Maghee *v.* The Camden & Amboy R. R. Co. Ibid. 514, per Ingraham, P. J. Accordingly, where a railroad company in Georgia, whose road terminated at Atlanta, where it connected with the Western and Atlantic Railroad, received at one of its stations fifty-eight bales of cotton, consigned to parties in New York, and gave the consignors a receipt specifying that the cotton was "to be transported to K. & Co., New York;" it was held that this was a special contract on the part of such company to carry the property to New York; and made it liable not only for its own default but for that of the other carriers on the line, and accountable for the value of a portion of the cotton destroyed by fire while in the possession of the Western and Atlantic Railroad Co. to whom it had been delivered for transportation. King *v.* R. R. 62 Barb. 160.

[1] Hempstead *v.* R. R. 28 Barb. 485. See McDonald *v.* R. R. 34 N. Y. 497; Condict *v.* R. R. 50 N. Y. 500. As to Massachusetts, see Gass *v.* R. R. supra.

[2] Mytton *v.* Midland R. R. Co. 4 H. & N. 615; Bristol & Ex. R. R. *v.* Collins, 7 H. L. Cas. 194; Coxon *v.* Great West. R. R. 5 H. & N. 274.

The same position is assumed by several American courts. Ill. Cent. R. R. *v.* Frankenberg, 54 Ill. 88; Toledo, &c. R. R. *v.* Merriman, 52 Ill. 123; Cin. &c. R. R. *v.* Pontius, 19 Ohio St. N. S. 22; Coates *v.* U. S. Exp. Co. 45 Mo. 238; Southern Exp. Co. *v.* Shea, 38 Ga. 519. See § 535.

[3] See Marshall *v.* York, N. & B. R. R. 11 C. B. 655; Gass *v.* N. Y., P. & B. R. R. 99 Mass. 220; Burroughs *v.* N. & W. R. R. 100 Mass. 26; Root *v.* Great West. R. R. 45 N. Y. 530; Barter *v.* Wheeler, 49 N. Y. 9; Campbell *v.* Perkins, 4 Seld. 430; Hart *v.* Rensselaer & Sar. R. R. 8 N. Y. 37; Knight *v.* P., S. & T. R. R. 56 Me. 234, where it is ruled that a through ticket over three several distinct lines of passenger transportation, issued in the form of three tickets on one piece of paper, and recognized by the proprietors of each line, is to be regarded as a distinct ticket for each line. It was further held that the rights of a passenger purchasing such a ticket, and the liabilities of the proprietors of the several lines recognizing its validity, are the same as if the purchase had been made at the ticket office of the respective lines. See supra, § 535.

§ 580. *Combination of carriers may be sued jointly.* — When several carriers agree on a general system of connecting common carriage, each line being authorized to act as the agent of the others, and they so hold themselves forth, they may be sued

In Kessler *v.* N. Y. Central R. R. 7 Lansing, 62, where it was shown that the plaintiff purchased a ticket from the railroad company for conveyance over its own line, with coupons attached for connecting roads, and received on delivery of her baggage a check marked with the name of each road, and that the defendant, the last carrier, failed to deliver the baggage for the check at the point of destination; it was held, that there was no proof of delivery to the defendant, or of loss while in its possession, and that the defendant was not liable. The opinion was given by Mullin, P. J., who said: "The court of appeals has decided: —

"1st. That it is competent for a railroad company to contract to carry passengers and freight beyond the terminus of its own line over other roads and even into other states than that in which such company is located. Maghee *v.* The Camden & Amboy R. R. Co. 45 N. Y. 514, and cases collected by Andrews, J., at p. 518; Burtis *v.* Buffalo & State Line R. R. Co. 24 Ibid. 269. See also Cary *v.* Cleveland & Toledo R. R. Co. 29 Barb. 35.

"2d. Where such a contract is entered into, the company thus contracting is liable for injury to the passenger and for loss or injury to his baggage over any of the roads over which such company has contracted to carry him. Quimby *v.* Vanderbilt, 17 N. Y. 306; Hart *v.* Rensselaer & Saratoga R. R. Co. 4 Seld. 37; Root *v.* Great Western R. R. Co. 45 N. Y. 525.

"3d. Where such a contract is made, the connecting road over which the passenger is carried is only liable for loss or injury to baggage or injury to himself happening on its own road. Root *v.* Great West. R. R. Co. supra; Burtis *v.* Buffalo & State Line R. R. Co. 24 N. Y. 269, 272.

"4th. When no contract is made by any one of several roads to carry a passenger beyond its own line, each company is liable only for loss or injury happening on its own road; and to render it liable for loss of or injury to baggage, it must be shown to have received it.

"5th. These principles apply to freight as well as to contracts for the carriage of passengers and their baggage.

"It follows from these decisions that if any contract was made for the carriage of plaintiff from Washington to Buffalo, it was made by the Baltimore & Ohio Company, as it is not shown that the agent who sold the ticket had any authority to bind the defendant by such a contract, nor that it was a partner with the connecting companies in carrying passengers between Washington and Buffalo. Hart *v.* Rensselaer & Saratoga Railroad Company, 4 Seld. 37.

"In the absence of all evidence on the subject, except such as may be inferred from the delivery of the coupon which gave the plaintiff the right to ride over defendants' road from New York to Buffalo, the presumption would be that the Baltimore & Ohio Railroad Company had purchased of defendant such coupon, or the right to issue it, and that it was delivered by that company in part performance of its contract to carry from Washington to Buffalo. Quimby *v.* Vanderbilt, 17 N. Y. 306."

jointly for the negligence, or the carrier by whom the negligence is committed may be sued, according to the law just stated, singly for negligence.[1]

When such combination of carriers extends its operation through several states, the law of the state where the negligence was committed is to prevail.[2]

§ 581. *Primary carrier undertaking only for himself liable only for his own negligence.* — But where the primary carrier does not hold out carriers who subsequently undertake the carriage as his agents, and when there is no contract between him and such subsequent carriers by which they undertake to transport the goods for him as his agents, then he is liable only for his own route, and when the contract requires, for safe delivery to the subsequent carrier.[3]

And where there is no public claim by a primary carrier that connecting carriers are his agents, and if, in receiving goods for an ultimate terminus, he expressly notifies the parties contracting with him that he is not liable for anything outside of his own route, then this limitation, if brought home to the consignor, will be sustained.[4]

§ 582. *Whenever a primary road enters into no contract with the passenger beyond that of selling a ticket to which is attached a coupon, easily detached, over a connecting but not continuous road, there being a change of cars at the connection, then, although there is a division of fares between the two roads, the first road is not liable for the negligence of the second road.* — In other words, the mere fact that one road sells tickets over another road makes the first road simply agent for the second road, and does not make the first road liable for the second road's negligence.[5] Thus in a recent New York case,[6] the evidence was that

[1] Barter *v.* Wheeler, 49 N. Y. 9. See Darling *v.* Bost. & A. R. R. 11 Allen, 295; Gass *v.* N. Y., Prov. & B. R. R. 99 Mass. 220; Burroughs *v.* Norwich & W. R. R. 100 Mass. 26; Pratt *v.* Ogdens. & L. C. R. R. 102 Mass. 557. Supra, § 535.

[2] Barter *v.* Wheeler, 49 N. Y. 9; Whart. Con. of L. § 479.

[3] Garside *v.* Trent & Mersey Nav. Co. 4 T. R. 581; Nutting *v.* Conn. R. R. R. 1 Gray, 502; Hood *v.* N. Y. & N. H. R. R. 22 Conn. 1; Van Santvoord *v.* St. John, 6 Hill (N. Y.), 158.

[4] Penn. R. R. *v.* Schwarzenberger, 45 Penn. St. 208; U. S. Expr. Co. *v.* Rush, 24 Ind. 403; Detroit & Milw. R. R. *v.* Farmers' Bk. 20 Wisc. 122. Converse *v.* Norwich & N. Y. Trans. Co. 33 Conn. 166. goes even further, but is of doubtful authority.

[5] See infra, § 604.

[6] Milnor *v.* N. Y. & N. H. R. R. Co. 53 N. Y. 363.

the defendant received from the plaintiff's assignor the fare from N. Y. to S., and gave therefor two tickets printed on the same paper but easily detached, one purporting to be its ticket from N. Y. to B., the other the ticket of the H. R. R. Co. from B. to S., containing a notice to change cars at B. The defendant checked the passenger's baggage to S., the check being marked H. R. R. The baggage was delivered at B. to the H. R. R. Co., and was destroyed by fire while in the possession of the latter. The roads connected at B., but were not a continuous route, and defendant's cars did not pass over the H. R. R. The fare received was divided between the two companies. In an action to recover for the loss of the baggage, it was held by the court of appeals, that the facts imported simply an agency, on the part of defendant, and not a contract by it as principal, for transportation over the H. R. R., and that defendant was not liable.[1]

[1] Church, Ch. J.: . . . . "The case of Quimby *v.* Vanderbilt (17 N. Y. 306) was very much relied upon by the counsel for the plaintiff. This court held in that case that separate tickets were not such contracts as precluded parol evidence that the contract was in fact entire. Denio, J. said: 'They are quite consistent with a more special bargain;' and added, 'we do not say that the receiving of separate tickets for the different lines is not evidence of some weight upon the question whether the contract was entire, but we hold that it does not come within the rule which excludes parol testimony respecting a contract which has been reduced to writing.' In that case there was positive evidence of a verbal contract from New York to San Francisco for a specified sum in gross, and there were various facts and circumstances tending to prove that the contract was entire on the part of the defendant. I agree that a contract might be shown independent of the tickets, and it would be competent to show that the tickets were delivered in pursuance of such contract, and it is unnecessary to say that the tickets would be inconsistent with proof of an entire contract. Here there was nothing proved but the sale of the tickets, the use of the check, and the receipt of money; and in holding that, from these facts and that the arrangement was for convenience, the presumption is an agency to sell the Housatonic tickets, we do not collide with anything said or decided in the case referred to. In the case of Hart *v.* The Renssellaer & Saratoga R. R. Co. 8 N. Y. 37, the defendant was the last of three connecting railroads between Whitehall and Troy, and was held liable upon the ground that the defendant's agents received the baggage at Whitehall, and had charge of it through to Troy. The separate tickets were not material. In Weed *v.* Saratoga & Shenectady R. R. Co. 19 Wend. 534, the defendant contracted to Albany and ran its cars the whole distance, but a part of the way over the Mohawk & Hudson River Railroad. In Cary *v.* Cleveland & Toledo Railroad Company, 29 Barbour, 35, where the circumstances were similar to those in this case, the court held, upon the point as to a through contract, that it was a question of fact for the jury, and

§ 583. *Valid agreement by primary carrier for a connecting series of roads relieves all the roads.* — An agreement by the owner with the primary carrier, when the goods are carried by a succession of auxiliary carriers, and when they are undertaken for the ultimate terminus by the primary carrier, that there should be no liability for fire or accident without negligence, pervades the whole transport of the goods, though the accident should occur on one of the auxiliary roads.[1] A different view has indeed been taken in Pennsylvania,[2] but without just ground, since the liability of the auxiliary carrier is simply that which devolves on him as agent of the primary carrier.

As has been seen, a primary carrier cannot relieve himself from the consequences of negligence by auxiliary roads when such roads form part of a joint combination.[3]

§ 584. *Company, though liable for any negligence in roads which it makes its agents, is not liable for injuries sustained by its passengers from a collision brought about by the negligence of a line to which it had leased part of its road, but over which it had no control.* — A railway company, by undertaking to carry a passenger between two places, contracts that he shall be carried in safety, and is responsible for the negligence of other companies over whose roads the plaintiff, in performance of the contract, is carried; supposing such negligence was in any way caused by those whom the contracting company made its agents.[4] The con-

as no request was made to submit it, the decision of the court was not erroneous. In the recent case of Burnell *v.* The N. Y. C. R. R. Co. 45 N. Y. 184, the ticket and check were from Palmyra to New York, and the contract was therefore held to be a through contract and the defendant liable for the negligence of the Hudson River Railroad Company. Each case must depend upon its own facts, but I have been unable to find any authority in this country which holds that the facts in this case constitute in law a contract on the part of the company selling the tickets for the entire route. The decided tendency of the authorities is the other way. Knight *v.* Portland, S. & P. R. R. Co. 56 Maine, 234; Brooke *v.* Grand Trunk R. Co. 15 Mich. 332; 2 E. D. Smith, 184; Root *v.* Great Western R. Co. 45 N. Y. 524. We think the decision of the special term was warranted, and that the judgment must be affirmed."

[1] Collins *v.* Brist. & Ex. R. R. 5 H. & N. 969, reversing *S. C.* 1 H. & N. 517, in the exchequer chamber, and affirming *S. C.* 11 Exch. 790; Maghee *v.* R. R. 45 N. Y. 514; Manhat. Oil Co. *v.* R. R. 51 N. Y. 197.

[2] C. & A. R. R. *v.* Forsyth, 61 Penn. St. 81.

[3] C., H. & D. R. R. *v.* Pontius, 19 Oh. St. 226.

[4] Great West. Ry. Co. *v.* Blake, 7 H. & N. 987; Buxton *v.* Midland Ry. Co., Law Rep. 3 Q. B. 549; Thomas *v.*

tract with the plaintiff is "that he should be carried throughout the journey for which the ticket was issued with reasonable care."[1] Thus in a case already referred to,[2] the evidence was that the plaintiff took a ticket of the defendants, a railway company, as a passenger from A. to C. At B., between A. and C., the defendants' line joins the line of the T. V. Company, over which the defendants have running powers from B. to C., on payment of certain tolls, the traffic arrangements being left in the control of the T. V. Company, and the station at B. belonging to and being in the exclusive control of the T. V. Company. After leaving B., it being after dark, the train of the defendants, in which the plaintiff rode, ran into a train of the T. V. Company, and the plaintiff was injured by the collision. The defendants' servants were guilty of no negligence, and the collision was owing to the negligence of the servants of the T. V. Company in sending on their own train without the proper tail light, and allowing the defendants' train to proceed on the same line of rails too soon after the other train without giving any warning to the driver of the defendants' train. It was ruled that the defendants were liable for the negligence of the T. V. Company; for that the contract into which a railway company enters with a passenger on giving him a ticket between two places is the same, whether the journey be entirely over their own line, or partly over the line of another company, and whether the passage over the other line be under an agreement to share profits, or simply under running powers: viz., that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management.[3]

§ 585. Yet a contracting line is not liable for the negligence of other lines over which it has no control, even though the injury sustained be to its own passengers on its own road, leased in part to the colliding line. In a case in the exchequer court in 1873,[4] the evidence was that the London & N. W. Co. had statutory authority to run over, in consideration of toll, a portion of the

Rhymney Ry. Co., Law Rep. 6 Q. B. 266.

[1] Bovill, C. J., in John *v.* Bacon, Law Rep. 5 C. P. 441–2.

[2] Thomas *v.* Rhymney Railway Co., Law Rep. 6 Q. B. 266.

[3] So held by Willis, J., and Bramwell, B., on the authority of Great Western Ry. Co. *v.* Blake, 7 H. & N. 987; 31 L. J. (Ex. 346); by the rest of the court both on principle and authority.

[4] Wright *v.* Midland R. R. 8 Exch. 137.

defendants' line. The signals, at the point of junction, were under the control of the defendants. In consequence of negligence on part of servants of the London & N. W. Co. a collision took place between a train of the latter line, and a train of the defendants' line, on which the plaintiff was travelling. The plaintiff was injured in this collision. It was held that he had no claim against the defendants. It was argued that a railroad company contracting to carry passengers from point to point are bound to see that other persons lawfully using their line use reasonable care. This, however, was denied by the court. "If they were to contract," said Bramwell, B., "that everybody should use care and diligence, their duty would extend to strangers," and an auxiliary road, not contracting to help carry the particular passenger complained of, is in this respect a stranger. "I quite agree," said Cleesby, B., "that a contract for carriage from one place to another extends over the whole journey, whether upon the line of the contracting company or not; and further, that it is the carrier's duty to use due and reasonable care during the whole journey." . . . . "But it is unsound to argue that the contract is that the railway shall be in a reasonably fit state so far as regards the acts of third parties, whoever they may be, who, whether negligently or not, cause some obstruction." [1]

[1] The distinction between the two cases mentioned in the text is thus clearly put by Cleesby, B., in Wright *v.* Midland Ry. Co., L. R. 8 Exch. 144:

"I also think that we may discharge this rule without in any way coming into conflict with any of the decided cases.

"I quite agree that a contract for carriage from one place to another extends over the whole journey whether upon the line of the contracting company or not; and, further, that it is the carrier's duty to use due and reasonable care during the whole journey. And I think that due and reasonable care extends to everything that is made use of by the contracting party during the course of that journey. For instance, as regards the construction of a railway, it embraces a contract that the rails themselves shall be in a sound and efficient state, so far as due care can make them so; and if they were worn out on a part of the railway not belonging to the contracting company, and which therefore they had not the power to repair, I agree that the decisions would establish that they would be liable for a want of care in those rails not being in a proper state if any damage was sustained thereby; and the same may be said if the switches or anything of that sort were defectively constructed, and it were made out that in the course of a journey over the rails an accident arose from that defective construction. So, again, as regards persons employed by the carrying company or made use of by them. The management of the stations, for example, is in the hands of

VIII. LIMITATION OF LIABILITY BY CONTRACT.

§ 586. *Agreements by which the carrier is relieved from his liability as insurer valid.* — That portion of a carrier's liability which is special to the English common law, and which consists of his liability for a damage not produced by his own or his servants'

certain persons; certain regulations are made; and I will suppose that whilst the regulations are proper and sufficient the persons intrusted with the duty of enforcing them, as in the Rhymney case, fail to do so, and an accident occurs in consequence. In such a case the contracting company, in performing their contract, make use of those persons, and although the arrangements at the station may be in other hands, still the carrying company would be responsible. That seems to me consistent with reason, and certainly is consistent with the authorities that have been referred to: it is consistent with Great Western Ry. Co. *v.* Blake, 7 H. & N. 987; 31 L. J. Ex. 346, where the decision is put upon the footing of there being neglect in allowing that to be upon the line which ought not to be there; and it is also consistent with Thomas *v.* Rhymney Ry. Co., Law Rep. 5 Q. B. 226; Law Rep. 6 Q. B. 266. In the latter case I was a party to the judgment in the exchequer chamber, and acquiesced in it upon the ground referred to in that passage which occurs in the Lord Chief Baron's judgment (at p. 274), where he put the case as one of negligence connected with the management of the railway, the defect being in the management of the railway during the journey on which the accident took place. That is the effect of the authorities, which I shall not go into any further.

"Now, it appears to me that the railway ought to be in a reasonably fit state, free from obstruction as far as regards the management and care of the railway; but it is unsound to argue (as is attempted in this case) that the contract is that the railway shall be in a reasonably fit state so far as regards the acts of third parties, whoever they may be, who, whether negligently or not, cause some obstruction. I cannot connect with the management of the railway something which is the direct effect not of defective regulations of the company, not of any act to which they were parties, not of the neglect of any person whose services they use, but of the neglect of some persons over whom they have no control whatever, and of whose services they do not make use.

"It seems to me the case of a level crossing is a very good illustration. Persons have a right to cross a level crossing with a cart. The railway company contracts to carry safely along the line, and the level crossing is upon that line. But do they contract that a person shall not, contrary to their regulations, cross at the time the train is going along properly? They do contract that the line shall be in a fit and proper state, so far as it can be made so by regulation; but they do not say it shall be in a proper state if a person contrary to their regulations brings a cart there. That seems to be the distinction that ought to be drawn in this case. Without, therefore, in any degree, dissenting from any of the authorities cited, I think the rule should be discharged."

negligence, he may be relieved from by special agreement with the owner of the goods.[1]

§ 587. *Notice brought home to owner sufficient.* — It may be stated generally that while the carrier cannot by general notice restrict liability,[2] he may do so by notice brought home to and accepted by the owner or his agent. "Assent is not necessarily to be inferred, from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered."[3]

§ 588. As to *baggage*, a bare notice on a ticket does not limit the carrier's liability;[4] but it is otherwise when the notice is brought home to the passenger either at the time of or before the purchase of the ticket.[5]

[1] McCann *v.* B. & O. R. R. 20 Md. 202; Michigan S. R. R. *v.* Heaton, 37 Ind. 448; Adams Ex. Co. *v.* Fendrick, 38 Ind. 150; N. I. S. N. Co. *v.* Merchants' Bk. 6 How. U. S. 344; York Co. *v.* Cent. R. R. 3 Wall. U. S. 107; Bankard *v.* Balt. & O. R. R. 34 Md. 197; Manhat. Oil Co. *v.* R. R. 54 N. Y. 197, and cases hereafter cited.

[2] Judson *v.* W. R. R. Co. 6 Allen, 486; Fillebrown *v.* G. T. R. R. 55 Me. 462; Lomberger *v.* Westcott, 49 Barb. 283.

[3] Bigelow, C. J., in Buckland *v.* Express Co. 97 Mass. 127; approved in Fillebrown *v.* G. T. R. R. 55 Me. 468. See Balt. & O. R. R. *v.* Brady, 32 Md. 333; Adams Ex. *v.* Stettaners, 61 Ill. 184.

[4] Rawson *v.* Pa. R. R. 48 N. Y. (3 Sick.) 212; Blossom *v.* Dodd, 43 N. Y. 264; Wilson *v.* Ches. & O. R. R. 21 Gratt. 654.

[5] See infra, § 613.

In Northrup *v.* Fargo, 63 Barb. 353, Johnson, J., says: . . . . "We understand the rule to be now settled, that a common carrier may limit his common law liability in certain particulars, and to a certain extent, by express contract with the owner or shipper of the goods. Dorr *v.* N. J. Steam Nav. Co. 11 N. Y. 485; Mercantile Mut. Ins. Co. *v.* Calebs, 20 Ibid. 173; Bissell *v.* N. Y. Cent. R. R. Co. 25 Ibid. 442; Parsons *v.* Monteath, 13 Barb. 353; Moore *v.* Evans, 14 Ibid. 524; Meyer *v.* Harnden's Express Co. 24 How. 290; French *v.* Buffalo, N. Y. & Erie R. R. Co. 4 Keyes, 108. But carriers cannot limit their liability by a mere notice, even though the notice is brought to the knowledge of the person whose property they carry. Blossom *v.* Dodd, 43 N. Y. 264; Dorr *v.* N. J. Steam Nav. Co., supra. It must be by express contract. Questions have sometimes arisen whether a receipt given by the carrier for the goods, containing a clause limiting and restricting his liability, operated as a contract to that effect between the carrier and the owner of the property carried under it, as in the case of Blossom *v.* Dodd, just cited. In such cases it has generally if not uniformly been held, that whether such receipt was to be regarded as a contract, de-

§ 589. *Agreements relieving carrier from liability for negli-*

pended upon the question whether the owner of the goods, taking the receipt, knew its contents or was presumed to have known them. If he knew, or is presumed to have known, from the nature of the transaction, the law infers his assent, and makes it the contract between the parties. Blossom *v.* Dodd, supra. . . . .

"This we regard as a sound and salutary rule of construction. The law seems to be now well settled in this state, that a carrier may, by express contract, exempt himself from liability for a loss arising even from the carelessness and negligence of his servants or agents. But in all such cases, where the exemption for loss from such cause is expressly provided for in the agreement, it has been uniformly held that such contract had no application to losses occasioned by the fraud or gross negligence of the carrier, or his servants and agents, and that the stipulation for exemption only applied to losses arising from want of ordinary care. Guillaume *v.* Hamburgh & Am. Packet Co. 42 N. Y. 212; Wells *v.* The Steam Nav. Co. 8 Ibid. 375; Alexander *v.* Greene, 7 Hill, 544. But here there is no such stipulation, and it must be held that the contract does not relate to losses arising from the negligence of the defendants or their agents. The same rule is applicable to the stipulation in respect to presenting their claim within thirty days from the accruing of the cause of action. But beside this, the presentation of the claim within the time and in the manner there specified is not a condition precedent to the right of action, and as a limitation it is not set up in the answer. Place *v.* Union Express Company, 2 Hill, 19.

"It is no valid objection that the plaintiffs are corporators or members of the company. The action is against the corporation." *S. C.* 6 Lansing, 319.

"In R. R. *v.* Richmond Man. Co. 16 Wall. 318, it was ruled that although a common carrier may limit his common law liability by special contract assented to by the consignor of the goods, an unsigned general notice printed on the back of a receipt does not amount to such a contract, though the receipt with such notice on it may have been taken by the consignor without dissent.

"Whether a carrier, when charged upon his common law responsibility, can discharge himself from it by special contract, assented to by the owner," so argues Davis, J., "is not an open question in this court since the cases of the New Jersey Steam Navigation Company *v.* The Merchants' Bank, 6 Howard, 344, and York Company *v.* Central Railroad, 3 Wallace, 107. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the former case, the effect of a general notice by the carrier seeking to extinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much controverted subject. In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: 'It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be im-

gence are invalid. — As a general principle, accepted as such by

plied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation, by parol or in writing, should be permitted to discharge him from duties which the law has annexed to his employment.'

"These considerations against the relaxation of the common law responsibility by public advertisements apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce, to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case this equality does not exist; and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

"It can readily be seen, if the carrier can reduce his liability in the way proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.

"The weight of authority is against the validity of the kind of notices we have been considering.[1] And many of the courts that have upheld them have done so with reluctance, but felt themselves bound by previous decisions. Still they have been continued, and this persistence has provoked legislation in Michigan, where this contract of carriage was made, and the plaintiffs in error have their ex-

[1] See 2 Parsons on Contracts, 238, note n, 5th edition; and the American note to Coggs *v.* Bernard, 1 Smith's Leading Cases, 7th American edition; Redfield, Law of Railways, p. 369; McMillan *v.* M. S. & N. J. R. R. Co. 16 Michigan, p. 109, and following.

our American courts almost without exception, we may hold that agreements relieving the carrier from liability for negligence are void.[1]

"The courts of New York," says Judge Bradley, in an opinion which we may here adopt, on account not merely of its authoritativeness but of the fulness and accuracy with which it exhibits our distinctive American jurisprudence on this point,[2] "where

istence. By an act of the legislature, passed after the loss in this case occurred, it is declared 'that no railroad company shall be permitted to change or limit its common law liability as a common carrier by any contract or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried.'[1] It is fair to infer that this kind of legislation will not be confined to Michigan, if carriers continue to claim exemption from common law liability through the medium of notices like the one presented in defence of this suit."

[1] New Jer. St. Nav. Co. *v.* Merch. Bk. 6 Howard, 344; Express Co. *v.* Kountze, 8 Wallace, 342; York Co. *v.* Cent. R. R. 3 Wall. 107; Sager *v.* P. I. & P. R. R. 31 Me. 228; Hall *v.* Cheney, 36 N. H. 26; Farm. & Mec. Bk. *v.* Champ. Trans. Co. 23 Vt. 205; Mann *v.* Birchard, 40 Vt. 326; Indianapolis, P. & C. R. R. *v.* Allen, 31 Ind. 394; Mich. S. R. R. *v.* Heaton, 37 Ind. 448; School Dist. *v.* B., H. & E. R. R. 102 Mass. 552. See Pratt *v.* Ogdens. & L. C. R. R. 102 Mass. 557; Great West. R. R. *v.* Hawkins, 18 Mich. 427; Clark *v.* Faxton, 21 Wend. 153; Smith *v.* N. Y. Cent. R. R. 29 Barb. 132; 24 N. Y. 181; Bissel *v.* N. Y. Cent. R. R. 25 N. Y. 442; Keeney *v.* Grand J. R. R. 47 N. Y. 525; *S. C.* 59 Barb. 104; Graham *v.* Davis, 4 Ohio, N. S. 362; Magnin *v.* Dinsmore, 35 N. Y. Super. 182; Cleveland, P. & A. R. R. *v.* Curran, 19 Ohio St. 1; Knowlton *v.* Erie R. R. 19 Ohio St. 269; Ill. Cent. R. R. *v.* Reed, 37 Ill. 484; Bingham *v.* Rogers, 6 W. & S. 495; Goldey *v.* Penn. R. R. 3 Penn. St. 242; Cam. & A. R. R. *v.* Bauldauff, 16 Penn. St. 67; Penns. R. R. *v.* McCloskey, 23 Penn. St. 526; Powell *v.* Penn. R. R. 32 Penn. St. 414; Penn. R. R. *v.* Butler, 57 Penn. St. 335; Hayes *v.* Kennedy, 3 Grant, 331; *S. C.* 41 Penn. St. 378; Lackawanna R. R. *v.* Cheneworth, 52 Penn. St. 382; Wolf *v.* West. U. Tel. Co. 62 Penn. St. 83; Lanc. Co. Nat. Bk. *v.* Smith, 62 Penn. St. 47; Empire Trans. Co. *v.* Oil Co. 63 Penn. St. 14; Cotton *v.* C. & P. R. R. 67 Penn. St. 211; Del. & Ches. St. T. C. *v.* Starrs, 69 Penn. St. 36; Am. Exp. *v.* Second Nat. Bk. 69 Penn. St. 394; Smith *v.* N. C. R. R. 64 N. C. 235; Orndorff *v.* Adams Ex. Co. 3 Bush, 194; Railway Co. *v.* Caldwell, 8 Kans. 244; Kans. Pac. R. R. *v.* Reynolds, 8 Kans. 641; Newman *v.* Smoker, 25 La. An. 383. Condict *v.* R. R. 54 N. Y. 500; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184; Com. *v.* R. R. 108 Mass. 7; Jacobus *v.* R. R., Alb. L. J. Aug. 8, 1874; Cent. L. J. July 30, 1874.

[2] R. R. *v.* Lockwood, 17 Wall. 357, deciding that an agreement by which a drover with a drover's pass was to travel at his own risk, did not relieve the road from liability for negligence causing hurt to himself.

[1] Statutes of Michigan, Compilation of 1871, p. 783, § 2386.

this case arose, for a long time resisted the attempts of common carriers to limit their common law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This they were allowed to enforce by means of a notice of non-liability if the disclosure was not made. But such announcements as 'All baggage at the risk of the owner,' and such exceptions in bills of lading as 'This company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged,' were held to be unavailing and void, as being against the policy of the law.[1]

"But since the decision in the case of the New Jersey Steam Navigation Company *v.* Merchants' Bank, by this court, in January term, 1848 (6 How. 344), it has been uniformly held, as well in the courts of New York as in the federal courts, that a common carrier may, by special contract, limit his common law liability, although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

"The case of the New Jersey Steam Navigation Company *v.* Merchants' Bank, above adverted to, grew out of the burning of the steamer *Lexington*. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although the terms of the contract were broad enough for that purpose; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss."

[1] Cole *v.* Goodwin, 19 Wend. 257; Gould *v.* Hill, 2 Hill, 623.

. . . . "The next cases of importance that arose in the New York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of Smith *v.* N. Y. Cent. R. R. Co. 29 Barb. 132, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car which caused it to jump the track. The supreme court, by Hogeboom, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. 'For my part,' says the judge, 'I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part.' The judge added, that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence or that of his servants. But to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extrajudicial. The judgment itself was affirmed by the court of appeals, in 1862, by a vote of five judges to three. 24 N. Y. 222. Judge Wright strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. 'Contracts in restraint of trade are void,' he says, 'because they interfere with the welfare and convenience of the state; yet the state has a deep interest in protecting the lives of its citizens.' He argued that it was a question affecting the public, and not alone the party who is carried. Judge Sutherland agreed in substance with Judge Wright. Two other judges held that if the party injured had been a gratuitous passenger, the company would have been discharged, but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

"In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

"The next case (Bissell *v.* The N. Y. Cent. R. R. Co. 29 Barb. 602), first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, 'whether of negligence by their agents or otherwise,' for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendants. The supreme court held that gross negligence (whether of servants or principals) cannot be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the court of appeals, four judges against three. 25 N. Y. Rep. 442. Judge Smith, who concurred in the judgment below, having in the mean time changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed by Wells *v.* The Central Railroad Co.; but whether so or not, the contract was founded on a valid consideration, and the passenger was bound to it, even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice Selden in favor, and by Justice Denio against, the conclusions reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, — that is the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice Denio, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or princi-

pals, where the lives and safety of passengers are concerned. The late case of Poucher *v.* N. Y. Cent. R. R. Co. 49 N. Y. 263, is in all essential respects a similar case to this, and a similar result was reached." [1]

"These are the authorities which we are asked to follow. Cases may also be found in some of the other state courts, which, by dicta or decision, either favor or follow more or less closely the decisions in New York. A reference to the principal of these is all that is necessary here: Ashmore *v.* Penn. R. R. Co. 4 Dutch. 180; Kinney *v.* Cent. R. Co. 3 Vroom, 407; Hale *v.* N. J. St. Nav. Co. 15 Conn. 539; Peck *v.* Weeks, 34 Conn. 145; Lawrence *v.* N. Y. R. Co. 36 Conn. 63; Kimball *v.* Rutland R. Co. 26 Vt. 247; Mann *v.* Birchard, 40 Vt. 332; Adams Exp. Co. *v.* Haynes, 42 Ill. 89; Ibid. 458; Ill. Cent. R. R. Co. *v.* Adams Exp. Co. Ibid. 474; Hawkins *v.* Great West. R. Co. 17 Mich. 57; *S. C.* 18 Mich. 427; Balt. & O. R. Co. *v.* Brady, 32 Md. 333; 25 Md. 328; Levering *v.* Union Transportation Co. 42 Mo. 88.

"A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the federal courts administering justice in New York have equal and coördinate jurisdiction with the courts of that State. And in deciding a case which involves a question of such importance to the whole country, a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the

[1] [In this case the evidence was that the defendant received of plaintiff at Newark a car load of sheep, to be transported to Albany, under a contract which contained a clause by which plaintiff agreed to go or send some one with the sheep, "who should take all the risks of personal injury from whatever cause, whether of negligence of defendants, its agents, or otherwise." After the sheep were loaded, plaintiff, who was intending to accompany them, and had a drover's pass, in passing by the tender to the engine was injured by a stick of wood negligently thrown therefrom. It was held by the court of appeals that, under the contract, defendant was exempted from liability.]

conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

"In passing, however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. 'The fruits of this rule,' says Justice Davis, 'are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts.' Stinson *v.* N. Y. Central R. Co. 32 N. Y. Rep. 337.

"We now proceed to notice some cases decided in other states, in which a different view of the subject is taken.

"In Pennsylvania, it is settled by a long course of decisions, that a common carrier cannot, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. Laing *v.* Colder, 8 Barr, 479; Camden & Amboy R. Co. *v.* Baldauf, 16 Penn. 67; Goldey *v.* Pennsylvania R. Co. 30 Penn. 242; Powell *v.* Penn. R. Co. 32 Penn. 414; Penn. R. Co. *v.* Henderson, 51 Penn. 315; Farnham *v.* Camden & Amboy R. Co. 55 Penn. 53; Express Co. *v.* Sands, Ibid. 140; Empire Trans. Co. *v.* Wamsutta Oil Co. 63 Penn. 14. 'The doctrine is firmly settled,' says Chief Justice Thompson, in Farnham *v.* C. & A. R. Co. 'that a common carrier cannot limit his liability so as to cover his own or his servants' negligence.' 55 Penn. 62. This liability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In Penn. R. Co. *v.* Henderson, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge Reed delivering the opinion, after a careful review of the Pennsylvania decisions, says: 'This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may be occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence.'

"The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence or that of his servants. Jones *v.* Voorhees, 10 Ohio, 145; Davidson *v.* Graham, 2 Ohio St. R. 131; Graham *v.* Davis, 4 Ohio St. 362; Wilson *v.* Hamilton, Ibid. 722; Welsh *v.* Pittsburg, Ft. W. & Chicago R. 10 Ibid. 75; Cleveland R. *v.* Curran, 19 Ibid. 1; Cincinnati, &c. R. *v.* Pontius, Ibid. 221; Knowlton *v.* Erie R. Ibid. 260. In Davidson *v.* Graham, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: 'He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. . . . . And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties.' In Welsh *v.* P., Ft. W. & Chicago R. the court says: 'In this state, at least, railroad companies are rapidly becoming almost the exclusive carriers both of passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the state.' From these facts the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: 'This doctrine, when applied to a corporation which can only act through its agents and servants, would secure complete immunity for the neglect of every duty.' Pp. 75, 76. And in relation to a drover's pass, substantially the same as that in the present case, the same court, in Cleveland, &c. R. *v.* Curran, 19 Ohio St. 1, held: 1. That the holder was not a gratuitous passenger. 2. That the contract constituted no defence against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of Bissell *v.* The New York Central R. 25 N. Y. 442; and of Penn. R. *v.* Henderson, 51 Penn. St. R. 315; and expresses its concurrence in the Pennsylvania decision. Pp. 13, 14. This was in December term, 1869.

"The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is ad-

missible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured; whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendants, that the burden of proof was on the plaintiff.

"In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, &c. (Fillebrown *v.* Grand Trunk R. Co. 55 Maine, 462); yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. 'The very great danger,' says the court, 'to be anticipated by permitting them' (common carriers) 'to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be over-estimated. It would remove the principal safeguard for the preservation of life and property in such conveyances.' Sager *v.* Portsmouth, 31 Maine, 228, 238.

"To the same purport it was held in Massachusetts, in the late case of School District *v.* Boston, &c. Railroad Co. 102 Mass. 552, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, and the court say: 'The special contract here set up is not alleged, and could not by law be permitted to exempt the defendants from liability for injuries by their own negligence.'

"To the same purport, likewise, are many other decisions of the state courts, as may be seen by referring to the cases, some of which are argued with great force and are worthy of attentive

perusal, but, for want of room, can only be referred to here. Indianapolis R. *v.* Allen, 31 Ind. 394; Mich. South. R. *v.* Heaton, 31 Ind. 397, note; Flinn *v.* Phil., Wilm. & Balt. R. 1 Houston's Del. R. 472; Orndorff *v.* Adams Exp. Co. 3 Bush (Ky.), R. 194; Swindler *v.* Hilliard & Brooks, 2 Rich. (So. Car.) 286; Berry *v.* Cooper, 28 Ga. 543; Steele *v.* Townsend, 37 Ala. 247; Southern Express Co. *v.* Crook, 44 Ala. 468; Whitesides *v.* Thurlkill, 12 Sm. & Mar. 599; Southern Express Co. *v.* Moon, 39 Miss. 822; N. O. Mutual Ins. Co. *v.* Railroad Co. 20 La. Ann. 302.

"It remains to see what has been held by this court on the subject now under consideration.

"We have already referred to the leading case of the N. J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. 383. On the precise point now under consideration, Justice Nelson said: 'If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of goods, it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties.'

"As to the carriers of passengers, Mr. Justice Grier, in the case of Philadelphia & Reading R. *v.* Derby, 14 How. 486, delivering the opinion of the court, said: 'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such a transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross."' That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument, that as to him, nothing but 'gross negligence' would make the company liable. In the subsequent case of the Steamboat New World *v.* King, 16 How. 469, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, Curtis, Justice, delivering the judgment, quoted the above proposition of Justice Grier, and said: 'We desire to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law.'

"In York Company *v.* Central Railroad, 3 Wall. 113, the court,

after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: 'When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.' In the case of Walker *v.* The Transportation Company, decided at the same term (3 Wall. 150), it is true, the owner of a vessel destroyed by fire on the lakes was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in Express Co. *v.* Kountze Brothers, 8 Wall. 342, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge at the trial charged the jury, that although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence, they were responsible; and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law.

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higgle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And this reason is obvious enough — if they did not accept this, they must pay tariff rates. These rates were seventy cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at 2,000 pounds,

making a charge of $14 for every animal carried, instead of the usual charge of $70 for a car load; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

"If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do, in fact, control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became in-

jured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society, and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law." [1]

§ 590. In England the earlier cases hold that such agreements

[1] "In Pennsylvania," says Read, J., in Penns. R. R. *v.* Henderson, 51 Penns. St. 315, "we have always adhered to one rule with regard to the limitation of their liability by common carriers, from Beckman *v.* Shouse, 5 Rawle, 179, decided on the 30th March, 1835, to Goldy *v.* Pennsylvania Railroad Company, 6 Casey, 248, decided in 1858, a period of twenty-three years, and such is still the doctrine of our courts. The last case was tried before the present chief justice, at nisi prius, and was argued by me in that court and in the supreme court, and, upon looking at my paper book, I find the latest English cases as well as our own were brought to the attention of the court. The agreement or release in this case relieved the company from all responsibility for any injury to person or property in the transportation of live-stock, and the learned judge charged the jury that "the carrier is bound, notwithstanding such a contract, to use ordinary diligence, such as a man of common prudence ordinarily employs in his own concerns; and if he fail in this and loss ensues therefrom, he is liable in damages. This company, holding itself out as a common carrier, and professing to have a railway, cars, and facilities for the transportation of live-stock, were bound, even after the plaintiff had signed the release, by the rule of ordinary diligence and care. The effect of the contract was to take away the insurance against all risks, to abridge their common law liabilities, but not to excuse them for the want of ordinary care in the execution of the duty voluntarily assumed." And Chief Justice Lowrie, in delivering the opinion of the court in banc, stated this proposition: that "a contract limiting their liability as carriers does not relieve them from ordinary care in the performance of their duty; and the most it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be actually proved against them." . . . .

are valid only as relieving the carrier from insurance against *casus* or accidents occurring without his fault,[1] but according to Blackburn, J., the cases decided "between 1832 and 1854 established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility, even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants; and it seems to me, the reason why the legislature intervened in the railway and canal traffic act in 1854 was because it thought that the companies took advantage of those decisions to subvert (in Story's language) the salutary policy of the common law."[2]

§ 591. The railway and canal traffic act (17 & 18 Vict. ch. 31, § 7), just mentioned, requires the courts to determine the question of the reasonableness of exemptions in contracts by carriers; and it is held that under this act a stipulation relieving a carrier of goods from liability for negligence is unreasonable, and will be treated as inoperative.[3] But at the same time, it is held that a *passenger* may agree that he shall be carried at his own risk; and if so, the carrier is not liable even for gross negligence.[4] And it was expressly ruled in 1873, a few months before the decision by the supreme court of the United States that has just been cited at length, that a drover who agreed that he was to be carried at his own risk could not recover damages from the company for injuries produced by their negligence.[5]

[1] Batson *v.* Donovan, 4 B. & A. 21. See Duff *v.* Budd, 3 Brod. & B. 177; Beck *v.* Evans, 16 East, 244; Smith *v.* Horne, 8 Taunt. 144; Bodenham *v.* Bennett, 4 Price, 31; Wyld *v.* Pickford, 8 M. & W. 443. Such, at least, was the law which, as stated by Blackburn, J., obtained until 1832. Peck *v.* R. R. 10 Ho. L. Cas. 473.

[2] Peck *v.* R. R., *ut supra*.

[3] Aldridge *v.* Great W. R. R. 15 C. B. N. S. 582; Beal *v.* Devon. R. R. 3 H. & C. 337; Peck *v.* N. Staff. R. R. 10 Ho. Lds. Cas. 473.

[4] Carr *v.* Lancashire & Yorkshire R. R. Co. 7 Exch. 707; Austin *v.* Manchester R. R. Co. 10 C. B. 454; McCawley *v.* Furness, L. R. 8 Q. B. 57.

[5] McCawley *v.* Furness, L. R. 8 Q. B. 59. The arguments of the judges were as follows: —

Cockburn, C. J.: "I think that the plea is good, and the replication bad. The terms of the agreement under which the plaintiff became a passenger exclude everything for which the company would have been otherwise liable. They would have been liable for nothing but negligence, and they would have been liable for negligence whether gross or of a minor degree; and so far, under ordinary circumstances, the passenger would have been carried at their risk. But it was agreed that the plaintiff should be carried at his own risk, which must be taken to exclude all liability

§ 592. *Conflict of opinion as to validity of agreements releasing company from liability for negligence to passenger.* — It will be seen, therefore, that so far as concerns the question, whether a drover, by agreeing with a railroad to travel, on a free pass, at his own risk, can recover from the company for damage received by him through their negligence, there is a direct conflict between the court of the queen's bench and the supreme court of the United States. On this conflict the following observations may be ventured: (1) Whether the passenger is "free" or not is immaterial, on the reasoning of the supreme court of the United States.[1] That reasoning rests on the assumption that railroads are public agencies, bound, on public reasons, to show due diligence to the carriage of passengers as well as of goods. If this be the case, this diligence is a public duty, the fidelity in the performance of which is not to be graduated by the amount of pay received. Were it to be so graduated, we would have first-class diligence required for first-class passengers; second-class diligence for second-class passengers; and so on until a minimum of diligence amounting to recklessness would be assigned to passengers who do not pay anything. No doubt, so far as concerns the furniture and speed of trains, such a graduating scale is proper;

on the part of the company for any negligence for which they would otherwise have been liable."

Blackburn, J.: "I am of the same opinion. The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to danger, and he is killed, they might be guilty of manslaughter, and they would certainly be liable to the relatives of the deceased in damages. But here the passenger was carried under special terms; that agreement would not take away any liability that might be incurred as to criminal proceedings, but it regulates the right of the plaintiff to recover damages. The plea states that it was agreed that the plaintiff, being a drover travelling with cattle, should travel at his own risk; that is, he takes his chance, and, as far as having a right to recover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It would of course be quite a different thing were an action brought for an independent wrong, such as an assault, or false imprisonment. Negligence in almost all instances would be the act of the company's servants, and 'at his own risk' would of course exclude that, and gross negligence would be within the terms of the agreement; as to wilful, I am at a loss to say what that means; but any negligence for which the company would be liable (confined, as I have said, to the journey, and it is so confined by the declaration) is excluded by the agreement."

[1] See supra, § 438.

but when the diligence so to be apportioned is that which concerns the care of life and limb, and which involves the application of so perilous a power as steam, no distinction can be recognized between those who pay a first-class fare and those who pay little or nothing. (2) Supposing it to be true that railroads are public agencies, bound, on public reasons, to show due diligence in the carriage of passengers as well as of goods, then the conclusion cannot be disputed that this diligence cannot be dispensed with by agreement between road and passengers. *Jus publicum*, says Papinius, *privatorum pactis mutari non potest;*[1] and this no doubt is true in all cases where the attempt is to evade by private agreement a law designed for the protection of the public. (3) At the same time it must be remembered that there are two cases where a passenger (*e. g.* a drover, as in the cases before us) is precluded, even admitting the principle above stated to be correct, from recovering damages from a railroad for injuries accruing to himself through negligence. The first is where the negligence was the joint act of the carrier and the passenger, or was the passenger's exclusive act, as in case of a drover, who, undertaking to feed his stock on a journey, neglects so to do. The second is where the passenger made himself a servant of the railroad, and was aware before the injury of the risks which led to it.[2]

§ 593. *When a limitation of the carrier's common law liabilities is effected by a valid agreement, the carrier loses the character of an insurer, but continues to be charged with the duties of a common carrier as in other respects.* — It is said by a learned member of the supreme court of Michigan, that "when a limited responsibility is legally contracted for, the bailee is not a common carrier in the full common law sense, but a private carrier or a bailee of another class, or a common carrier *sub modo* only."[3] The tendency of the Pennsylvania cases, as elsewhere noticed, is to take, when the occasion demands (*e. g.* with contracts for the conveyance of cattle, a contract foreign to the English common law doctrine of common carriage), the first of the above alternatives, holding that a

[1] L. 38. D. de pact. 2. 14.

[2] Infra, § 641 *a*.

[3] Graves, J. — Lake Shore R. R. *v.* Perkins, 25 Mich. 335, citing Dorr *v.* New J. Steam Nav. Co. 11 N. Y. (1 Kern.) 485; New J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. (U. S.) 344; York Company *v.* Central R. R. 3 Wall. 107; Farnham *v.* Cam. & A. R. R. 55 Penn. St. 53.

special agreement by a carrier to transport a particular class of goods in a particular way, giving to them a care entirely distinct from the usual care of a common carrier, constitutes a special form of bailment, which would fall under the title of mandates for pay.[1] There can be no question that as to the particular duties with which the carrier thus charges himself, he becomes a mandatary, subject, as is elsewhere shown, to the general liabilities as to diligence which adhere to mandataries. Under such circumstances, the burden, in a suit for negligence in discharging such peculiar duties, would be on the plaintiff. At the same time, as to that portion of the carrier's duties under such a contract which belong to him as a common carrier, his duties continue as at common law, and must be construed and applied as such by the courts. In conformity with these views it has been held in Ohio that in a suit against the carrier, on such common law duties, the burden is on the defendant to prove *casus* or *vis major*.[2]

§ 594. *Owner or consignor of goods selecting his own carriage or vessel.* — While a carrier is bound to have adequate carriages or vessels suitable for the kind of carriage he undertakes, it is possible for the consignor, by selecting a particular carriage or vessel, after full knowledge of its defects, to so far assume the risk of the venture as to relieve the carrier for liability for damages accruing through the defects thus assumed by the consignor.[3] But this is to be taken with two qualifications. In the first place, the defect must be a matter as to which the consignor must be as competent to judge of as the carrier. Defects which the carrier knows, or ought to know, to be very serious, the consignor, who is not required to be an expert in the business of a carrier, may be unable properly to estimate.[4] Secondly, the existence of such defects, and the knowledge of them by the consignor, do not diminish the duty of the carrier to remedy them if within his power.[5]

[1] See infra, § 614.

[2] See Davidson *v.* Graham, 2 Ohio St. 131; Graham *v.* Davis, 4 Ohio St. 362; Wilson *v.* Hamilton, 4 Ohio St. 722; Welsh *v.* Pitts., F. W. & C. R. R. 10 Ohio St. 75; Cleveland R. R. *v.* Curran, 19 Ohio St. 1; R. *v.* Pontius, 19 Ohio St. 221; Knowlton *v.* Erie R. R. 19 Ohio St. 260; and see remarks of Bradley, J., on this point in N. Y. C. R. R. *v.* Lockwood, quoted supra. See supra, § 422.

[3] Harris *v.* North. Ind. R. R. 20 N. Y. 232. Infra, § 641 *a*.

[4] Powell *v.* Penn. R. R. 32 Penn. St. 414.

[5] East Tennessee R. R. *v.* Whittle, 27 Ga. 535; Hannibal R. R. *v.* Swift,

§ 595. *Special agreements as to transport of live-stock.* — It is elsewhere noticed that the transport in carriages of live-stock to a distant terminus requires special qualifications and care, distinct from, if not incompatible with those exercised by a carrier of passengers according to the definition both of Roman and Anglo-American law. The common carrier, by the latter definition, must provide road-worthy carriages and servants capable of driving such carriages; and he is liable for all injuries caused by negligence, either in the structure of his carriages, the condition of his road so far as it is controlled by himself, or the conduct of his servants in the management of carrier and road. But the transporter of live-stock by rail has duties which, in order to enable them to reach their destination, are of a character different either from those just described, or from those of a carrier of goods. The cattle must when on transit be fed, watered, and nursed. Now does the duty of a common carrier at common law include such feeding and nursing? So far as concerns *passengers*, it has been urged, with much force, that the duty of a common carrier does not oblige him to take care of a sick passenger, but that such passenger should provide himself with a nurse as his own special servant.[1] No one would maintain, supposing a sick passenger thus provides himself with a nurse, that the railroad would be liable for the nurse's negligence. Is a common carrier, as such, required to nurse cattle on the road? No doubt he can undertake to do this by special contract, but is not such a contract severable from his common law duties as a common carrier, and does it not[2] make him a mandatary, subject to the law of negligence as applicable to mandates? And if this duty of nursing is assumed by the owner of the cattle, by special agreement with the carrier, is the carrier liable for the owner's negligence when executing this particular duty? This is an interesting question which, as thus detached, does not appear to have received distinctive judicial consideration. Undoubtedly we frequently meet with strong general statements to the effect that a carrier cannot exonerate himself by special agreement from damage happening to cattle sent over his road.[3] But these expressions we may not

2 Wall. 262; Chouteau *v.* Leech, 18 Penn. St. 224.

[1] New Orleans, I. & G. N. R. R. *v.* Statham, 42 Miss. 607.

[2] See supra, § 594.

[3] See particularly Fillebrown *v.* Grand Trunk R. R. 55 Me. 462, and other cases cited by Judge Bradley in

unnaturally regard as limited to damages arising from negligent management of the road, and not as extending to collateral duties, such as the nursing and tending of cattle when on transit.[1]

It is at all events clear that, on principles elsewhere stated, if the owner attends, and contributes to or shares in the negligence, he cannot recover from the carrier for injuries which such negligence caused.[2]

New Y. C. R. R. *v.* Lockwood, quoted § 589.

[1] Thus in Cragin *v.* N. Y. C. R. R. Co. 51 N. Y. 61, where the evidence was that the defendant contracted to transport a lot of hogs for plaintiffs from Buffalo to Albany, and by the contract, in consideration of a reduced rate of freight, plaintiffs assumed the risks of injuries from heat, &c., but that forty-three of the hogs died from the effects of heat, the result of the negligence of defendant's employees in not watering and cooling the hogs by wetting; it was ruled, in an action to recover damages, that as the common law liability of carriers did not apply to live-stock, but in the transportation thereof they were only liable for negligence, to give effect to the stipulation in the contract, it must be construed as exempting defendant from injuries by heat, the result of negligence, and that therefore defendant was not liable. In his opinion Earl, C. said: "In this state it is well settled that a carrier may, by express contract, exempt himself from liability for damages resulting from any degree of negligence on the part of his servants, agents, and employees. Lee *v.* Marsh, 42 Barb. 102; Keeny *v.* Buffalo & N. Y. Erie Co. 4 Keyes, 108; Keeny *v.* Grand Trunk R. R. Co. 59 Barb. 104; Bissell *v.* N. Y. Central R. R. Co., supra. In some of the States it is held that a carrier cannot be exempted from responsibility for gross negligence. But so long as the freighter can insist that the carrier shall carry his property under the common law responsibility, there can be no reason founded in justice, convenience, or public policy why he may not voluntarily enter into a contract founded upon sufficient consideration, exempting the carrier from all responsibility for any degree of negligence, whether it be gross or slight.

"In this case the plaintiffs assumed and agreed to take the risk of injuries to the hogs in consequence of heat. Effect should be given to this stipulation. The parties must be held to have meant something by it. In consideration that the plaintiffs would assume and take certain risks, which would otherwise devolve upon the defendant, it agreed to carry at a reduced rate. If it be held that this stipulation simply exempts the defendant from liability for injuries to the hogs from heat without any fault in its part, then it gets nothing; for in such case, without stipulation, it would not be responsible. Force and effect can be given to this stipulation only by holding that it was intended to exempt the defendant from negligence, in consequence of which the hogs died from heat." . . . .

[2] Squire *v.* N. Y. Cent. R. R. 98 Mass. 239. See Bissell *v.* N. Y. Cent. R. R. 25 N. Y. 442; Rixford *v.* Smith, 52 N. H. 355. Supra, § 300, 563.

§ 596. *Mere usage without proof of notice no agreement.* — It is no defence, in case of loss while the live-stock is on board a vessel, for the carriers to show a custom to the effect that they took no risk in case of losses of this kind. To make the defence good that such a custom prevailed, it must be shown that the shipper had full knowledge of the custom at the time of shipment, and that he delivered the stock on board with reference to the custom.[1]

§ 597. *Special agreement valid by which owner takes risk of loss of cattle by overcrowding.* — When the owner has an opportunity of examining the cars, and is cognizant of the way in which they are packed, and then agrees that he will take the risk of overpacking, he cannot recover from the road damages caused by such overpacking.[2]

[1] Pitre *v.* Offatt, 21 La. An. 679.

[2] The authorities on this point are ably examined in Squire *v.* N. Y. Central R. R. Co. 98 Mass. 245, by Gray, J.: . . . . "The owner also agrees to take the risk of injuries which the animals may receive 'in consequence of heat, suffocation, or of being crowded, or on account of being injured, whether such injury shall be caused by the burning of hay, straw, or any other material used for feeding said animals, or otherwise.' It might not be easy, and in this case is not necessary, to define with accuracy the limits of the operation of the latter part of this clause. It could not, consistently with American decisions of high authority, be held to imply an exemption of the carriers from the consequences of their own negligence or misconduct. New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 383, 384; Sager *v.* Portsmouth Railroad Co. 31 Maine, 228; Wells *v.* Steam Navigation Co. 4 Selden, 375. Neither does this case call for any opinion upon the validity or effect of the subsequent distinct stipulations that the owner shall take all risk of injuries happening in consequence of defects in the floor, frame, or doors of the cars, and that the person in charge of the animals shall take all risk of personal injury from whatever cause, whether negligence of the carriers or their agents, or otherwise.

"It is the first part of the clause just quoted which is immediately involved in this case, by which the owner or shipper agrees to take the risk of injuries to the animals 'in consequence of heat, suffocation, or of being crowded.' He also agrees to load and unload the animals at his own risk, to examine the cars on which they are to be carried, and to go or send one or more men in the same train (who are to be carried free of fare) to take charge of them. The only cause of injury to the plaintiff's hogs, which the evidence offered at the trial tended to prove, was suffocation by overcrowding and want of ventilation. We are unable to see anything contrary to the policy of the law in permitting the parties to agree together that, in consideration of the payment of a reduced rate of freight, a person who delivers property of this nature to a carrier, to be laden

§ 598. *A contract by which the owner or consignee "assumes all loss by fire" will not be so construed as to exonerate the carrier*

and transported, under the immediate charge of himself or his agent, in cars which he has an opportunity of examining, should bear the risk of injuries resulting from the size and mode of construction of the cars and the manner of stowing the property. A similar contract has been held valid and binding to this extent by the supreme court of Vermont. Kimball *v.* Rutland & Burlington Railroad Co. 26 Vermont, 247. And in New York, where the contract in question was made and to be performed, and by the law of which, as was agreed at the argument, the rights of the parties are to be regulated, contracts exactly like this have been held by the court of appeals to be lawful and conclusive, both as to the risks to which the animals are exposed and as to the injuries to the person travelling in charge of them. Bissell *v.* New York Central Railroad Co. 25 N. Y. 442, and cases cited.

"The English cases cited for the plaintiff's arose under the St. of 17 & 18 Vict. c. 31, § 7, by which carriers are allowed to make such special contracts only as shall be adjudged to be just and reasonable by the court before which the question may arise. Peek *v.* North Staffordshire Railway Co. 10 H. L. Cas. 473. In Gregory *v.* West Midland Railway Co. 2 H. & C. 944, the contract was held by its terms to exempt the carriers from all responsibility whatever, and to be therefore unreasonable. In Allday *v.* Great Western Railway Co. 11 Jur. (N. S.) 12, the contract which was held to be unreasonable undertook to exempt the carriers, among other things, from risks of 'overcarriage,' or 'any other cause whatsoever,' and the damage sued for was occasioned by carrying the cattle beyond their destination. Even in that case, Lord Chief Justice Cockburn said: 'If it could really be shown that the company had undertaken to carry the cattle at lower rates than they were legally entitled to, in consideration of the owner being content to take his chance of the due arrival and safety of his property, I think, under such circumstances, they would have been protected.' And in Pardington *v.* South Wales Railway Co. 1 H. & N. 392, it was adjudged that a clause like that now before us was reasonable, and exempted the carriers from liability for loss by suffocation of cattle put by them, not into proper cattle trucks, but into vans closing with lids, one of which became closed on the journey while the servant travelling in charge of the cattle was in another car. See also Beal *v.* South Devon Railway Co. 5 H. & N. 875, and 3 H. & C. 337." . . . .

So in Rixford *v.* Smith, 52 N. H. 355, it was held that the carrier of cattle is not liable to the owner for loss or damage caused by an inherent defect in the thing or animal carried without any fault of the carrier, or by the manner of packing or loading, the responsibility of which the owner has assumed. (See also supra, § 563.)

Doe, J.: "It seems to us correct to say that, by an elementary general principle of the law of common carriage insurance, a common carrier of live animals is not bound to insure them against inevitable accidents caused by their own fault or vice, in the sense explained by Mr. Justice Willes. And we do not see how this principle can relieve the carrier from the liability of an insurer on other points, to which this principle has no application. He may still be

for any loss to which his negligence in any sense contributed.[1] — Thus where goods, having been shipped upon the defendants'

bound to insure against inevitable accidents caused by defects in his road, track, cars, and machinery, and against loss by embezzlement, theft, and trespass, when he has such exclusive possession and control of the property carried as require him to be an insurer in those particulars, on the ground of that public expediency or policy, recognized by the law as equivalent to a practical, reasonable necessity, which is the reason of the law, and the foundation of the whole doctrine of this compulsory kind of insurance. Palmer *v.* G. J. R. Co. 4 M. & W. 749, 758; Brind *v.* Dale, 8 C. & P. 207; Willoughby *v.* Horridge, 12 C. B. 742; Martin *v.* G. I. P. R. Co. L. R. 3 Exch. 9; White *v.* W. Co. 7 Cush. 155; N. J. S. N. Co. *v.* Merchants' Bank, 6 How. 344.

"Where, however, the cause of the damage for which recompense is sought is unconnected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach. . . . . 'Considering the law of carriers to be established upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exception requires.' Denio, C. J., in Clarke *v.* R. & S. R. Co. 14 N. Y. 570, 574. When the rule is applied as far as the reason of it requires, and no further, there is no departure from the law, and no exception to the rule. The general principle does not transcend the bounds of the sound policy upon which it is based. The legal structure, in its length and breadth, is coextensive with its foundation. Where the reason of the law stops, the law itself stops.

"The decisions directly in point are much less numerous than they would have been but for an unfortunate innovation, introduced in Westminster Hall. The English courts having adopted a new and erroneous doc-

[1] Condict *v.* R. R. 54 N. Y. 500; Empire Trans. Co. *v.* Wamsutta Oil Co. 63 Pa. St. 17. In this case, where there was an agreement that the company should not be liable for loss from fire, but where fire took place through the negligence of the defendants in permitting combustible matter to be in the car, Sharswood, J., said: "It (the carriage) must be perfect in all its parts, in default of which he becomes responsible for any loss that occurs in consequence of any defect, or to which it may have contributed. New Jersey Railroad Co. *v.* Kennard, 9 Harris, 204. *When merchandise, of whatever character, is carried on the same railroad train with cars loaded with a combustible substance, easily ignited by sparks from the locomotive engine*, it is the special duty of the carrier to take every available precaution against the communication and spreading of the fire, if it should occur. An evident and simple measure is, to have the coupling of the cars in such perfect order that any one or more of them can be easily detached from the others, in time to be saved from the consequences. If the fact be that the coupling was defective, unless such defect was the result of an inevitable accident, and, in consequence of it, the car containing the plaintiff's merchandise could not be detached in time to be saved, the negligence and liability of the carrier are inferences of law, from the facts."

railway under a bill of lading containing a clause releasing it from liability "for damage or loss to any article from or by fire

trine, giving effect to notices and conditions by which common carriers sought to limit their common law liability, 'the rule of the common law has been substantially restored' by parliament. Moses *v.* B. & M. R. 24 N. H. 71, 87; Hollister *v.* Nowlen, 19 Wend. 234, 237, 241, 243, 248, 249, 250. By the Railway & Canal Traffic Act of 1854, 17 & 18 Vict. ch. 31, sec. 7, such notices and conditions as shall be adjudged to be just and reasonable by the court; and no special contract between any such company and any other parties, respecting transportation, is binding upon any such party, unless signed by him or by the person delivering the property for carriage. Such conditions, to be binding, must not only be, in the opinion of the court, just and reasonable, but must also be embodied in a special contract in writing, signed by the owner, bailor, or person delivering the goods to such company. Simons *v.* G. W. R. Co. 18 C. B. 805; L. & N. W. R. Co. *v.* Dunham, Ibid. 826; Aldridge *v.* G. W. R. Co. 15 C. B. N. S. 582; Peck *v.* N. S. R. Co. Ellis, B. & E. 958; *S. C.* Ibid. 986; *S. C.* 4 B. & S. 1005; 10 H. L. Cas. 473. 'The intention of the legislature in passing the act in question (17 & 18 Vict. ch. 31) was to place the whole railway system under the control of the court.' Jervis, C. J., in L. & N. W. R. Co. *v.* Dunham, 18 C. B. 826, 829. English cases abound in, and generally turn on notices, conditions, special contracts, and statutes. So far as they show what are regarded in England as just and reasonable conditions, they may be of some value in this country. But the errors that prevailed there before the interposition of parliament, and the modified forms in which the common law has been restored by legislation, prevent our receiving much of that assistance which would have been afforded by the English authorities had there been no departure from the old law in that country. Hinton *v.* Dibbin, 2 A. & E. N. S. 646; Shaw *v.* Y. & N. M. R. Co. 13 A. & E. N. S. 347; Austin *v.* M. S. & L. R. Co. 10 C. B. 454; Austin *v.* M., S. & L. R. Co. 16 A. & E. N. S. 600; Carr *v.* L. & Y. R. Co. 7 W., H. & G. 707; Walker *v.* Y. & N. M. R. Co. 2 E. & B. 750; Beal *v.* S. D. R. Co. 5 H. & N. 875; *S. C.* 3 H. & C. 337; Y., N. & B. R. Co. *v.* Crisp, 14 C. B. 528; Hughes *v.* G. W. R. Co. Ibid. 637; Slim *v.* G. N. R. Co. Ibid. 647; MacAndrew *v.* E. Telegraph Co. 17 C. B. 3; Wise *v.* G. W. R. Co. 1 H. & N. 63; Pardington *v.* S. W. R. Co. Ibid. 392; White *v.* G. W. R. Co. 2 C. B. N. S. 7; M'Manus *v.* L. & Y. R. Co. 2 H. & N. 693; *S. C.* 4 H. & N. 327; Coxon *v.* G. W. R. Co. 5 H. & N. 274; Lewis *v.* G. W. R. Co. Ibid. 867; Harrison *v.* L., B. & S. C. R. Co. 2 B. & S. 122; *S. C.* Ibid. 152; M'Cance *v.* L. & N. W. R. Co. 7 H. & N. 477; Garton *v.* B. & E. R. Co. 1 B. & S. 112; Gregory *v.* W. M. R. Co. 2 H. & C. 944; Hodgman *v.* W. M. R. Co. 5 B. & S. 173; Allday *v.* G. W. R. Co. Ibid. 903; Chippendale *v.* L. & Y. R. Co. 7 Railway Cas. 824; 15 Jur. 1106; 12 L. J. Q. B. 22; G. N. R. Co. *v.* Moville, 7 Railw. Cas. 830; 16 Jur. 528; 21 L. J. Q. B. 319; Lloyd *v.* W. & L. R. Co. 15 Irish C. L. 37; Dodson *v.* G. T. R. Co. 7 Canada L. J. N. S. 263; P. & O. S. N. Co. *v.* Sand, 3 Moore P. C. C. N. S. 272; Baxendale *v.* G. E. R. Co. 10 B. & S. 212; Redmayne *v.* G. W. R. Co., L. R. 1 C. P. 329; Lord *v.* M. R. Co., L. R. 2 C. P. 339.

or explosion of any kind," were destroyed by fire, kindled by sparks from the locomotive hauling them: it was ruled by the New York court of appeals that such clause did not exempt the defendant from liability for loss by fire occasioned by the omission to apply to the locomotive any apparatus known and actually in use, which would prevent the emission of sparks; though it was added, that the charge of the judge, that if the jury should find "that a locomotive could be so constructed as to prevent the emission of sparks, and thereby secure combustible matter from ignition, and the defendant neglected so to construct this locomotive, they should find for plaintiff, because there was a duty upon the defendant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation," was error, and not in accordance with the correct rule.[1]

IX. BAGGAGE.

§ 599. *Baggage of traveller is generally to be regarded as goods received by common carrier under the ordinary terms of common carriage.*[2] — But whether the common carrier is the *insurer* of baggage has been doubted in England;[3] though the affirmative is expressly declared by the supreme court of the United States.[4]

§ 600. *Carrier is liable for baggage the traveller takes into the same car with him as baggage, though unchecked or unreceipted for by the company.*[5] — "If a man travel in a stage coach," says Chambre, J.,[6] "and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be

[1] Steinweg *v.* Erie Railway, 43 N. Y. 123; Condict *v.* R. R. 54 N. Y. 500. See § 52–635.

[2] Robinson *v.* Dunmore, 5 B. & P. 416; Clarke *v.* Gay, 6 East, 564; Brooke *v.* Pickwick, 4 Bing. 218; Richards *v.* London, Brighton, &c. R. R. 7 C. B. 839; Butcher *v.* London & S. W. R. R. 16 C. B. 13; Bennett *v.* Dutton, 10 N. H. 481; Powell *v.* Myers, 26 Wend. 591; Hawkins *v.* Hoffman, 6 Hill, 586; Dexter *v.* S. B. & N. Y. R. R. 42 N. Y. 326.

[3] Stewart *v.* London & N. W. Ry. Co. 3 H. & C. 139; Munster *v.* South E. Ry. Co. 4 C. B. N. S. 676; Talley *v.* Great West. Ry. Co. Law Rep. 6 C. P. 44. See Ross *v.* Hill, 2 C. B. 877.

[4] Hannibal R. R. *v.* Swift, 12 Wallace, 262.

[5] Le Conteur *v.* London & S. W. R. R., L. R. 1 Q. B. 54; 6 B. & S. 961; Richards *v.* London & S. W. R. R. 7 C. B. 39; Hannibal R. R. *v.* Swift, 12 Wall. 262; Cohen *v.* Frost, 2 Duer, 335.

[6] Robinson *v.* Dunmore, 2 B. & P. 419.

lost;" and this view has been extended to railroads.[1] But as to articles which are not placed in the baggage car or van, but which are kept in the carriage in which the passenger travels, "so that he and not the company's servants has *de facto* the entire control of them whilst the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is considerably modified by the circumstance of their being" under the passenger's personal care. "To such a state of things, the rule that binds common carriers absolutely to insure the safe delivery of the goods, except against the act of God or the queen's enemies, whatever may be the negligence of the passenger himself, has never, that we have been aware of, applied."[2] Hence, when it was shown that the plaintiff, instead of placing his portmanteau in the van, took it with him into a passenger car, and then negligently changed cars, leaving his portmanteau unprotected, it was held that the company was not liable to the plaintiff for damage accruing to him through the robbery of the portmanteau after it was thus deserted;[3] nor is the company liable for articles carried on the traveller's person, nor for overcoats, canes, and umbrellas, such as he usually has under his exclusive care.[4]

§ 601. *Nor is carrier's liability relieved by the owner placing his baggage in a special car supervised by himself.* — This was ruled by the supreme court of the United States in 1870, in a case where the baggage of the officers of a military company, with their camp equipments, arms, and munitions were placed in a separate car, selected by the commanding officer out of several cars standing in the yard of the company, and not in the regular baggage car, and where the car was loaded by soldiers detailed for the purpose, and not by the servants of the company; it appearing that after the car was loaded and locked by the commanding officer, the agents and employees of the company took

[1] Richards *v.* London & Brighton Ry. Co. 7 C. B. 839; Butcher *v.* London & S. W. Ry. Co. 16 C. B. 13; Le Conteur *v.* London & S. W. Ry. Co. Law Rep. 1 Q. B. 54. See infra, § 708.

[2] Willes, J., in Talley *v.* Great West. Ry. Co., Law Rep. 6 C. P. 51.

[3] Talley *v.* Great West. L. R. 6 C. P. 44. See Bank of Greenfield *v.* M. & C. R. R. 20 Ohio N. S. 527; infra, § 708.

[4] Richards *v.* London & S. W. R. R., *ut supra;* Steamboat Palace *v.* Vanderpool, 16 B. Monr. 302; Tower *v.* Utica & Sch. R. R. 7 Hill N. Y. 47. See infra, § 708.

charge of it and placed it in the regular train. "The liability of the company," it is declared by Judge Field, "attached when it thus took possession of the property." [1] So in a still stronger case, a railroad company has been held, in New York, liable as common carrier in a case where it only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen.[2]

§ 602. *Agreement that carrier shall not be liable for negligence invalid.* — The rule in this country, as we have already seen,[3] is that agreements by which carriers seek to exonerate themselves from liability for negligence are invalid as against the policy of the law. This rule applies to the baggage of passengers travelling even with free tickets.[4]

§ 603. *Proof of loss throws burden on carrier.* — In accordance with the principle already stated,[5] proof of loss of baggage is *primâ facie* evidence of negligence.[6]

§ 604. *Liability when baggage is checked through connecting roads.* — When baggage is checked to a distant terminus, to be carried by a series of distinct carriers acting in concert, a ticket being sold for the whole route, the New York rule is, that each company is liable for negligence in carrying the baggage, when there is no evidence where the loss occurred.[7] It has however been ruled that a railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, even though the company has given a check for the baggage to the terminus of the steamboat line, unless the company has some interest in, or control over, the carriage of passengers by such boat line. And it has been said that proof that the railroad company checked the baggage to the terminus of the boat line, although there be evidence that they did so for their own convenience, without proof that the

[1] Hannibal R. R. *v.* Swift, 12 Wall. 262.

[2] Mallory *v.* Tioga R. R. Co. 39 Barb. 488.

[3] Supra, § 586.

[4] Mobile & Ohio R. R. *v.* Hopkins, 41 Ala. 486; Marshall *v.* York, N. & B. R. R. 11 C. B. 655; Hall *v.* Cheney, 36 N. H. 26. See Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 483; Steamboat New World *v.* King, 16 How. 469.

[5] See supra, § 422.

[6] Van Horn *v.* Kermit, 4 E. D. Smith, 453; Hart *v.* Rens. & S. R. R. 4 Selden, 184.

[7] Hart *v.* Rens. & S. R. R. 4 Selden, 184; Stratton *v.* N. Y. & N. H. R. R. 4 E. D. Smith, 184; supra, § 535, 577.

passenger paid them for his passage by the boat, is not sufficient.[1] In Massachusetts it has been said that the mere failure by a railroad company to deliver at B., on its road, luggage of a passenger who delivered it to a connecting railroad at N., is not evidence of negligence on the part of the latter, which sold to the passenger at N. the tickets to transport him over both roads to B., and checked his luggage accordingly.[2]

§ 605. The English practice is to consider the first company alone liable on the contract, even when the negligence occurred on the line of another company.[3] But if sued for the negligence as such, or, in other words, for a specific breach of duty, it is hard to see how the company specially guilty of the negligence can be exonerated.[4]

§ 606. *Carrier, without notice, not liable for merchandise taken as baggage.* — For merchandise taken under guise of baggage, the carrier not being notified of its true character, the carrier is not liable, if the understanding or usage is that he restricts his liability to the personal effects of the traveller.[5] But if the carrier knowingly undertakes to transport merchandise, in trunks or in boxes, as baggage, he is liable, since he is bound by his own contract thus intelligently made.[6]

§ 607. *What articles "baggage" includes.* — "Baggage," so as thus to impose liability on the carrier, includes materials to be worked into clothes for the traveller and his family, but not articles

[1] Green *v.* N. Y. Central R. R. Co. 4 Daly, 553; supra, § 535, 582.

[2] Stimson *v.* Connect. Riv. R. R. 98 Mass. 82. See, however, Cary *v.* R. R. 29 Barb. 35.

[3] Mytton *v.* Midland R. R. Co. 4 H. & N. 615.

[4] See supra, § 535, 579.

[5] Belfast, &c. R. R. *v.* Keys, 9 H. of Lords, 536; Cahill *v.* London & N. W. R. R. 13 C. B. N. S. 818; Hudston *v.* Midland R. R., L. R. 4 Q. B. 366; Smith *v.* B. & M. R. R. 44 N. H. 325; Collins *v.* Boston & Me. R. R. 10 Cush. 506; Pardee *v.* Drew, 25 Wend. 459; Hawkins *v.* Hoffman, 6 Hill, 586; Dibble *v.* Brown, 12 Ga. 217; Stimpson *v.* Conn. Riv. R. R. 98 Mass. 83.

A railroad company is not liable to either owner or agent, on its ordinary contract of transportation of a passenger, for losing a valise delivered into its charge as his personal luggage, but which contained only samples of merchandise, and, with its contents, was owned by a trader whose travelling agent he was to sell such goods by sample; nor in tort, for the loss, without proof of gross negligence. Stimson *v.* Connect. Riv. R. R. 98 Mass. 83.

[6] Great Northern R. R. *v.* Shepherd, 8 Exch. 30; Butler *v.* Hudson Riv. R. R. 3 E. D. Smith, 571; Brooke *v.* Pickwick, 4 Bing. 218.

carried by him for others.[1] The term, also, has been held to include the bedding of an emigrant packed with his clothes in his trunk;[2] and an opera-glass in a trunk;[3] and jewelry personally used by a lady and placed with her wardrobe.[4]

§ 608. *Money or bullion when carried as baggage.* — A carrier's liability for negligence in respect to money or bullion is entitled to specific consideration, from the fact that a higher grade of diligence, according to the rules we have recapitulated, is required in carrying money or bullion than in carrying wearing apparel. This is not because in such cases we recognize the theory of a *diligentia diligentissimi*, with its antithesis of *culpa levissima;* for this theory is both unauthorized and absurd.[5] But, taking the true standard of good business vigilance, — *diligentia diligentis patrisfamilias*, — it is clear that the care which a good business man would bestow on a package of bullion is far greater than that which he would bestow upon a package of wool; and that consequently that which would not be *culpa levis*, or special negligence, in the carriage of a package of wool, would be *culpa levis*, or special negligence, in the carriage of a package of bullion. For, independently of other reasons, the package of bullion would be likely to be tracked and rifled by thieves, which would not be likely with the package of wool. Hence in carrying baggage, the carrier cannot be held liable for negligence in respect to bullion, money, or plate, concealed in such baggage (beyond the amount necessary for the traveller's current expenses), unless he had such notice as would enable him to give to the parcel the particular care it required.[6] And even the exception above stated, allowing the passenger to carry in his baggage a small sum for current expenses, has in some cases been disapproved.[7]

[1] Dexter *v.* S. B. & N. Y. R. R. 42 N. Y. 326; Wilson *v.* Grand T. R. R. 56 Me. 60.

[2] Ouimit *v.* Henshaw, 35 Vt. 605.

[3] Toledo & Wabash R. R. *v.* Hammond, 33 Ind. 379.

[4] Brooke *v.* Pickwick, 4 Bing. 218; McCormick *v.* Hudson River R. R. 4 E. D. Smith, 181; Jones *v.* Vorhees, 10 Ohio, 145; Miss. R. R. *v.* Kennedy, 41 Miss. 178.

[5] See supra, § 57.

[6] Doyle *v.* Kiser, 6 Porter, 242; Jordan *v.* Fall River R. R. 5 Cush. 69; Bell *v.* Drew, 4 E. D. Smith, 59; Phelps *v.* London & N. W. R. R. 19 C. B. N. S. 321; Bomar *v.* Maxwell, 9 Hump. 621; Orange Co. Bk. *v.* Brown, 9 Wend. 85; Weed *v.* S. & S. R. R. 19 Wend. 534.

[7] Chicago & Aurora R. R. *v.* Thompson, 19 Ill. 578 (which is, however, apparently overruled by Illinois Cent. R. R. *v.* Copeland, 24 Ill. 332); Hickox *v.* Naugatuck R. R. 31 Conn. 281.

§ 609. *When carrier's liability merges in that of warehouseman.* — After the baggage has arrived at its terminus, for which it is checked, and the passenger neglects to call for it, the company's liability as common carrier ceases. Its liability, however, as bailee for the goods, continues, first as a bailee for hire, requiring it to exercise the *diligentia diligentis*, or diligence of a good business man charged with duties such as those in question, and afterwards when the baggage remains unclaimed, for such a time as to make the bailment one practically gratuitous, as a bailee without hire, or depositary, liable only for gross negligence.[1] As to the time which must elapse in order to convert the common carrier into a warehouseman without hire no fixed rule can be laid down. It is the practice in companies to check baggage and sell tickets for a distant terminus, with the right on the part of the passenger to lie over at intermediate stations.[2] When such a right is conceded, the railroad company cannot complain if, on a long route, the traveller is several days behind his baggage. Yet is the carrier liable as *carrier*, *i. e.* as insurer, for the baggage thus held by him, waiting the arrival of the passenger? We must recollect that charging the carrier as insurer

[1] See supra, § 571. Van Horn *v.* Kermit, 4 E. D. Smith, 453; Jones *v.* N. & N. Y. T. Co. 50 Barb. 193; Rock Isl. & Pac. R. R. *v.* Fairclough, 52 Ill. 106; Mote *v.* Chic. & N. W. R. R. 27 Iowa, 22; Roth *v.* Buffalo & S. L. R. R. 34 N. Y. 548; Louisville, C. & L. R. R. 8 Bush, 184. In Mote *v.* The Chicago & N. W. R. R. Co. 27 Iowa, Beck, J. said: "But care and liability of the company did not terminate upon arrival at the place of destination and holding there, for a reasonable time, the baggage of the traveller for delivery. If the baggage is not called for, the carrier cannot abandon it. It must be stored and kept with proper care until claimed. This rule is not only the result of sound reason, but required by the customs and habits of public carriers and of travellers who are transported by them. It is not always practicable or convenient for the traveller to call within the required time for his baggage, and, frequently, he may, for convenience, permit his baggage to be carried in advance to the place of destination. This may result from his stopping over on the way, a practice that is permitted by the customs of railways. The system of 'checking' baggage, by which it is taken from under the personal control and oversight of the traveller, and held until the return of the 'check,' secures the carrier from loss, by delivering it to an improper person, and renders its identification certain. This system renders the transfer of baggage from one carrier to another obligatory, and makes necessary, proper, and secure places for storing and keeping it until transferred. Such places for storage the law requires these carriers to provide."

[2] Infra, § 611.

is peculiar to the Anglo-American law; that this exceptional and highly onerous liability is not only rejected by all modern European codes as inconsistent with the public interests, but is deplored by many eminent Anglo-American jurists; and that the tendency of the courts is to strictly limit it within its present bounds. We must recollect also, that after this peculiar liability ceases, a liability begins which is coextensive with the liability of carriers by the German and French law, *i. e.* the liability of a good business man exercising his specialty. Hence it is no particular hardship to the traveller, if, as a counterpoise to his omitting to call for his trunk immediately on his arrival, the railroad ceases to be the insurer of the trunk, and becomes its bailee for hire, liable for special negligence, indeed, but not liable for accidents, such as fire communicated without negligence on its part. Indeed the very idea of warehousing, with the exposure of such a building, situated in a great city, to conflagration, contrasted with the comparative non-exposure to the same danger of carriages traversing an open country, suggests a reason why, when baggage or goods reach their destination, and remain uncalled for, this special liability for fire should cease.[1] How long a period should be allowed to elapse before the insuring quality in the carrier's duty should be viewed as gone, is of course to be determined by local usage, and will fluctuate with each particular case. In New York and Kentucky it has been held that leaving a trunk over night at a station, where it is destroyed by fire, works this effect.[2] Yet after all the question, whether the traveller has had time to call for his baggage, is one of fact, as to which the jury alone, under the limitations above expressed, can determine.[3]

§ 610. But it must be again remembered that the carrier, by being relieved of his duty as an insurer, becomes bound to the duty of a warehouseman, and should exercise the same vigilance as a good warehouseman would do under similar circumstances, providing a proper wareroom for their safe-keeping.[4] And it must also be remembered that, as has been said, there must

[1] See supra, § 569.

[2] Louisville, C. & P. R. R. *v.* Mahan, 8 Bush, 184; Roth *v.* Buffalo, &c. R. R. 34 N. Y. 548.

[3] Supra, § 571. See Van Horn *v.* Kermit, 4 E. D. Smith, 453; Ouimit *v.* Henshaw, 35 Vt. 602; Jefferson R. R. Co. *v.* Cleveland, 2 Bush, 473; Louisville, C. & L. R. R. *v.* Mahan, 8 Bush, 84; and supra, § 570.

[4] Bartholomew *v.* St. L., Jacks. & Ch. R. R. 53 Ill. 227; Mote *v.* Chic. & N. W. R. R. 27 Iowa, 26. Supra, § 572.

come a limit when the strict duty even of a warehouseman, as to baggage uncalled for, ceases, and the bailee becomes liable only as a depositary, or bailee without hire.[1]

§ 611. *Owner may travel separately from but cannot abandon his baggage.* — It is no defence that the passenger does not accompany his baggage.[2] In fact, the practice which has been already noticed, of checking baggage to a distant terminus, with liberty to the passenger to lie over at intermediate points, concedes to the passenger this right of separation.[3] But if the passenger merely drop his baggage in a car, boat, or station, without checking it, or taking for it a receipt, and then proceed himself by a subsequent boat or train, the obligation of common carriage cannot be regarded as having been undertaken. No common carrier can be expected to forward goods or baggage without specific directions.[4]

§ 612. *Railroad liable for negligence of its porter when carrying trunk to or from depot.* — A railway company is liable for the negligence of its porters in delivering baggage to the traveller's cab at the place of destination, it appearing to be the usual course

[1] See Minor *v.* Chic. & N. W. R. R. 19 Wisc. 40.

It is ruled in Wisconsin to be the duty of a railroad company to provide convenient and reasonably safe depots where its freight can be stored; and evidence as to the character and location of its depot, for the purpose of showing negligence in that respect, in consequence of which the goods were destroyed by fire, is admissible in such a case, where a proper foundation has been laid for it in the complaint. So also evidence as to the competency of defendant's servants, its facilities for putting out fires, and for saving property in case of a fire, &c., &c. After evidence had been given tending to show that "wool-waste" was stored in the depot along with plaintiff's goods, and that it could be distinguished by its external appearance from ordinary wool, by those accustomed to handling the latter, they were entitled to show that such wool-waste was liable to ignite spontaneously, under certain circumstances, and what was the custom of warehousemen in regard to storing it.

As to the liability of wool-waste to spontaneous combustion, the opinion of manufacturers and others engaged in the wool trade, and shown to possess from experience peculiar knowledge of the subject, might be taken in evidence as that of *experts*. A railroad company which stores in its own depot goods for consignees until called for is bound to ordinary care, like other warehousemen and bailees of goods to be kept for hire. Whitney *v.* Chicago & N. W. R. R. Co. 27 Wisc. 327.

[2] Logan *v.* Pontchartrain R. R. 11 Rob. (La.) 24.

[3] Wilson *v.* Ches. & O. R. R. 21 Grat. 654, Mote *v.* Chic. & N. W. R. R. 27 Iowa, 26.

[4] Wright *v.* Caldwell, 3 Mich. 51. See Collins *v.* Boston & Me. R. R. 10 Cush. 506.

for the company's servants to assist gratuitously in removing passengers' baggage from the train to authorized cabs in attendance, of which the cab which the plaintiff engaged was one.[1]

§ 613. *Owner's claim based on carrier's duty irrespective of consideration.* — The plaintiff's right to recover for lost baggage is not exclusively based on a contract, but may be maintained wherever it is shown that the bailee accepted the confidence, and undertook its discharge. Thus a servant, whose ticket was paid for by his master, may sue in his own name the carrier for lost baggage,[2] and a person whose ticket was paid for by friends has the same right.[3] Indeed, even in view of the fact that the carrier who undertakes a bailment can recover the value of his services in a suit against the bailee, a passenger, even on a free ticket, has a right to recover against the carrier for injury caused to baggage by the carrier's negligence.[4]

§ 614. *Notices restrictive of liability.* — The general subject of such notices has been already discussed.[5] It may be here incidentally observed, that to restrict the liability of a railroad company as a common carrier for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of such restriction, before the cars are started; and an indorsement on the ticket given to the passenger is not enough, unless it is shown that he knew its purport before the cars started.[6]

[1] Richards *v.* London & B. R. R. 7 C. B. 839; Butcher *v.* London & S. W. R. R. 16 C. B. 13. See Le Conteur *v.* London & S. W. R. R., L. R. 1 Q. B. 54; Jordan *v.* Fall River R. R. 5 Cush. 69. See supra, § 577.

[2] Hall *v.* Cheney, 36 N. H. 26; Marshall *v.* York, N. & B. R. R. 11 C. B. 655; 7 Eng. L. & E. 519. See supra, § 437.

[3] Van Horn *v.* Kermit, 4 E. D. Smith, 453.

[4] See Hall *v.* Cheney, 36 N. H. 26; Hannibal *v.* Swift 12 Wall. 262. See supra, § 437.

[5] See supra, § 586.

[6] Rawson *v.* Pa. R. R. 48 N. Y. 212; Blossom *v.* Dodd, 43 N. Y. 264.

In Wilson *v.* Ches. & O. R. R. 21 Grat. 654, Anderson, J. said: "At all events it seems to be well settled, that a carrier cannot be released from the legal responsibilities of his undertaking, unless the knowledge of the notice is brought home to the passenger in time to leave the car, and have his baggage removed before the train leaves. The mere delivery of the ticket to the passenger, with the notice printed upon its back, or on its face, under the usually attending circumstances which have been detailed, and which are of public notoriety, is not sufficient to raise the legal presumption of actual notice to the passenger before the train leaves. 'Such notices by printed cards, or inserted in newspapers, are not sufficient unless it

X. LIVE-STOCK.

§ 615. *Live-stock not subject to the incidents of "goods" in common carriage.* — By the English common law, as we have already had frequent occasion to observe, a common carrier insures to deliver goods which he undertakes to carry, unless prevented by *vis major*, or such extraordinary casualties as are called the acts of God. It has also been observed that this doctrine is peculiar to the English law, no such unqualified duty being laid on the carrier either by the Roman law, or by any modern European code; and that in our own practice, so inconvenient has the doctrine been, in mixing up two departments of business, that the courts have permitted it to be qualified by two important exceptions. In the first place, it has been held that by notice, certainly by contract, the carrier can relieve himself from this onerous obligation of insurance. In the second place, it is held that this obligation does not apply to passengers, being restricted to goods. The questions now immediately before us are whether live-stock can be called "goods," in reference to the duty in question; and secondly, whether the duty of the person who undertakes to transport live-stock from point to point by carriage is that of a common carrier by the English common law.

If the question were the construction of a statute which simply determines the question of property, there could be no doubt that live domestic animals might be viewed as "goods." But the question before us is not pointed at live-stock simply in this narrow relation; for we have now to inquire whether live-stock are to be treated as goods so far as concerns their capacity for being carried in car or boat from point to point. And here an important difference between these two classes of property arrests us at once. The cask of oil, or the barrel of potatoes, has in it no power of voluntary motion, and no qualities of disturbance or perishability save those which may be determined by an inspection of the article itself. Live animals, on the other hand, have the power of voluntary motion, and have in them qualities of disturbance and perishability which

be shown that knowledge of the contents of such notices came to the party; and this is always a question for the jury.' 2 Redf. on Railw. p. 83; Clayton *v.* Hunt, 3 Campb. R. 27; Rowley *v.* Horne, 3 Bing. R. 2."

cannot be determined until they are tried by this particular mode of conveyance. The quietest ox may be possessed by a frenzy of passion when placed in a freight car, with the engine screaming ahead of him, the boards shaking underneath him, and the train rumbling and jerking behind. Even strength and endurance, in stiffening the brute system to a mere continuously excited bracing up against the motion, may prove a greater hindrance to safe travel than the supple weakness which yields helplessly to the jar. There are features, therefore, of live-stock, which take them out of the category of "goods." There are undoubtedly perishable goods, such as fruit, but the perishability of such articles is patent, and hence distinguishable in a most material relation from the perishability of cattle.[1]

[1] See supra, § 563–8.

Hence, while agreeing to the correctness of the decision in Blower *v.* Great West. R. R. Law. Rep. 7 C. P. 662, I cannot adopt that portion of the argument of Willes, J., which, in the following extract, is based on the assumption that the two kinds of perishability just noticed have the same incidents. "This," says Willes, J., in the case just cited, "was an action brought in the county court of Monmouthshire against the Great Western Railway Company for the non-delivery of a bullock, which was delivered to them at Dingeston station to be carried by them to Northampton. The bullock was received by the company under the terms of a notice which is assailed by the plaintiff. It is unnecessary to consider whether or not the notice was a reasonable one. The question for our decision is whether the defendants, upon the facts and findings of the county court judge, are liable as common carriers for the loss of this animal. Whether a railway company are common carriers of animals is a question upon which there has been much conflict of opinion, and although there may be difficulties in determining that question, such as induced Lord Wensleydale, in Carr *v.* Lancashire & Yorkshire Railway Co.[1] to make the observations which have elicited remarks from some learned judges apparently to the contrary, it may turn out after all to be a mere controversy of words. The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves, or disposition producing unruliness or frenzy, and accidents which are not the result of inherent vice or unruliness of the animals themselves. It comes to much the same thing whether we say that one who carries live animals is not liable in the one event but is liable in the other, or that he is not a common carrier of them at all, because there are some accidents other than those falling within the exception of the act of God and the queen's enemies, for which he is not responsible. By the expression 'vice' I do not, of course, mean moral vice in the thing itself or its owner, but only that sort of vice which, by its internal development, tends to the destruction or the injury of the animal or thing to be carried,

[1] 7 Ex. at pp. 712, 713; 21 L. J. Ex. 261.

§ 616. *Duties of persons conveying live-stock not convertible with those of common carriers.* — Some portions of the duties of persons conveying live-stock are undoubtedly those of the common carrier. In both cases a carriage suitable to the particular

and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties. This becomes more clear when we consider the reason why a common carrier is liable for a loss though happening without any negligence at all on his part, unless in the case of the act of God or the queen's enemies. The reason is so well known and so well explained by Lord Wensleydale in Wyld *v.* Pickford,[1] that it is unnecessary to add anything, or to keep up authorities on the subject. A common carrier is liable as an ordinary bailee for negligence; and he is liable for a loss occasioned by negligence, even though the act of God or of the queen's enemies conduce to the loss. But he is further liable as an insurer for losses which occur through no negligence on his part. It is only necessary therefore to observe that an insurer is not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes."

. . . . "Was, then, what happened in the course of the journey the result of negligence on the part of the company's servants? Or was it attributable to some inherent vice in the bullock which led to its own destruction? The facts found in the case seem to me to be conclusive in favor of the latter view. It is found that the bullock in question was put into a proper and sufficient truck ordinarily used by the company for the conveyance of similar cattle along their railway, and was loaded in the proper and usual way. That could not have been found unless the truck was sufficient to secure the cattle from injury from the ordinary incidents of a railway journey, including fright occasioned by their novel position and passing objects. The company are clearly bound to provide trucks that are sufficient to retain cattle under the ordinary incidents of a railway journey; but their liability in this respect extends no further. Amies *v.* Stevens.[2] The case expressly finds that 'the truck was in every respect proper and reasonably sufficient for the conveyance of the bullock and cattle loaded therein,' and that 'there was no actual negligence whatever on the part of the company or their servants with reference to the bullock, or in the receiving or forwarding the same by them.' Mr. Bosanquet says it is not found that the company might not have provided such trucks that no bullock *could* escape under any circumstances during the journey. The judge finds that the truck was reasonably fit for the conveyance of the animal. We cannot be led away from that finding by a suggestion that some possible form of truck might be devised which would prevent the recurrence of such an accident. I think the finding excludes the notion of negligence on the part of the company, or of the escape of the bullock arising from any other cause than its own inherent vice, or restiveness, or frenzy; and for such an injury the company are not responsible."

[1] 8 M. & W. 443.

[2] 1 Stra. 128.

service must be provided, and servants put in charge who are capable of faithfully running boat or train. But in the conveyance of live-stock an important duty arises which has no counterpart in the ordinary service of a common carrier. The common carrier sees that the goods committed to him are safely packed in a suitable carriage, and then his specific charge over them is confined to the propulsion of the carriage containing them. The transporter of cattle, on the other hand, is required to watch them either personally or through the owner, who is for this purpose the servant of the transporter, and to feed and refresh them when they are on the road. In England this question does not present itself prominently, for the reason that in England journeys of this kind last but a few hours. In this country, however, such journeys may last a week, and the stock will perish unless they are attended with peculiar care. They must be constantly inspected, lest by the strong in particular cases crowding on the weak, the weak be destroyed. They must be not merely fed and watered, but they must from time to time be washed, and the cars cleansed and sprinkled. Duties of this kind are the duties of the drover, and not of the common carrier, and require the exercise of skill, experience, and diligence, which a drover alone, from his peculiar training, fraught as it is with a knowledge of the habits of animals, through continuous care of and dwelling with them, can be expected to possess.[1] We have no more right to charge the common carrier with the liabilities of the drover, than we have to charge the drover with the liabilities of the common carrier. Undoubtedly we must hold the carrier who undertakes to transport live animals chargeable with the same duties, as to adequacy of road, carriage, and motive power, as we do the carrier who undertakes to transport human beings; and undoubtedly, also, we must charge him specially (if he undertakes this) with the duty of tenderly watching and caring for the dumb creatures who are thus placed under his charge. But we cannot, if we thus create a new form of mandate for him, hold him for insurance as we would hold the ordinary carrier of goods in bale or package. We must treat him as a Mandatary, who, on the law heretofore expressed, is bound to perform the business accepted by him with the diligence with

[1] See Maynard *v.* Buck, 100 Mass. 40; Cayzer *v.* Taylor, 10 Gray, 274; Sullivan *v.* Scripture, 3 Allen, 564; Shrewsbury *v.* Smith, 12 Cush. 177.

which it would be conducted by a good, competent, and faithful business man, who, experienced in this particular work, undertakes its discharge.[1]

[1] Squire *v.* N. Y. Cent. R. R. 98 Mass. 239; Clarke *v.* Rochester R. R. 14 N. Y. 570; Penn. *v.* Buffalo & E. R. R. 49 N. Y. 207; Farnham *v.* Cam. & A. R. R. 55 Penn. St. 53; Cotton *v.* Cleveland & Pitts. R. R. 67 Penn. St. 211; Mich. South. R. R. *v.* McDonough, 21 Mich. 166; Lake Shore R. R. *v.* Perkins, 25 Mich. 329.

As sustaining the positions of the text the reader is referred to an able opinion of Christiancy, J., in Michigan Southern Railroad Co. *v.* McDonough, 21 Mich. 189, from which the following extracts are taken: —

. . . . "But the transportation of cattle and live-stock by common carriers by land was unknown to the common law, when the duties and responsibilities were fixed making them insurers against all losses and injuries not arising from the act of God, or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving, in their transportation, much fewer risks, and of quite a different kind, from those which are incident to the transportation of live-stock by railroad. Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of the cars, in their frenzy injure each other by trampling, plunging, goring, or throwing down; and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue and fright, the weak easily fall and are trampled upon, and unless helped up, must soon die. Hogs also swelter and perish. See per Parke, Baron, in Carr *v.* Lancashire & Y. Railway Co. 7 Exch. 712, 713; Denio, J., in Clark *v.* Rochester & S. R. R. Co. 14 N. Y. 573. It is a mode of transportation which, but for its necessity, would be gross cruelty, and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property, that I do not think this kind of property falls within the reasons upon which the common-law liability of common carriers was fixed. In McManus *v.* Lancashire Railway Co. 2 Hurl. & Norman, 702, the court say: 'We are able to decide the case without referring to the second point made by the defendants, viz.: the alleged distinction between the liability of carriers as to the conveyance of horses and live-stock, and ordinary goods; but should the question ever arise, we think the observation which fell from Baron Parke in Carr *v.* Lancashire & York Railway Company, is entitled to much consideration.' In the same case on appeal in the exchequer chamber, 4 Hurls. & Norman, 346, Earle, J., speaking of the condition of the contract in that case, says: 'This condition is imposed in respect of horses. And I find neither authority nor principle for holding that defendants were bound to receive living animals, as common carriers.'

"In Palmer *v.* Grand Junction Railway Co. 4 M. & W. 758, Parke, Baron, interrupting counsel, asks: 'Does the rule as to negligence apply to live animals, as horses? Of course, if they

§ 617. From this view the following conclusions result: (*a*) *Carrier of live-stock is not an insurer, but his duties, when*

are stolen, it would; but is it so when they are delivered, although hurt or damaged? If misdelivered, the carriers would be liable; but they would not be liable for a mere accident to an animal, supposing the carriage to be safe and good and properly conducted.' This case was decided in 1839, when the question was comparatively a new one. And it is quite manifest that Baron Parke, in the above remarks, had reference to the question as one of common law merely; and when he comes to decide the case (on pp. 767, 768), holding that if the company choose to carry (horses), and do not take care to accept them with a limited responsibility, then, by accepting them, they must be held to have accepted as common carriers, it is equally manifest that the decision is rested wholly upon the statute which he cites, expressly enumerating '*cattle*' with 'other goods, wares, and merchandise, articles, matters, and things,' which the company were authorized to carry, placing all apparently upon the same ground. The conclusion from the statute would seem to have been quite as broad, at least, as the premises would warrant. But it had the statute, such as it was, to rest upon. It may, however, well be doubted, whether the decision would have been the same if the question had arisen for the first time after the decision in Oxlade *v.* North East. R. Co. 15 C. B. (N. S.) 680, to be hereafter noticed, and that of Pardington *v.* South Wales Co. 38 Eng. L. & Eq. 432, decided in November, 1856. In the latter case the question arose upon the reasonableness of a notice given by the company to a shipper of cattle under 17 & 18 Vict. ch. 31, § 7 (Railway Traffic Act of 1854), which expressly held the company liable for the loss of, or injury done to, 'any horses, cattle, or other animals,' or to any goods, &c., unless the conditions, fixed by the notices, &c., should be held by the court to be just and reasonable. Martin, Baron (interruping counsel), says: 'The common-law liability of common carriers does not apply to cattle at all. In former days they were not carried. They might, therefore, but for the statutes, make what conditions they pleased.' Pollock, Chief Baron, also says: 'Why should they not say, If you insist upon our carrying your cattle, we will carry them; but it must be upon the terms that we shall not be responsible for any injury which may happen to them? They hold themselves out as carriers of horses and cattle, *sub modo*.' The drovers went with the cattle as in the present case; and Martin, Baron, in giving his judgment, says: 'I doubt the liability of the company at all, even if there had been no stipulation on their part; for the fault, if any, was the fault of those who went by the train with the cattle.' All the judges held the notice reasonable.

"It will be noticed that in England, by the statute cited, railroad companies are common carriers of cattle, horses, &c., and bound to carry as such, if insisted upon by the shipper, except as they may limit their liability by notices or contracts which the court hold reasonable. And that the statute cited in Palmer *v.* Grand Junction Co. 4 M. & W. 758, was there held to have the effect to make them common carriers of such property, if they accepted it without conditions. (In that case, however, there was no evidence of their having held themselves out as doing such business *only* on special terms.)

not prescribed in writing, are those of a special agent to transport the cattle to their place of destination, he supplying suitable and safe carriage and motive power. — "While common carriers," says Allen, J., in a recent case in New York, "are insurers of inanimate property against all loss and damage except such as is inevitable, or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care.[1] But for the special agreement under which the plaintiff's cattle were transported, there would be but little doubt as to the defendant's liability for the damages caused by the want of proper care while detained at Dunkirk. Ordinary care and attention to the cattle during the delay would have prevented the injury. The liability of the defendant is, however, to be determined by the agreement of the parties. The railroad company, by reason of the written contract, occupied the position of a private carrier for hire, and is only liable for the performance of the duty undertaken according to its terms, or for some wrongful act, either wilful or negligent. The agreement furnishes the extent of the liability, unless a loss has occurred from the wilfulness or negligence of the carrier."[2]

But this case has been frequently cited in this country, as if it had been made upon common law reasons only, and applied to cases where there were no such statutes as that upon which it was clearly rested by the court. Thus (without enumerating other instances), in Kimball *v.* Rutland Co. 26 Vt. 247, the court, after very correctly holding that the company, by publicly offering to take cattle at one price with the common law liability, and at another and less rate when the owner assumed the risk, thereby held themselves out and became common carriers of cattle, proceed to cite this case of Palmer *v.* Grand June. Co. as proving the proposition, that 'the fact that the company have undertaken such transportation for *hire*, and for such persons *as choose to employ them*, establishes their relation as common carriers.' The remark was correct enough, if applied to the facts of the case before them; but the language is much broader than is warranted by the case cited.

"Upon sound principle, and upon the English authorities above cited, I think it clear the transportation of cattle by railroad does not come within the reasons of the law applicable to common carriers, so far as relates to the care of the property and responsibility for its loss or injury."

[1] Clarke *v.* Rochester & Syracuse R. R. Co. 14 N. Y. 570; Michigan S. & N. J. R. R. Co. *v.* McDonough, 21 Mich. 165; Angell on Carriers, § 214 *a*.

[2] Farnham *v.* Camden & Amboy R. R. Co. 55 Penn. St. R. 53; Colton *v.* Cleveland & Pittsburg R. Co. 67 Ibid. 211; New Jersey St. Nav. Co. *v.* Merchants' Bank, 6 How. U. S. R.

§ 618. (*b.*) *By special agreement the owner or his agent may be placed in charge of the cattle, and the duty of feeding and caring for them transferred to him by the carrier.* — No doubt this is an apparent departure from the rule heretofore expressed, that by no special agreement can the carrier be relieved from liability for his neglect. But it may be justly argued that the *diligentia bonis patrisfamilias* by the carrier is better performed when he transfers the care of the cattle to their owner or driver than when he undertakes such care himself. The carrier cannot be expected to understand the management of cattle so well as one trained to the work; and the interests, if not sympathies, of the master will lead him to a tenderer consideration of the wants of his creatures than the carrier would be likely to give. Yet there are some duties which the carrier cannot devolve on others. So far as concerns the running of the train and the providing of adequate carriages, he is bound to bestow on the animals committed to his charge the same grade of diligence as it is required that he should render to the human beings on his trains; and what would be negligence, so far as concerns want of safety of carriage or management, in the latter case, would be considered negligence in the former. In addition to this, there are other duties from which it stands to reason the carrier cannot by such special agreement rid himself. He alone can stop the cars at places necessary for refreshment, and he must be held liable for the consequences of negligence should he fail so to do. And the same result follows if he fails to take those measures for cleaning the cars, which he alone has power to carry out.[1]

§ 619. *Carrier, if he undertakes care of cattle, bound to diligence.* — In any view, if the carrier undertakes the special duty of caring for live-stock, he is bound to exercise this office, not as an insurer, but as a special mandatary or agent, required to show the due diligence of a person skilled in this department of labor, — the *diligentia boni et diligentis patrisfamilias*, — as it is elsewhere explained.[2] It is true that he is not liable for any injuries

344; Angell on Carriers, § 225, 226; Dorr *v.* N. J. St. Navigation Co. 1 Ker. 485.

[1] See cases above cited, and Squire *v.* N. Y. Cent. R. R. 98 Mass. 239; Poucher *v.* N. Y. Cent. R. R. 49 N. Y. 263; Gill *v.* Manchester R. R., L. R. 8 Q. B. 186; Phillips *v.* Clark, 2 C. B. N. S. 156; Ill. Cent. R. R. *v.* Adams, 42 Ill. 474.

[2] See Petre *v.* Offutt, 21 La. An. 679.

caused by the inherent viciousness of the animal carried.[1] Nor, when he assumes in any way the management of such animal, can he excuse himself on the ground of special contract exempting him from the consequences of restiveness, if the restiveness was in any way provoked by himself. Thus a clause in a contract for the transport of a cow by railroad, that the carrier will not be responsible for "damage caused by the kicking, plunging, or restiveness of the animal," does not release the defendants from the consequences of negligence in the management of the cow, although it appear that the injury to her was caused by her restiveness when imprudently let out by a servant of the defendants.[2]

§ 620. (*c*) *Illustrations of diligence required by carrier of live-stock.* — It has just been said that the carrier is liable for negligence in respect to any of the duties which can only be performed by himself. Thus it has been correctly ruled in Illinois, that where live hogs are shipped in railroad cars, and by reason of their crowded and unnatural condition become heated, which can only be allayed and the property saved by throwing water upon them while in the cars, and where this fact is made known to the conductor of the train, it being customary for the company to apply water in such cases, and having the necessary conveniences for applying the water, the company, in case of neglect in this respect by its servants, is liable for the consequent injury.[3] It is said, however, that the carrier is not chargeable with a want of proper diligence for allowing them to stand in the car from ten o'clock P. M. to nine A. M., after the passing of the regular cattle train, which neglected to take the car load.[4]

§ 621. How far the carrier may be made liable for negligences of the owner in matters which the carrier assumes, is illustrated by two interesting English decisions. A greyhound was delivered to a canal company, with a string round his neck; and the company gave for him an ordinary carrier's receipt. The dog was fastened by this string to a box, but slipped his head through the noose. It was held that the carrier ought to have secured

[1] Clarke *v.* R. & S. R. R. 14 N. Y. 570; Hall *v.* Renfro, 3 Metc. Ky. 51; Conger *v.* Hudson River R. R. 6 Duer, 375. See, as to contributory negligence in this respect, supra, § 565.

[2] Gill *v.* Manchester R. R., L. R. 8 Q. B. 186; Phillips *v.* Clark, 2 C. B. N. S. 156; and other cases cited supra, § 565.

[3] Ill. Cent. R. R. Co. *v.* Adams, 42 Ill. 474.

[4] Ill. Cent. R. R. Co. *v.* Waters, 41 Ill. 73.

him or locked him up, as the string was evidently not meant nor fit to be a permanent fastening.[1] But where another greyhound, delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried, and the fare demanded was paid; at the time of delivery the greyhound had on a leathern collar with a strap attached to it; in the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened, it slipped its head from the collar, and ran upon the line and was killed: it was ruled that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company.[2]

[1] Stuart *v.* Crawley, 2 Stark. 323, cited more fully in next note.

[2] Richardson *v.* N. E. R. R. 7 C. P. 75. The point was thus argued by Willes, J.: . . . . "The county court judge decided that the defendants were responsible for the escape and consequent destruction of the dog, on the ground that they by their servants were guilty of negligence, and that there was no contributory negligence on the part of the plaintiffs. We are clearly of a different opinion. The county court judge, in deciding as he did, appears to have proceeded upon a supposition that the case fell within the ruling of Lord Ellenborough in Stuart *v.* Crawley, supra. That case however, in our judgment, differs in some essential particulars from the present. It was an action against a carrier of goods by the Grand Junction Canal, for negligence in losing a valuable greyhound which had been delivered to him to be carried from London to Harefield Lock. It appeared that the servant of the plaintiff took the dog to the defendant's warehouse with a string about his neck, and the defendant's bookkeeper gave a receipt acknowledging the delivery; that the dog was afterwards tied by the cord to a watch box, but within half an hour afterwards slipped his head through the noose, and was lost. It was sought to charge the plaintiff with negligence in not delivering the dog to the defendant's bookkeeper in a state of security, he having no collar, but merely a cord round his neck, which was insufficient; and the case was sought to be assimilated to that of a delivery of goods imperfectly packed. But Lord Ellenborough held that the defendant was responsible. 'The case,' he said, 'was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured. After a complete delivery to the defendant, he became responsible for the security of the dog; the property then remained at the risk of the defendant, and he was bound to lock him up or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on

XI. GRATUITOUS PARCELS.

§ 622. *Diligence required by railroad or other company as to parcels carried by its officers without pay to itself, though a gratuity be received or expected by the officer.* — A custom prevails generally on our railroads and other lines of common carriage, for baggage-masters, conductors, and other officers to carry parcels from point to point gratuitously, as a favor to customers of the road, the officers taking this trouble receiving from time to time presents from those thus obliged, but the pay being purely voluntary. The same custom exists among steamboats and other vessels undertaking the carriage of goods by water. Cases of this kind may be presented in two distinct phases. The first is, when this custom is part of the carrier's ordinary business, and is known to the management of the road, as it necessarily is on our great railway lines. The second is when this special mode of carrying parcels is by agreement done at the owner's own risk, and with the knowledge on both sides that the officer taking the parcel does so out of the range of his prescribed duties. In the latter case the company is not liable.[1] In the former, interesting ques-

the defendant to provide for his security.' That case is obviously different from this. Here, the greyhound when delivered to the guard had a leathern collar on with a strap attached to it, indicating that the strap was the thing by which she was to be secured. If it was negligence on the part of the guard to fasten her by the strap, it was a negligence which was suggested by the person who delivered her to him without notice that the fastening was an unsafe one. There are, therefore, two important distinctions between that case and the present: first, that there the defendant was a common carrier, and here the defendants are not; and, secondly, that, when the dog was delivered to the defendants' servant, he had no means of seeing that it was insufficiently secured, whereas here the mode of securing the dog was that which is ordinarily adopted, viz., by a collar and strap.

"My brother Smith and myself are therefore of opinion that the decision of the county court cannot be sustained, and must be reversed. In this we only follow the course pursued by this court in the case of Tally *v.* Great Western Ry. Co.,[1] and if the rule laid down in Schroder *v.* Ward [2] were followed, it ought to be reversed with costs; but we do not feel inclined to act upon that rule here, because there was some laxity on the part of the defendants' servants in receiving the dog to be carried without giving a ticket. The defendants would probably not press for costs." Judgment reversed.

[1] Cincinnati & Lou. Mail Line Co. *v.* Boal, 15 Ind. 345.

[1] Law Rep. 6 C. P. 44.

[2] 12 C. B. N. S. 410; 32 L. J. C. P. 150.

tions arise. Is the company a common carrier as to the parcels thus carried by its subalterns? and is it to be treated as insuring the same, according to the law applicable to common carriers? These questions must be answered in the negative. To enable goods (not luggage) to be forwarded as freight, custom, if not contract, requires that certain formalities should be pursued, which formalities are not here attempted. What liability, then, if we must reject that of the common carrier at common law, does the company assume as to parcels which it thus permits its officers to carry? It has been said that its liability is simply for gross negligence: *e. g.* that of a depositary or other gratuitous bailee.[1] But this conclusion rests on two assumptions, neither of which can be sustained. The first is that this particular contract is gratuitous, whereas, if the salary or income of the officers carrying such parcels is increased by these gratuities, and the company secures the service of these officers at a cheaper rate than it could do otherwise, then the carriage is not strictly gratuitous, though there be no such fixed pay as is necessary to constitute the agreement of common carriage. The second mistake is that in mandates, supposing them to be gratuitous, the diligence required is only the ordinary diligence of seeing what everybody sees, and that consequently the only negligence for which the mandatary is responsible is gross negligence, or *culpa lata*. But this, as has been seen, is not the law. Mandate means special confidence imposed and accepted; and whenever this takes place, and a service is done in pursuance of such service, then the mandatary can recover compensation from the mandator, and is bound to the mandator to apply to the mandate that special diligence which every good business man is bound to exhibit in every transaction which in his particular department he undertakes.[2]

[1] Haynie *v.* Waring, 29 Alab. 263. See King *v.* Lenox, 19 Johns. 235; Sewall *v.* Allen, 2 Wend. 327, reversed by Sewall *v.* Allen, 6 Wend. 351; Chateau *v.* Steamboat St. Anthony, 16 Mo. 216. See supra, § 547.

[2] See on this point discussion in 2 Redfield on Rail. § 169, and cases there cited; Farmers' & Mech. Bk. *v.* Champ. Trans. Co. 23 Vt. 186; Mayall *v.* Bost. & Me. R. R. 19 N. H. 122; Cincin. & Lou. Mail Line *v.* Boal, 15 Ind. 345; supra, § 438–547.

CHAPTER VI.

PASSENGER CARRIERS.

Who are passenger carriers, § 625.
Passenger carriers not insurers, § 626.
But bound to diligence of good specialist in their department, § 627.
Carriage must be adequate to the work, § 628.
Carrier not liable for defects of carriage caused by *casus*, § 630.
Nor for latent defects, § 631.
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Diligence to be that which a good carrier of the particular grade is accustomed to exact, § 636.
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Same rule applies to steamboats, § 638.
And to horse railways, § 639.
Illustrations of distinction between "good" and "perfect" management, § 640.
"Free" passengers: liability to, § 641.
Agreements that they should take all risks, § 641 *a*.
Trespassers, § 642.
Exception where free passenger acts as employee, § 643.
No defence that road is under government control, § 644.
Nor that train was an "excursion" train, § 645.
Removal of passenger from car, § 646.
Stopping at spot where there is no platform, § 647.
Suddenly and without notice starting train, § 648.
Conductor must notify of danger, § 649.
Conductor must notify of approach of station, § 650.
Conductor must notify when train is about to start, § 651.
Must be secure access to and egress from cars, § 652.
Platforms must be adequate, § 653.
And must have safe access and egress, § 654.
And so of stairway and passages in boat, § 655.
And so of access to road by level crossing, § 656.
And so of modes of disembarking passengers to and from boat, § 657.
Injury to passengers from cattle on track, § 659.
Passengers leaning out of carriage windows, § 660.
Burden of proof, § 661.
Liability to passenger for failure in punctuality, § 662.
Auxiliary lines, § 663.

§ 625. *Who are carriers of passengers.* — A common carrier of passengers, to extend the definition already given, is one who transports such passengers as choose to employ him from place to place for reward.[1] A person driving his own carriage, therefore, who gives a seat in it to another, is not such a carrier as to subject himself to the liabilities of common carriers; and in case of damage, is liable, not for the negligence of an expert (*culpa levis*), but for the negligence only of a non-expert (*culpa lata*). Thus in an interesting English case,[2] the plaintiff was a decorator and

[1] See supra, § 545.

[2] Moffatt *v.* Bateman, 8 L. R. Ap. 115.

ornamental gardener in the service of the defendant, at a salary. On the day of the accident the defendant had asked the plaintiff to accompany him to a place about eight miles distant, for the purpose of assisting in papering some rooms, and had offered to drive him there in his trap. The plaintiff had with some hesitation consented to be driven over by the defendant; his hesitation apparently having arisen from his knowledge of the defendant's reckless habit of driving. The carriage was overturned on the way, and the plaintiff damaged. Except that the kingbolt had broken, there was no evidence to show how the accident occurred; and to rebut any presumption that might have been raised upon this fact, as to want of care, evidence was given that the carriage was regularly examined by a blacksmith every three months. The jury gave a verdict for the plaintiff, and the question for the court was, whether that verdict was warranted by the evidence. The judicial committee of the privy council in their judgment, delivered by Lord Chelmsford, held that there was no evidence of such negligence as to warrant the verdict.

§ 626. *Carriers not insurers of passengers.* — The element of insurance, which by the English common law exists in contracts by a common carrier to carry goods, does not apply, it has been held by the same law, to the carriage of passengers.[1]

§ 627. *But bound to the diligence which a good specialist in such business is accustomed to exert.* — The carrier, however, is bound to exercise the diligence, prudence, and skill of a good business man in his particular work (the *diligentia boni et diligentis patrisfamilias* of the Romans); that is to say, in whatever branch of carrying he may be engaged, he must exhibit diligence, prudence, and skill such as a good business man in such department exhibits.[2] With steam conveyances the care must increase in proportion to the risk.[3]

[1] Aston *v.* Heaven, 2 Esp. 533; Munroe *v.* Leach, 7 Metc. 274; Feital *v.* R. R. 109 Mass. 398; Meier *v.* Penn. R. R. 64 Pa. St. 225; Frink *v.* Potter, 17 Ill. 496; Knight *v.* P. S. & P. R. R. 56 Me. 234; McPadden *v.* N. Y. C. R. R. 44 N. Y. 478; and cases hereafter cited.

[2] Sharp *v.* Grey, 9 Bing. 79; Christie *v.* Griggs, 2 Camp. 79; Skinner *v.*

[3] Knight *v.* P. S. & P. R. R. 56 Me. 234; Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282; Meier *v.* Penn. R. R. Co. 64 Pa. St. 225; and cases cited infra, § 637.

As to reciprocal duties of carrier and

§ 628. *Carriage must be adequate to the work.* — The carrier must have carriages adequate to the work to which they are sub-

London, Brighton & S. C. Ry. Co. 5 Exch. 787; Burns *v.* Cork & Bandon Ry. Co. 13 Ir. C. L. Rep. 543; Stokes *v.* Eastern Co. Ry. Co. 2 F. & F. 691; Ford *v.* London & S. W. Ry. Co. 2 F. & F. 730; Stokes *v.* Saltonstall, 13 Peters, 181; Meier *v.* Penn. R. R. 64 Pa. St. 225; Pendleton St. R. R. *v.* Shires, 18 Oh. St. 255. See infra, § 636–37.

Thus, it has been held a *primâ facie* case of negligence that a passenger in an omnibus was injured by a blow from the hoof of one of the horses, which kicked through the front panel; there being no evidence that the horse was a kicker, but it being proved that the panel bore the marks of other kicks, and no precaution having been taken by the application of a kicking strap, and no explanation offered by the defendant. Simson *v.* London General Omnibus Co., L. R. 8 C. P. 390.

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passenger, see Contributory Negligence, supra, § 353. The authorities on this point are collected in an excellent opinion of Bellows, J., in Taylor *v.* Grand Trunk R. R. 48 N. H. 313. At the same time it must be remembered that the high degree of care required from railroads is not the antithesis of *culpa levissima*, but that of *culpa lata;* in other words, the diligence a good business man exercises in proportion to his responsibilities and opportunities.

Bellows, J.: . . . . "The doctrine of the American courts is still more strict and explicit; and the general current of the authorities is, that the carrier of passengers is bound to the utmost care and diligence of very cautious persons, and is responsible for any, even the smallest neglect; holding their undertaking to be to carry their passengers with safety as far as human care and foresight can go. This is distinctly laid down in Story on Bail. § 601, 601 *a*, and also in 2 Greenl. Evi. § 221, and in 2 Kent's Comm. *601, *602, and Redfield on Rail. chap. 17.

"This, it will be perceived, accords substantially with the definition of the highest degree of care required of bailees of goods, namely, that care and diligence which very prudent persons take of their own concerns. Story on Bail. § 16; Jones on Bail. 166; where it is said that slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels.

"It is true that doubts have often been expressed as to the utility of the theory which undertakes to define the degrees of negligence as slight, ordinary, and gross, as in Steamboat New World *v.* King, 16 How. U. S. Rep. 474, and cases cited, where Curtis, J., expresses the opinion that the attempt thus to define the degrees of negligence had better be abandoned. So it is in Briggs *v.* Taylor, 28 Vt. Rep. 184.

"But however this may be, some light may be gained in respect to the duty of carriers of passengers by steam, by considering some of the rules which have governed the courts in relation to bailments.

"When the contract of bailment is mutually beneficial to both parties, as in the case of bailments for hire, pledges, and the like, the bailee has been held for ordinary care; which is defined to be that care which every person of common prudence and ca-

jected, and he is liable for any damage caused by failure of his duty in this respect.[1]

pable of governing a family, takes of his own concerns; Jones on Bail. § 11; Story on Bail. § 11; while a bailee who alone receives a benefit, as in the case of the borrower, is bound to use extraordinary care.

"In the case of the bailee of goods, the obligation of care and diligence rises in proportion to the demand for it, although it still is only ordinary diligence that is required; but it is obvious that what will constitute ordinary care will be affected by the nature, bulk, and value of the goods bailed, for no one would expect the same care to be taken of a bale of cotton as of a box of jewelry, or other things peculiarly liable to be stolen or injured.

"The case of common carriers of goods is an exception to the general rule applicable to bailments, and they are now regarded as insurers, and liable for all losses except such as are caused by the act of God, or by the public enemies; and this is put upon the ground of public policy to guard against both negligence and collusion. Moses *v.* Boston & Maine Railroad, 24 N. H. 84.

"Upon grounds of public policy, also, the carrier of passengers is bound to exercise the highest degree of care and diligence. To his diligence and fidelity are intrusted the lives and safety of large numbers of human beings. He assumes the trust voluntarily, and for it receives a sufficient compensation; and we think it very apparent that in no case of the bailment of goods is there so great and imperative a demand for the utmost skill and diligence as from the carrier of passengers; especially is this true when the passengers are carried upon railroads by steam; for then, in consequence of the greater speed, the hazards to life and limb are largely increased.

"In the Philadelphia & Reading Railway Co. *v.* Derby, 14 How. U. S. Rep. 486, the court says: 'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence; and whether the consideration be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance, or the negligence of careless agents; any negligence in such cases may well deserve the epithet of gross;' and this statement is emphatically indorsed in the case of the Steamboat New World *v.* King, 16 How. U. S. Rep. 474, as resting not only on public policy but on sound principles of law.

"In Redfield on Rail. § 149, note 5, the author says: 'If the degree of care and watchfulness is to be in proportion to the importance of the business and the degree of peril incurred, it is scarcely possible to express the extreme severity of care and diligence

[1] Curtis *v.* Drinkwater, 2 B. & Ad. 169; Crofts *v.* Waterhouse, 3 Bing. 319; Brunner *v.* Williams, 1 C. & P. 414; Taylor *v.* Day, 16 Vt. 566; Derwort *v.* Loomer, 21 Conn. 245; Fuller *v.* Naugatuck R. R. 21 Conn. 557; Hollister *v.* Nowlen, 19 Wend. 611; Stokes *v.* Saltonstall, 13 Pet. U. S. 181; McPadden *v.* N. Y. Cent. R. R. 44 N. Y. 478; *S. C.* 47 Barb. 247, qualifying Alden *v.* N. Y. Cent. R. R. 26 N. Y. 102; Hegeman *v.* West. R. R. 16 Barb. 353; 13 N. Y. 9.

§ 629. He must also see that such carriages are kept in due repair.[1] But the mode of diligence varies with each particular case,

which should be required in the conduct of passenger trains upon railways.'

"So in Hegeman *v.* Western R. R. Co. 3 Kernan Rep. 9, it is held that the same precautions required in running a stage-coach at the rate of six miles the hour, would not be the test for a railroad car running thirty or forty miles the hour, and a similar view is adopted in 1 Smith's Leading Cases, 5th Am. ed. 328; note to Coggs *v.* Bernard.

"The measure of the care and diligence required of carriers of passengers, as laid down in Story on Bailments, Greenleaf's Evidence, Kent's Commentaries, and Redfield on Railways, as before cited, is fully sustained by the American cases.

"In Stokes *v.* Saltonstall, 13 Peters, U. S. Rep. 181, the instructions to the jury were, that it was incumbent on the defendant to prove that in managing the coach the driver acted with reasonable skill, and with the utmost prudence and caution; and that if the injury was occasioned by the least negligence or want of skill or prudence on his part, the defendant was liable; and on error, these instructions were held to be correct, the court saying, that the undertaking is that as far as human care and foresight can go the carrier will transport the passengers safely.

"In Massachusetts it is held that carriers of passengers are bound to use the utmost care and diligence to prevent the injury which human foresight can guard against; Ingalls *v.* Bills, 9 Met. 1; where it is said that the carrier is responsible for defects that might have been discovered upon the most careful and thorough examination. In McElroy and wife *v.* Nashua & Lowell R. R. 4 Cush. 400, it was held that the defendants were bound to the utmost exact care and diligence, not only in the management of the trains and cars, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers. In Maine the carrier is held for such care as is used by very cautious persons. Edwards *v.* Lord, 49 Maine Rep. 279.

"In Connecticut the carrier is held for the highest degree of care of a reasonable man. Hall *v.* Conn. River Steamboat Co. 13 Conn. 320; Derwent and wife *v.* Loomer, 21 Conn. 253; Fuller *v.* Naugatuck R. R. 21 Conn. 557, 576. In Hadley and wife *v.* Cross, 34 Vt. Rep. 586, the doctrine of Ingalls *v.* Bills was applied to a livery stable-keeper letting a defective carriage, namely, that he was liable if the defect could have been discovered upon the most careful and thorough examination. So in New York, in Hegeman *v.* Western R. R. 16 Barb. 353, it is held that the carrier is bound to conduct his business with all the care which human prudence and skill could suggest; and the defendants were held liable for injuries caused by a defect in a car made by a competent manufacturer, which defect was not discoverable upon a thorough examination after the car was finished, but might have been before, by bending the axle in which the defect was, and thus holding the carriers liable for the neglect of the manufacturer, and this decision was affirmed in 3 Kernan, 9. In Caldwell *v.* Murphy,

[1] Ibid.; Curtiss *v.* Rochester & S. R. R. 20 Barb. 282.

although its standard is the same with all. It must be the diligence of a good business man in his specialty, which, as has already been seen, is equivalent to the *diligentia diligentis patris-*

1 Duer, 241, the charge of the judge, that the law exacted of the carriers of passengers extraordinary care and diligence, and that they were liable for an injury unless it happened from pure accident, was held to be entirely correct, and that extreme care was required. In Camden & Amboy R. R. *v.* Burke, 13 Wend. 626, the court recognize the rule that the carrier is bound for the utmost care of very cautious persons.

"In Railroad Co. *v.* Aspell, 23 Penn. 147, it was held that a railroad was bound to exercise the strictest vigilance, and must carry their passengers safely if human care and foresight can do it, and they are liable for any defect in the road, the cars, or the engines, or any other species of negligence whatever of which they or their agents may be guilty. So is N. J. Railroad Co. *v.* Kennard, 21 Penn. 203.

"In Galena & Chicago R. R. *v.* Yarwood, 15 Ill. Rep. 468, it is said that the current of authorities both in England and America is uniform in holding these carriers to the utmost prudence and caution; holding them liable for the slightest negligence, and that the diligence of cautious persons is not enough.

"In Galena & Chicago R. R. *v.* Fay, 16 Ill. Rep. 558, it is held that the highest degree of care, vigilance, and skill are required, and that the carrier is responsible for the least neglect known to the law, short of insurance. In Frink *v.* Potter, 17 Ill. 406, it was held that carriers of passengers are liable for slight neglect, and that the law imposes upon them the duty of carrying their passengers safely, so far as is reasonably practicable, and that they would be liable for injury by the breaking of an axle by reason of frost, if by extraordinary care and attention the danger might have been avoided. Similar views are also maintained in Frink *v.* Coe, 4 Greene (Iowa), Rep. 555, and in Fairchild *v.* California Stage Co. 13 Cal. Rep. 599.

"In Kenney *v.* Neil, 1 McLean, 540, it was held that a passenger carrier was not liable for casualties which human sagacity could not foresee, and against which the utmost prudence cannot guard; that the driver is bound to exercise the utmost care, and must be skilful, and that the employer is responsible for the least degree of imprudence and want of care in the driver; and much the same is Marcy *v.* Tallmage, 2 McLean, 157, holding that the carrier is bound to carry his passengers safely as far as human skill can accomplish that object, and is chargeable for the least negligence or want of skill or prudence.

"In our own state it is said, per Eastman, J., that railroads as carriers of passengers are liable for all damages that may arise to them from even the smallest negligence on their part, or that of their servants. Cornwall *v.* The Sullivan R. R. 28 N. H. 169. A similar statement is made in Clark *v.* Barrington, 41 N. H. 51.

"The authorities cited fully sustain the general view taken by the judge in his instructions to the jury; and the question is whether, in the illustrations given, there was anything calculated to mislead them. The objection most urged is the statement that defendants must use such a degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business."

familias. And as the specialty varies so must vary the mode of diligence required. The diligence of a stage-coach maker is very different from the diligence of the maker of locomotives and cars. The diligence to be exerted by the stage-coach maker must be such as a good stage-coach maker is accustomed to exert, the diligence to be exerted by the maker of locomotives and cars must be such as a good manufacturer in his particular line is accustomed to exert.[1]

[1] In Meier *v.* Penn. R. R. 64 Pa. St. 225, the question in the text is thus discussed by Agnew, J.: . . . . "The language of Judge Gibson, taken from N. Jersey Railroad Co. *v.* Kennard, 9 Harris, 204, that a carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, has no relation to the question now before us. The case he was considering was that of a car made without guards at the windows to prevent the arms of passengers being thrust out to their injury, which he considered a defect in the construction of the car, making the carrier liable for negligence. The car was not perfect in its parts as he thought. The car was imperfect in construction, and therefore not adapted to the end to be attained, to wit, security. It may not be amiss to say that this opinion of the chief justice as to window guards, was not sustained by the court in banc, and has since been overruled in Pittsburg & Connellsville Railroad Co. *v.* McCleary, 6 P. F. Smith, 294. The doctrine we are now asked to sustain is, that though the car is perfect in all its parts, if imperfect from some latent and undiscoverable defect, which the utmost skill and care could neither perceive nor provide against, the railway company must still be held responsible for injury to passengers on the ground of an absolute liability for every defect. The plaintiff in error in effect contends, that the defendants were warrantors against every accident; but even in the case referred to, Judge Gibson denied this rule. He said of the carrier, he is bound to guard him (the passenger) from every danger which extreme vigilance can prevent. This expresses the true measure of responsibility. He answered a point in these words: 'That the company is responsible only for defects discoverable by a careful man, after a careful examination and exercise of sound judgment.' Thus, 'This is true, but were there such an examination and exercise of judgment?' The defective construction of the car must have been obvious to the dullest perception,' &c. The same rule was laid down in Laing *v.* Colder, 8 Barr, 482. Judge Bell says, it is long since settled that the common law responsibilities of carriers of goods for hire do not, as a whole, extend to carriers of passengers. The latter are not insurers against all accidents. But though (he says) in legal contemplation they *do not warrant the absolute safety of* their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages. The same doctrine will be found in substance in Railroad Co. *v.* Aspell, 11 Harris, 149, and Sullivan *v.* The Philadelphia &

§ 630. *Carrier not bound for breakage of carriage or road caused by casus.* — In accordance with the views heretofore expressed,[1] the carrier is not liable for defects which could not have been averted except by the exercise of an excess of diligence incompatible with the performance of the duties of a common carrier. Thus, he will not be held liable for damages to a passenger caused by the breaking of a rail through extreme cold, when, in point of fact, to make rails of such a character as uniformly to withstand such extreme cold, would involve a degree of caution and expense which, if carried into every department, would make railway transportation impracticable.[2]

§ 631. *Nor for latent defects.* — So the carrier is not liable, so far as concerns passenger carriage, for damages incurred through latent defects which could not have been discovered by examina-

Reading Railroad Co. 6 Casey, 234, and in other cases. In all the Pennsylvania cases, it will be found that negligence is the ground of liability on the part of a carrier of passengers. Absolute liability requires absolute perfection in machinery in all respects, which is impossible.

"The utmost which human knowledge, human skill, and human foresight and care can provide is all that in reason can be required. To ask more is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business — that of insurance. Nor can we carry the requirement beyond the use of known machinery and modes of using it. Railroads must keep pace with science, and art, and modern improvement, in their application to the carriage of passengers, but are not responsible for the unknown as well as the new. The rule laid down by the learned judge, in the language quoted in the second assignment of error, is a correct summary of the law. The rule of responsibility differs from the rule of evidence. *Primâ facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it. Laing *v.* Colder, 8 Barr, 482; Sullivan *v.* Philadelphia & Reading Railroad Co. 6 Casey, 234; Shearman & Redfield on Negl. § 280; Redfield on Railways, § 1760, and notes. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty, to carry the passengers safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent."

[1] Supra, § 586.

[2] McPadden *v.* N. Y. Cent. R. R. 44 N. Y. 478; *S. C.* 47 Barb. 247; qualifying Alden *v.* N. Y. Cent. R. R. 26 N. Y. 102. See, however, Frink *v.* Potter, 17 Ill. 406; and see Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282.

tion, and which are not traceable to any want of good business diligence in the manufacture.[1]

[1] Grote *v.* C. & H. R. R. 2 Exch. 251; Readhead *v.* Midland R. R., Law, Rep. 2 Q. B. 412; aff. in Exch. Ch., Law Rep. 4 Q. B. 379. See Meir *v.* Penn. R. R. 64 Pa. St. 225; *S. C.* 27 Phil. Rep. 229.

Latent defects of railway track.— Toledo, &c. R. R. *v.* Conroy, 61 Ill. 162, was a suit by an employee against a railroad for damages arising from a defective bridge. In the opinion of the court, Lawrence, C. J., said: "Where it" (the company) "did not know, and could not have informed itself of the defect, we do not see how it can be held responsible." "It may possibly be said that decay in the timbers of a bridge, being necessarily gradual, could always be ascertained by the use of due diligence. This may be so, but we do not feel justified in assuming it as a legal presumption." See also infra, § 634.

In McPadden *v.* R. R. 44 N. Y. 478 (supra § 630), Earl, C. said: "But there is another reason. It does not appear that plaintiff's counsel, upon the trial, claimed that he had shown any negligence against the defendant, and he did not claim to go to the jury upon any such question, and the general term did not grant a new trial upon the ground that there was any question of negligence in the case, which ought to have been submitted to the jury, but upon the ground above stated.

"In the case of Alden *v.* The New York Central Railroad Co., the accident, by which the plaintiff was injured, was caused by the breaking of an axle of the car in which the plaintiff was riding, and it was held that a common carrier is bound absolutely, and irrespective of negligence, to provide road-worthy vehicles, and that the defendant was liable for the plaintiff's injuries caused by a crack in the axle, although the defect could not have been discovered by any practicable mode of examination. That case was a departure from every prior decision and authority to be found in the books of this country or England, and, so far as I can learn, has never been followed anywhere out of this state. It was in conflict with the previous case, in the same court, of Hegeman *v.* The Western Railroad Corporation, 3 Kernan, 9. The only authorities cited to sustain the decision was the English case of Sharp *v.* Grey (9 Bing. 457), and yet the distinction has been distinctly repudiated in England, in the well considered case of Readhead *v.* Midland Railw. Co. first decided in the queen's bench (Law Reports, 2 Q. B. 412), and then on appeal in the exchequer chamber (Law Reports, 4 Q. B. 379), where it was unanimously affirmed in 1869; and the court held that the contract, made by a common carrier of passengers for hire, with a passenger, is to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and that it does not contain or imply a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, and road-worthy. In the exchequer chamber, Mr. Justice Smith, writing the opinion of the court, alludes to the case of Alden *v.* The New York Central Railroad Company, and dissents from it, and comments upon the case of Sharp *v.* Grey, relied upon in that case; and he shows clearly that it was no authority for the broad doctrine laid down in that case. He says: 'We have referred somewhat fully to this case (Sharp *v.* Grey), because

§ 632. The plaintiff, being a passenger in a railway carriage belonging to the defendant, got up from his seat and put his

it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the judges of the court of appeals in New York, in a decision which will be afterward referred to. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision.' Hence the case of Alden *v.* The New York Central Railroad Company has no foundation of authority whatever to rest on, and the only reason given for the decision is that the new rule adopted would be plainer and easier of application than the one that had been recognized and acted upon for hundreds of years. It was always supposed that there was a difference, founded upon substantial reasons, between the liability of the common carrier of goods and the common carrier of passengers. The former was held to warrant the safe carriage of the goods, except against loss or damage from the act of God or the public enemy; but the latter was held to contract only for due and proper care in the carriage of passengers.

"I have thus commented upon and alluded to the case of Alden *v.* The New York Central Railroad Company, with no design to repudiate it as authority, but for the purpose of claiming that it is a decision which should not be extended. I am unwilling to apply it to every case that apparently comes within its principle; nor would I limit it to the car in which the passenger was riding. The whole train must be regarded as the vehicle; and the engine and all the cars attached together must be free from defect and road-worthy, irrespective of negligence. So far, and no farther, am I willing to regard that case as authority. Shall it be applied to steamboats and vessels, common carriers of passengers upon the ocean and our inland waters? Shall it apply to innkeepers, proprietors of theatres, and other places of public resort, who invite the public into their buildings, for a compensation? And shall all such persons be held to an implied warranty that their buildings, with the appurtenances, are suitable and proper, and free from all defects which no foresight could guard against, or skill detect? Shall it be applied to the road-bed of a railroad? If so applied, where shall it stop? It must also extend to the bridges, masonry, signals, and, in fact, to all the different parts of the system employed and used in the transport of passengers by railroad. And as railroad companies are responsible for the skill and care of all their human agents, such an extension of that decision would make them substantial insurers of the safety of all their passengers, and thus practically abolish the distinction between the liability of the carriers of passengers and the carriers of goods. While such a rule would 'be plain and easy of application,' I am not satisfied that it would be either wise or just. Railroads are great public improvements, beneficial to the owners, and highly useful to the public. There is a certain amount of risk incident to railroad travel which the traveller knowingly assumes; and public policy is fully satisfied, when railroad companies are held to the most rigid responsibility for the utmost care and vigilance for the safety of travellers.

hand on the bar which passed across the window of the carriage, with the intention of looking out to see the lights of the

"If, therefore, the jury had found that the rail was broken by the eastward bound train, it would still have been a case of mere accident, caused without any want of proper care and vigilance on the part of the defendant, and the defendant would not have been liable." . . . .

Condition of carriage. — In Readhead *v.* Midland Railway Company, L. R. 2 Q. B. 412, the point decided in the queen's bench was that a carrier of passengers for hire is bound to use the utmost care and skill in everything that concerns the safety of the passengers; but that he is not bound at his peril to provide a carriage roadworthy at the commencement of the journey; and if the carriage turns out to be defective, he is not liable to a passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction, nor discovered by subsequent examination. This view was concurred in by Mellor and Lush, JJ. ; Blackburn, J., however, dissented, holding that there is an obligation on a carrier of passengers to provide at his peril a vehicle in fact reasonably sufficient for the journey, and he is responsible for the consequences of any insufficiency, though arising from a latent defect.

This ruling was affirmed in the exchequer chamber, L. R. 4 Q. B. 381, in which court Montague Smith, J., gave an elaborate opinion, from which the following passages are extracted:

"This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious, that for the plaintiff on this state of facts to succeed in his action, he must establish either that there is a warranty, by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as the learned counsel mainly insisted, a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence.

"We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier, and the obligation undertaken by him, are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows that the absence of such care, in other words negligence, would alone be a breach of this contract; and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care, or foresight, we think the plaintiff has failed to sustain his action, and that the judgment of the court below in favor of the defendant ought to be affirmed.

"The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied lia-

next station. The pressure caused the door to fly open, and the plaintiff fell out and was injured. There was no further evi-

bility. If it had not been the custom of the realm or the common law declared long ago that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiff to do in the case of carriers of passengers. . . . .

"It is now proposed to consider the authorities relied on as having a direct bearing on the question before us. The case which the plaintiff's counsel relied on as the strongest in his favor is Sharp *v.* Grey.[1] But that case when examined furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axle-tree of a stage-coach. The defect might have been discovered if a certain examination had taken place, and it was made a question of fact at the trial whether it would have been prudent or not to make that examination. Tindal, C. J., at p. 458, who tried the case, is reported to have directed the jury to consider 'whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely.' Now, if the learned chief justice had supposed there was an absolute warranty of road-worthiness, this direction could not have been given, as it would have been an utterly immaterial consideration. The jury found, on this direction, for the plaintiff; and a motion was made in the absence of Tindal, C. J., for a new trial. Two of the learned judges (Gaselee and Bosanquet, JJ.), in refusing the rule, are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a road-worthy vehicle. Park, J., uses language which, as reported, is ambiguous. But the judgment of Alderson, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says: 'A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered by investigation.' We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the judges of the court of appeal in New York, in a decision which will be afterwards referred to. But the case when examined furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and the authority of Tindal, C. J., and Alderson, J., is against the plaintiff.

. . . "But a case still more directly bearing upon the present point was tried before Cockburn, C. J.[2] There the accident happened in consequence of the breaking of the tyre of the near wheel of the engine. The tyre broke from a latent flaw in the welding. The trial lasted six days, and the questions mainly were, whether the flaw was not visible, and whether by the exercise of care it might not

[1] 9 Bing. 457.

[2] Stokes *v.* Eastern Counties Railway Co. 2 F. & F. 691.

dence as to the door or its fastenings. The jury having found for the plaintiff, it was held, in 1873, both by the queen's bench and the exchequer chamber, that there was evidence to sustain the verdict.[1]

§ 633. *No defence that maker of carriage was competent.* — If a carriage be defective, from being negligently made, and an injury thereby occurs, it is no defence that the carriage was made by a competent manufacturer. The carrier is liable for the negligence of his servants, whether in making or running his carriage.[2]

§ 634. *Track of railroad must be kept in safe running order.* — A more questionable application of this principle, so far as concerns the merits, is to be found in an English case, where a railroad embankment was washed away by a freshet. The bed of the railroad was, at the particular spot, an embankment of loose sand, peculiarly liable to be disintegrated by water. The embankment certainly was not strong enough to withstand all possible freshets, for it did not withstand the freshet which

have been detected. The lord chief justice commences a full direction to the jury by saying:[1] 'The question is, whether the breaking of the tyre resulted from any negligence in the defendants, or their servants, for which they are responsible.' The latent defect in the tyre was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tyre was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tyre was in the wheel of the carriage, and there in the wheel of the engine. But for the reasons already given, it can never be that a warranty can exist as to the carriage, but not as to the engine drawing it. Thus, then, it is plain, a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied, and there the learned chief justice, and the parties themselves, seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case is right; for the warranty, as an obligation implied by law, must have existed at the time of these trials, if it exists now; and surely it is strong to show that no such rule does form part of a common law that it was not then recognized and declared."

See these cases further examined, supra, § 360–5; infra, § 774–5.

[1] Gee *v.* Metrop. Rail. Co., L. R. 8 Q. B. 161. See supra, § 363–4.

[2] Sharp *v.* Grey, 2 Bing. 459, per Alderson, B.; Readhead *v.* Midland Ry. Co., Law Rep. 2 Q. B. 412; 4 Q. B. 379; Francis *v.* Cockrell, Law Rep. 5 Q. B. 184; aff. in Exch. Ch., L. R. 5 Q. B. 501.

[1] 2 F. & F. at p. 693.

caused the damage under investigation. But it was shown that the embankment had not previously been washed away, and that the freshet to which it succumbed at the time of the accident was higher than any recorded prior freshet. An express train, passing over the road just after the damage thus sustained, was thrown from the track, and the plaintiff thereby injured. The jury found a verdict for the plaintiff, which was set aside by the court on the ground that there was no inculpatory negligence on the part of the company if the road was able to stand ordinary as distinguished from extraordinary tests.[1] But while this is correct, so far as it is to be understood as expressing the position that the diligence required of a railroad is the practical diligence of a capable and faithful railroad management, and not the speculative diligence of an imaginary perfect railroad management, yet there is much good sense in the following criticism of Judge Redfield: "But it certainly deserves consideration whether there is not rashness in driving an express train at the usual rate of speed under such circumstances."[2] This, of course, depends upon whether, by proper diligence, the company could have known of the shock the road had received. If so, it was negligence to send over it an express train without special investigation. As with carriages, so with road; it is no defence that the defendants employed a competent engineer, if the road, or its bridges or culverts, be negligently made or kept.[3]

To leave a switch out of place is *per se* negligence.[4]

Breakage of a rail by extraordinary frost is, as has been seen, a defence.[5]

§ 635. *All practicable improvements in transportation will be adopted.* — Yet, it must be again remembered, that the test is that of the *good* not of the *perfect* business man; and this, as has already been shown, because, among other reasons, no perfect business man exists.[6] A good business man, to apply this test, will adopt all improvements which, when tested by experience,

[1] Withers *v.* North Kent R. R. 3 H. & N. 969. That a road must be in good running order, see Rockwell *v.* R. R. 64 Barb. 438; Read *v.* Spalding, 5 Bosw. 395; *S. C.* 30 N. Y. 630; Michaels *v.* R. R. 30 N. Y. 564; Morrison *v.* Davis, 20 Penn. St. 171; and cases cited supra, § 630–1.

[2] 2 Redf. on R. R. § 192.

[3] Grote *v.* Chester & Holy. Ry. Co. 2 Ex. 254.

[4] State *v.* O'Brien, 3 Vroom, 169; R. *v.* Pargeter, 3 Cox C. C. 191; infra, § 802.

[5] Supra, § 630.

[6] See supra, § 65.

seem likely to add to the security of those intrusted to his care, provided that such improvements can be applied without, by their cumbrousness or expense, impeding the transportation which such persons desire. But a good business man will not seize upon all inventions, though they ultimately prove to be improvements, which have not been tested by experience.[1] The engineer, to take up the question concretely, must apply the diligence of a good engineer; the brakesman that of a good brakesman; the conductor that of a good conductor; the manufacturer, who is *pro tanto* the owner's agent, that of a good manufacturer of his class; the repairer that of a good repairer.[2] Neither is required to be perfect.

§ 636. *Diligence to be that which a good carrier of the particular grade is accustomed to exert.* — It is true that we sometimes find great confusion in the expression of this rule. The authority of Sir William Jones, based, as has been shown, on unauthorized glosses of the scholastic jurists, backed as it is by Judge Story's reluctant though influential approval, continues occasionally to draw from judges the statement that the law contemplates a third kind of diligence, the *diligentia diligentissimi*, or the utmost diligence, with its antithesis of *culpa levissima;* but when this is done, it is generally with qualifications that show that the *culpa levissima* in question is simply the *culpa levis* of the business Roman jurists; *i. e.* that negligence which a man who specially undertakes a particular business shows either in the inadequate preparation for, or the inadequate management of such business. Of this we have an illustration in a Massachusetts case, where the damage arose from the breaking of the axle-tree of a coach through a flaw not visible from the outside. It was assumed by the court that the defendant had been at great pains and expense in procuring a coach that was entirely road-worthy. The court began by asserting that carriers of passengers are bound to use the *utmost care and diligence* in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, *in order to prevent those injuries which human care and foresight can*

[1] Supra, § 52, 212–3; infra, § 872; Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282; Balt. & O. R. R. *v.* State, 29 Md. 252; Unger *v.* R. R. infra, § 639; Taylor *v.* Redway, 48 N. H. 304; Steinweg *v.* Erie R. R. 43 N. Y. 123.

[2] See Fletcher *v.* Bost. & Me. R. R. 1 Allen, 9; Briggs *v.* Taylor, 28 Vt. 180; Parker *v.* Dubuque S. W. R. R. 34 Iowa, 400.

guard against; and if accident happens through defect in the coach, which might have been discovered and remedied upon the most thorough and careful examination of the coach, the owner is liable." But then comes the qualification: "But if the injury arose from some invisible defect *which no ordinary test will disclose*, like that in the present case, the carrier is not liable." [1] The *culpa levissima*, therefore, of the theorist subsides into *culpa levis* when applied to practical life. The tests by which this *culpa* is to be defined are not *extraordinary*, but *ordinary;* in other words, they are the tests which a good business man, skilled in his particular department, is accustomed to apply.[2]

§ 637. *But such diligence rises in proportion to the risks.* — Yet it must not be forgotten that the diligence to be applied, from the very nature of the definition just given, rises in proportion to the risks incurred.[3] The diligence and skill required to push a scow is far lower than that to navigate a steamship, but in each case the standard is the same; the diligence and skill which a good business man in the specialty is accustomed to use under similar circumstances.

§ 638. *Same rule applies to steamboats.* — So, also, the structure of steamboats must be such as to enable them, in proportion to the risks to which they will be exposed, to apply the improvements of mechanical art for the safe transit of passengers. Nor does the fact that a carrier by steamboat has fully complied with the act of Congress, as to the safeguards to be used for the protection of passengers, clear him from liability, or remove a presumption of negligence established by the evidence. His liability is not in any manner restricted or limited by that act, but a failure to comply with its provisions would, of itself, subject him to a charge of negligence.[4]

§ 639. *And so as to horse railways.* — So the same test — the diligence of a good business man in the particular specialty when acting under similar circumstances — is applicable to horse railroads.[5] Hence in the attachment of horses to its cars it is not

[1] Ingalls *v.* Bills, 9 Mete. 1. See also Edwards *v.* Lord, 49 Me. 279.

[2] See further, to this effect, Bowen *v.* N. Y. Cent. R. R. 18 N. Y. 408; Curtis *v.* Rochester & S. R. R. 18 N. Y. 534; Meier *v.* Penn. R. R. 64 Pa. St. 225; Tuller *v.* Talbot, 23 Ill. 357. See supra, § 627; infra, § 872.

[3] See supra, § 48, 50, 627, and notes.

[4] Caldwell *v.* N. J. Steam Nav. Co. 47 N. Y. 282.

[5] See Feital *v.* R. R. 109 Mass. 398.

bound to use the best method human skill and ingenuity have devised to prevent accidents. If it uses the method in general use, and which has been found usually adequate and safe, its duty in this respect is discharged.[1]

[1] Unger *v.* 42 St. R. R. Co. 51 N. Y. 497. In this case the question is thus discussed by Earl, C.: . . . . "Regard must be had to convenience and practicability, and to the safety of the passengers. The team should be so attached that it can be easily detached in any emergency. Hence, upon all the evidence in the case, no jury could properly determine that even the greatest degree of care would require that the pin should be used with the hook. But the learned counsel for the appellant argues that a street railway company is bound to adopt every improvement and to use every precaution for the purpose of meeting an unforeseen occurrence, and preventing injuries to travellers upon the streets as well as passengers in the cars; and he seeks to apply the same rule, as to diligence and care, which has in many cases been applied to railway companies, whose cars are drawn by steam, in the construction of their cars, with the view to the safety of passengers therein. The argument is clearly unsound. The degree of care which a person owing diligence must exercise depends upon the hazards and dangers which he may expect to encounter, and upon the consequences which may be expected to flow from his negligence. Railroad companies, whose cars are drawn by steam, at a high rate of speed, are held to the greatest skill, care, and diligence in the manufacture of their cars and engines, and in the management of their roads, because of the great danger from their hazardous mode of conveyance to human life in case of any negligence. But the same degree of care and skill is not required from carriers of passengers by stage-coaches (Hegeman *v.* Western Railroad Corporation, 13 N. Y. 9); and, for the same reason, is not required from the carriers of passengers upon street cars drawn by horses. The degree of care required in any case must have reference to the subject matter, and must be such only as a man of ordinary prudence and capacity may be expected to exercise in the same circumstances. In some cases this rule will require the highest degree of care, and in others much less.

"But whatever degree of care may be required of street railway companies, as to the passengers which they carry, their cars are no more dangerous to pedestrians in the street than carriages, omnibuses, or any other vehicles drawn by horses; and there can be no more danger from the horses attached to the street cars than from horses attached to any other vehicle; and, hence, no more care can be required of street railway companies in the management of their cars and horses in the street than is required of the driver or owner of any other vehicle. It would be a very hard and unwise rule which would require of the owner of every vehicle driven in the streets of a city that he use, in the construction of his carriage and in the harness of his horses, and all the means by which they are attached to the vehicle, the best methods which human skill and ingenuity have contrived and brought into use to prevent accidents to pedestrians in the streets. Such a rule has not, and probably never will be, adopted.

§ 640. *Further illustration of the distinction between "good" and "perfect" railroad management.* — The distinction between the *culpa levis* which is the antithesis to good practical diligence, and the *culpa levissima* which is the antithesis to perfect ideal diligence may be illustrated by the well known law, as elsewhere detailed, which is applied to physicians. A physician, when called upon to manage a case, is not required to apply the skill and care which could be applied by the perfect ideal physician, for the reason that from the limitation of the human intellect no perfect ideal physician exists in practice, and from the limitation of human endurance no perfect ideal physician, even if he existed, could watch a patient unintermittingly. But a physician, when called upon to manage a case, is bound to exercise the skill and vigilance which good and faithful physicians, under the circumstances in which he is placed, would exercise. If called upon in a country town, remote from the great centres of scientific activity, to attend to an exceptional case which requires immediate action, he is not liable if he does not employ those mechanisms which only a residence in such a centre of scientific activity would enable him to procure. On the other hand, a physician living in such a centre is liable for negligence if, when called upon in such a case, he does not use such mechanism, supposing its application to be advisable.[1] So it is with railroads. A railroad doing a small local business in a sparsely populated territory, and running only a few slow trains where the chances of collision are slight, is not required to apply those delicate and complicated checks and guards which are not only very expensive, but involve new and critical risks peculiar to themselves. It would not, for instance, be negligence in such a road to omit the construction of an auxiliary telegraph, by which each station-master, and through him each engineer, can be advised of the position of all other trains at that time traversing the same section of the track. But a great trunk road, over which at any given moment are dashing, within a range of a few miles, several express trains, which cannot wait at a given station until all other

"I hold, therefore, that the defendant was not required to adopt an unusual and perhaps untried method of attaching its horses to the cars. It discharged its duty in that respect to pedestrians who had the right to use the streets in common with it if it attached them in the way which was in general use, and which had been found reasonably adequate and safe." . . . .

[1] See infra, § 730–7; supra, § 437.

due trains have arrived, may be bound to employ such a telegraph. So with regard to a double track. When a double track is not required by the business of the road, it is not negligence to have but a single track; but the business of a road may become so heavy and complex as to make the omission of a double track negligence. So, while a road will not be compelled to have its beds laid with ties of iron or cut stone (which would be *diligentia diligentissimi*), and will be permitted to lay them with wood, yet these ties, when made of wood, must be preserved sound and road-worthy.[1] So, to take up a case elsewhere independently discussed, is it with fencing. To omit fencing is negligence when required by law, or essential to the ordinary safe transport of passengers; it is not negligence when it is not required by law, and when it is not necessary, from the sparseness of population, to the ordinary safe transport of passengers. Diligence in all these cases is not the speculative perfection of the ideal road; it is the practical adequacy of the actual road for the particular duty which it undertakes.[2]

§ 641. *Free passengers.*[3] — It has been already shown, in the discussion of mandates, that when there is special confidence between bailor and bailee, the idea that the gratuitous bailee is liable only for gross negligence is exploded as inconsistent both with reason and authority.[4] But in addition to this, it may be questioned whether there are really any litigated cases of passengers, not employees, who are truly gratuitous.[5] Railroads are not accustomed to give passes for nothing.[6] The consideration may be the interchange of courtesies with officers of other roads, or it may be the expectation of administrative favors; or it may be the attracting of custom, as is the case with tickets given to newspaper reporters, to persons having the option of sending masses of freight, to drovers,[7] and in a less but still perceptible degree,

[1] Pittsburg, C. & L. R. R. *v.* Thompson, 56 Ill. 138.

[2] Ford *v.* S. W. R. R. 2 F. & F. 730; Great W. R. R. *v.* Fawsett, 1 Moore P. C. (N. S.) 101; Le Baron *v.* E. B. Ferry, 11 Allen, 312; Steinweg *v.* Erie R. R. 43 N. Y. 123; Pittsburg, C. & S. R. R. *v.* Thompson, 56 Ill. 138. Supra, § 25, 212–3.

[3] See this topic discussed in its relations to contributory negligence, supra, § 355.

[4] See supra, § 355, 485, 501; Jacobus *v.* R. R., Cent. L. J., July 18, 1874; Alb. L. J., Aug. 8, 1874.

[5] See supra, § 355.

[6] Cleveland, R. & A. R. R. *v.* Curran, 19 Ohio N. S. 1.

[7] A drover with a free pass is a passenger for hire. New Y. Cent. R.

to lecturers, clergymen, and others who circulate among large sections of the community. Or, the giving away of a certain number of free tickets may be among the perquisites of the officers of the road, who pay for them by their services. But however this may be, it is clear that where a railroad undertakes to transport a passenger, it is bound to exercise the same degree of diligence, whether that passenger pays or does not pay money for his ticket. Undoubtedly when the idea of *culpa levissima* was afloat, it was a relief to say that in cases at least of free passengers this impossible degree of vigilance was not to be exacted. But whenever it has come to the question whether a railroad, in transporting a free passenger, is not bound to exercise towards such passenger the diligence which a good and competent business man should under such circumstances exercise (which is all that is required as to pay passengers), then the answer is emphatically in the affirmative. Thus, in a celebrated case before the supreme court of the United States, where the plaintiff was invited, being the president of another road, to ride as free passenger on the Philadelphia and Reading Railroad, and while so riding was injured by a collision caused by the negligence of the employees of the latter road, it was held that the plaintiff was entitled to recover. The reasoning of the court goes to the root of the question, and is in full harmony with the Roman law of mandates as heretofore discussed. Whether the service is gratuitous is treated as immaterial; it is enough if confidence is tendered on the one side and accepted on the other. "The confidence induced," says Judge Grier, "by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it." [1]

R. *v.* Lockwood, 17 Wall. 357; supra, § 355.

[1] Phil. & Read. R. R. *v.* Derby, 14 How. U. S. 983. See also Nolton *v.* West. R. R. 15 N. Y. 444; Gillenwater *v.* M. & I. R. R. 5 Ind. 540; Great N. R. R. *v.* Harrison, 12 C. B. 576, and cases cited at large, supra, § 355.

Where a person was travelling on a railroad, in a caboose car, in charge of his stock and furniture, and an entry in reference to him had been made on the way-bill by the assistant superintendent, thus, "A man in charge;" he is a passenger, and was entitled to all the rights and remedies of a passenger, though perhaps not entitled to the use by the company of all the appliances for the safety of passengers that would be used on passenger trains. But in whatever class of cars a railroad company undertakes to convey its passengers, its duty is to so manage such train that passengers shall not by its own carelessness be killed or injured. So it is ruled that where a railroad company carries for hire, in a caboose car, on a freight

§ 641 *a. Agreement that free passenger should take risk of all injury.* — It has been elsewhere shown that an agreement that a carrier shall not be liable for negligence is void as against the policy of the law.[1] There is no reason why this principle should not apply to cases of free as well as of paid carriage. If "confidence," as has been just stated, is a sufficient consideration, then no passage voluntarily tendered and accepted is gratuitous. But, independently of this, it is against public policy that a person using the high and dangerous agency of steam should do so in any case on which human life depends with a diligence less than a good and capable expert should employ in wielding such an agency. If so, steam service would be graded in diligence according to the degree of pay: first class diligence for first class cars; second class diligence for second class cars; minimum diligence to those who pay but little, or do not pay at all. But the law knows no such gradations; when the work is undertaken, then so far as safety is concerned, the same precautions must be taken for all who are permitted to take passage.[2]

§ 642. *Trespassers.* — The duties of carriers to trespassers has been elsewhere distinctively discussed.[3]

§ 643. *Exception where passenger assumes the position of an employee of the road.* — Yet, in obedience to the familiar principle that an employee cannot recover from his employer for risks

train, all passengers that apply, it becomes to some extent a passenger train, and the company is bound to use such safeguards for the protection of its passengers as science and skill have devised, and such as experience has proved to be efficacious in accomplishing their object on such a train. Slight care is not sufficient. It is bound to employ all the means reasonably in its power to prevent accidents and protect passengers.

In an action against a railroad company for an injury to the plaintiff while a passenger, resulting from the negligence of the defendant, an instruction, that public policy demands that the law should be applied as rigidly to railroad companies as to any other species of common carriers, is not calculated to mislead the jury. I. B. & W. R. R. Co. *v.* Beaver, 41 Ind. 493.

[1] See supra, § 589, 592.

[2] Ohio & Miss. R. R. *v.* Muhling, 30 Ill. 9; Ind. Cent. R. R. *v.* Mundy, 21 Ind. 48; Cleveland, R. & A. R. R. *v.* Curran, 19 Ohio N. S. 1; Mobile & O. R. R. *v.* Hopkins, 41 Ala. 488; Ill. Cent. R. R. *v.* Read, 37 Ill. 484; Edgarton *v.* N. Y. & H. R. R. 39 N. Y. 227; Dunn *v.* Grand Trunk R. R. 58 Me. 187; Penn. R. R. *v.* Henderson, 51 Penn. St. 315; R. R. *v.* Lockwood, 17 Wall. 357. On the other hand such contracts have been sustained in Kinney *v.* Cent. R. R. 34 N. J. 513; 3 Vroom, 407, and other cases cited supra, § 589.

[3] Supra, § 354.

of which he was previously advised,[1] cases may occur when a passenger, by taking upon himself the duties of an employee, may put himself in such a relation to the road that it will not be liable to him for injuries he received from defects as to which he was advised, and whose risks he agreed to assume. This has been held in New York to be the case where a drover took a free ticket under an agreement that "persons riding free *to take charge of their own stock* do so at their own risk of personal injury from whatever cause."[2] And whatever view we may take of the immediate point here taken, or of the discussion of it elsewhere noticed,[3] we must concur in the conclusion, as given under another title, that on the general principles of contributory negligence, the drover who participates with the carrier in the mismanagement of the stock cannot recover from the carrier damages for losses thus incurred.[4]

As a matter of fact, we may hold that employees, paying no fare, but riding on road by virtue of their employment, are not passengers, though they may not on the particular trains be affording any service to the company.[5]

§ 644. *Defendant not exonerated by the fact that the road is under government control.* — This is largely the case with Germany, where it is held that whatever may be the authority of the state over the road, the carrier who undertakes to transport on it passengers is liable for *culpa levis*, or for such negligence as exists in the lack of the diligence which a good and competent business man should under the circumstances show. Such is undoubtedly the law in the United States.[6]

§ 645. *Excursion trains.* — Nor does it make any difference that the contract for passage was one for an excursion party in an excursion train hired in gross. Such a case is within the scope of the reasoning heretofore noticed as applying to free tickets. No matter what may be the carrier's engagements, he must exercise

[1] See supra, § 209; Sprong *v.* R. R. 3 N. Y. Supr. Ct. 54.

[2] Bissell *v.* R. R. 25 N. Y. 442.

[3] See supra, § 355, 589, 641, and cases there cited.

[4] See supra, § 595–7.

[5] Gilshannon *v.* Stony Brook, 10 Cush. 228; Seaver *v.* Bost. & Me. R. R. 14 Gray, 466; Russell *v.* R. R. 17 N. Y. 134; Higgins *v.* Hannibal & St. Joseph R. R. 36 Mo. 418; Un. Pac. R. R. *v.* Nichols, 8 Kans. 505.

[6] Peters *v.* Rylands, 20 Penn. St. 497.

as a carrier the skill and diligence of a competent and faithful business man when undertaking the particular class of work.[1]

§ 646. *Removal of passenger from car.* — It is within the power of the company to remove a mischievous or troublesome passenger from the cars;[2] and an omission so to do is a neglect for which the company is liable to parties thereby damaged.[3] At the same time the company is liable to the party offending for negligence in putting him out;[4] as well as for executing the duty at an improper time. Yet the removal of a passenger, for alleged misconduct, from the ladies' car to another, by the officers of the train, while the train is moving at the rate of twenty miles an hour, is not negligent or wrongful *per se*, but a question to be left to the jury under all the facts of the case. So, too, the question whether unnecessary force was used, or used in an unreasonable manner, is a question of fact for the jury.[5]

§ 647. *Stopping at spot where there is no platform.* — Stopping a train at an unusual place, and compelling a passenger to alight at such a place, where there is no platform, is a *primâ facie* case of negligence.[6] At the same time, if the passenger, when he knows that he can be safe by waiting a moment, or by alighting from an end of the car where there is a platform, steps off where there is no platform and is injured, he cannot recover from the company.[7]

§ 648. *Suddenly and without notice starting* a train while pas-

[1] Skinner *v.* L., B. & S. R. R. 5 Exch. 787; Cleve., C. & C. R. R. *v.* Terry, 6 Ohio (N. S.) 570.

[2] Pittsburg, F. W. & C. R. R. *v.* Hinds, 53 Penn. St. 512; Marquette *v.* Chic. & N. W. R. R. 33 Iowa, 563.

[3] Flint *v.* Norwich & N. Y. Co. 34 Connect. 554.

[4] Col., Chic. & Ind. R. R. *v.* Powell, 40 Ind. 37.

[5] Marquette *v.* Chic. & N. W. R. R. 33 Iowa, 563.

[6] Curtis *v.* R. & S. R. R. 29 Barb. 285; Memphis & C. R. R. *v.* Whitfield, 44 Missis. 466. See supra, § 371, 375.

A passenger on a freight train which was not regularly, but only occasionally, used to carry passengers, paid his passage money; the train carried him five miles beyond his destination; put him off at another station; he had to walk back to his destination; he had chronic rheumatism, and was exposed to the weather. It was held, on demurrer to the evidence, that the passenger was entitled to recover. Mobile & Ohio R. R. *v.* McArthur, 43 Miss. 180.

Overshooting "the platform a little" not *per se* negligence. Honyman, J., in Weller *v.* London, B. & S. R. R., L. R. 9 C. P. 134, quoting Blackburn, J., in Lewis *v.* London, C. & D. R. R., L. R. 9 Q. B. 66; supra, § 375-9.

[7] See supra, § 370, 375.

sengers are getting on and off, is negligence.[1] Thus in a Massachusetts case,[2] the evidence was that the driver stopped the carriage to receive the plaintiff as a passenger; that the carriage was crowded and all the seats in it were occupied; and that, immediately after she had got in, and when she was standing within the door, she was thrown out by its violent jerk at starting. It was held by the supreme court, that there was evidence in favor of the plaintiff to go to the jury.[3]

§ 649. *Conductor must notify of danger.* — When a danger approaches, it is the duty of the officers of the road to notify the passengers so that they can take steps to avoid it; and failure to give such notice is negligence.[4] So, also, if there is a dangerous place at the landing, it is the duty of the conductor to warn those about stepping out. He is not obliged specially to attend infirm passengers,[5] but he must give notice to all if any danger in alighting is probable.

§ 650. *Conductor must notify of approach of station.* — So must a conductor notify the passengers of an approaching station; and if any one of them is injured from the want of such notice,

[1] Keating *v.* R. R. 49 N. Y. (4 Sick.) 673; Burrows *v.* R. R. 3 N. Y. Supr. Ct. 44; Jeff., &c., R. R. *v.* Hendricks, 41 Ind. 48. But see Barton *v.* R. R. 1 N. Y. Supr. Ct. 297; Probst *v.* R. R. 1 N. Y. Supr. Ct. 10. Supra, § 371–7. The same rule applies to street cars. Geddes *v.* R. R., infra; Dale *v.* R. R. 3 N. Y. Supr. Ct. 686.

[2] Geddes *v.* R. R. Co. 103 Mass. 391.

[3] In a case in Wisconsin, the train being a night train with sleeping car attached, it was not error to refuse to instruct the jury that plaintiff's attempting to get aboard *before the sleeping car was abreast of the platform* was negligence *per se;* it not appearing that plaintiff knew the length of the train as compared with the platform, or ought to have assumed that it was intended to bring the sleeping car to that position. An instruction that if, under the circumstances of this case, the train, in being brought up to the station, came to a stop in such a manner as to induce the belief, on the part of the passengers, waiting on the platform, that it had stopped for their reception, and then when they, acting on this belief, were going aboard, started again without caution or signal given, this would be an act of negligence on the part of the company, whether or not the starting was one of necessity, and whether the stop was an actual or only an apparent one; was held not erroneous. It was the duty of the company, if the passengers were not to enter the cars under these circumstances, to have some one there to warn and prevent them; and of the persons in charge of the train, not to start it without previous caution or signal given. Curtis *v.* R. R. 27 Wisc. 158.

[4] McLean *v.* Burbank, 11 Minn. 277; Derwort *v.* Loomer, 21 Conn. 245.

[5] New O. & G. N. R. R. *v.* Statham, 42 Miss. 607.

the company is liable.[1] The liabilities attaching to his neglect in this respect have been already discussed.[2] But the conductor need not personally notify passengers not to stand on the platform (unless some sudden and peculiar danger be imminent) if there be a printed notice posted in the cars warning the passengers not to stand on the platform.[3]

§ 651. *Conductor must signalize when train is about to start.* — When passengers have alighted at a way-station, it is the duty of the officers of the train to notify them by signals when the train is about to start; but if they go out of hearing of such signals, the road is not liable. Thus where a through train turns out upon a side-track, at an intermediate station, and there stops to await the crossing of another train out of time, and a through passenger, not destined to that station, leaves the car, and is on the platform, or near the track when his train is about to start, or the coming train has signalled its approach, the road, through its officers, should give reasonable notice for such passenger to

[1] Southern R. R. *v.* Kendrick, 40 Miss. 374.

[2] Supra, § 379. The inference a passenger is entitled to draw from the conductor calling out the name of a station has been already largely discussed, and the leading English cases bearing on the question have been cited. (See supra, § 379.) It is scarcely necessary here to repeat that the inference is one of fact, which varies with each particular case. If, to take an extreme case on the one side, a conductor, when the train is travelling at full speed, calls out the name of an approaching station, a passenger jumping from the cars at such an announcement is guilty of such negligence as to bar his recovery. If, on the other hand, a train overshoots the platform, and comes to what appears to be a final stand-still, and the conductor calls out the name of the station, and a passenger alights and is hurt, then, on this bare state of facts, the company is liable for the injury received by the passenger. Between these two extremes we may conceive of an almost numberless series of cases, each with its own *differentia*, as to each of which distinct inferences may be drawn by the jury. In addition to the cases already mentioned may be cited that of Nicholls *v.* R. R. 7 Irish L. T. 58; reported in part in an article republished in the Albany L. J. of Aug. 1, 1874, p. 72. In this case (as in Lewis *v.* R. R., L. R. 9 Q. B. 70, cited supra, § 379), the train had passed beyond the platform when the conductor called out the name of the station. The plaintiff was acquainted with the locality, but nevertheless alighted and was injured. It was held that the defendant was liable for the plaintiff's injury, on the grounds that the defendant's conduct was such as to lead the plaintiff to believe the train had come to a final rest, and that the plaintiff took ordinary care in alighting.

[3] Higgins *v.* N. Y. & H. R. R. 2 Bosw. 132. See supra, § 364.

return to the car, by using proper diligence, caution, and care; and if there be an established signal, by the blowing of the whistle for passengers to resume their places in the cars, that should also be given. But if the passenger go out of sight, and out of the reach of the usual notice for all passengers to repair on board, the officers of the road are not required to go after him.[1]

§ 652. *Carrying includes giving secure access to and egress from the conveyance.* — This topic belongs, in many of its relations, to another head.[2] At the same time it may be here distinctively noticed, that a common carrier, in offering to take passengers, must give such passengers free ingress and egress, and is liable for any damage which may occur to such passengers from his negligence in not securing them from risk when approaching or leaving the carriage.[3]

§ 653. *Platforms must be adequate.* — Even as a matter of contract, the duty of a common carrier protects passengers not only when they are in the cars, but when they are standing on the platforms provided for the convenience of passengers at stations where the train stops for refreshments.[4]

§ 654. *So of access to and egress from platform.* — Thus in an action against a railroad company to recover for injuries alleged to have been occasioned by defective steps in the end of a platform, beyond which the train had been backed during a stop for supper, and which the plaintiff was descending to enter the car, evidence that the passenger room was filled with tobacco smoke, crowded, and offensive, was held admissible as a part of the transaction, and as tending to show that plaintiff was justified in leaving the room and seeking the cars before the train had returned in front thereof. It was also held that evidence tending to show that passengers to and from another railroad usually passed over these steps, was admissible to show that plaintiff, when injured, was not endeavoring to enter the cars by a dangerous and unfrequented place.[5]

[1] State *v.* G. T. R. R. Co. 58 Me. 176.

[2] See infra, § 821.

[3] See Warren *v.* Fitchburg R. R. 8 Allen, 227; Burgess *v.* G. W. R. R. 6 C. B. (N. S.) 923; Longmore *v.* G. W. R. R. 19 C. B. (N. S.) 183; Nicholson *v.* L. & Y. R. R. 3 H. & C. 534; Foy *v.* London, B. & S. R. R. 18 C. B. (N. S.) 225; infra, § 821-2.

[4] Infra, § 821; Jeffersonville, &c. R. R. *v.* Riley, 39 Ind. 569. See supra, § 360.

[5] McDonald *v.* Chic. & N. W. R. R. 29 Iowa, 170; *S. C.* 26 Iowa, 124. In Toomey *v.* The London, Brigh-

§ 655. *So of stairways to passages in boat.* — The use on a stairway of a brass covering which by long wear has become so

ton & South Coast Railway Co. (3 Com. B. N. S. 146; 27 L. J. C. P. 39), it appeared that there were on the platform two doors, one of which was marked, "For gentlemen," and had a light over it, and led to an urinary, and the other was inscribed, "Lamp-room," and was open, and had steps downwards inside and no lamp over it; and the plaintiff, after asking his way of a stranger to the urinary, went in a hurry through the door of the lamp-room and fell down the stairs and suffered injury thereby. Upon an action against the company for negligence, Cresswell, J., directed a nonsuit, and upon a motion to set it aside the court refused a rule, Willes, J., saying: "In order to make out a case of negligence by the company, it ought to have been shown that the steps were more than ordinarily dangerous. In order to make a person guilty of negligence in such a case, it ought to be shown that he has used his property in such a way as to be likely to endanger the safety of others. It is impossible for any one so to dispose his property that a man may not by accident or negligence injure himself upon it."

In Crafter *v.* Metropolitan Railway Company, L. R. 1 C. P. 300, the evidence, as given to the jury, was that the staircase leading from a railway station to a highway (being otherwise objectionable) had at the edge of each step a strip of brass, which originally had been roughened, but which had from constant use become worn and slippery. The staircase was about six feet wide, and had a wall on each side, but no hand-rail. The plaintiff (a passenger by the railway, who was a frequent traveller by the line) in ascending from the station slipped and fell upon the stairs, and was much hurt. In an action charging the company with negligence in not providing a reasonably safe and convenient staircase, two witnesses for the plaintiff stated that, in their opinion, the staircase was unsafe, one of them (a builder) suggesting that brass nosings on the steps was improper, and that lead would have been better, because less slippery, and that there should have been a hand-rail. It was held that in the plaintiff's case there was no evidence of negligence to go to the jury.

In Cornman *v.* The Eastern Counties Railway Co. (4 Hur. & Nor. 781; 29 L. J. Ex. 94), it appeared that the plaintiff, being at a railway station in the daylight, with a crowd of persons awaiting the arrival of a train, caught his foot against the edge of a weighing-machine, the base of which was raised a few inches above the level of the platform, and falling, he broke his knee-cap. The machine was of a description in use at railway stations, and was in its usual place adjoining the end of a counter on which passengers' luggage was placed on the arrival of trains, and was used for weighing baggage. Upon these facts it was held that there was no evidence of negligence to go to the jury.

In giving judgment, Martin, B., said: "In all cases of this nature, the first question to be considered is, Was there any evidence of negligence at all? That is a question to be determined by the judge. Here there was nothing more than that the platform was in the same state as it had been for five years. The company had for that space of time placed weighing-machines in a convenient place for weighing; the plaintiff had

slippery as to be unsafe, is such negligence as to make the person owning it liable for damages to those who without fault of their own slip on it and fall.[1]

§ 656. *So of access to road by level crossing.* — Thus where[2] it appeared that the level crossing between the platforms at a railway station, which formed part of the "way out" for passengers arriving at such platform, was blocked for more than ten minutes by the train in which the plaintiff arrived there; and that under such circumstances it was usual for the arrival passengers — and the railway company did not object to the practice — to walk alongside and round the end of the train, in order to cross the line; but the plaintiff in so doing, in the dark, stumbled over a hamper, which had been taken out of the train, and placed at the side of the line, some distance from the platform; upon this it was held, that there was evidence of negligence on the part of the railway company.

§ 657. *So of modes of disembarking passengers from boat.* — Thus in an English case,[3] the evidence was that A. agreed to carry B. from M. to L.; the mode of transit provided was that B. should come on to a hulk lying in the harbor at M., and wait till a steamer came and took him to L. On the hulk, close to a ladder down which B. had to pass to reach the steamer, was a large hatchway, which was negligently left unguarded and improperly lighted, and B. fell through it and was injured. The hulk belonged to a third party, and A. had only acquired a right to use it for the purpose of embarking passengers on his steamer.

an opportunity of seeing the machine, and if he did not do so it is a misfortune for which the defendants are not liable. If they had left on the platform an open space into which a man might fall and be hurt, that would be evidence of negligence. However, there is nothing of the sort here; and on the whole of the case I can see no evidence of negligence by the defendants. If that be so, this action will not lie: for if the injury which the plaintiff has received was the result of accident, he must bear it." So, too, Bramwell, B., said: "It is not enough to say that there was some evidence; a scintilla of evidence; a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence."

[1] Crocheren *v.* Ferry Co. 1 N. Y. Supr. Ct. 446.

[2] Nicholson *v.* The Lancashire & Yorkshire Railway Co. 3 Hur. & C. 534; 34 L. T. Ex. 84.

[3] John *v.* Bacon, L. R. 5 C. P. 437; infra, § 823.

In an action by B. against A. for the injury he sustained, it was held by the English common pleas that A. was answerable for all injury occurring through the means of transit being improper, whether it arose from the negligence of his own servants or of other parties who helped to provide the means of transit. It was also held (Brett, J., doubting), that A., having invited B. on to the hulk, was bound to protect him from concealed dangers, and was liable for injury he sustained through the condition of the hatchway, even though it was under the care of others and not his own servants.

§ 658. *So also as to wharf for through travellers to pass on way from cars to boat.* — Thus in a Maine case,[1] the evidence was that the plaintiff's ticket entitled her to a passage over the defendant's road to Portland, and by steamboat from Portland to Belfast; and the defendants had built their track upon their wharf down to the steamboat, and had run their passenger train upon it for a time, and still continued to run their baggage train there; and they directed their passengers verbally, or by printed sign, to use the wharf as a passage way to the boat, and they did so use it; and they made the wharf subsidiary and necessary to the proper use and enjoyment of their road; in an action by the plaintiff to recover for an injury upon the wharf, it was held by the supreme court: 1. That the defendants are bound to exercise the same degree of care, in making the wharf safe and convenient for their through passengers to travel over, as is required of common carriers of passengers, although they required them to disembark at their depot, forty rods distant from the steamboat; and, 2. That this liability continued until, in the ordinary course of their passage over the wharf, they reached the point where the liability of the steamboat company commenced.[2]

§ 659. *Injury to passengers from cattle on the track.* — Is it

[1] Knight *v.* P., S. & P. R. R. 56 Me. 234.

[2] Ibid. Appleton, C. J.: . . . . "The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all subsidiary arrangements necessary to the safety of passengers. McElroy *v.* The Nashua & Lowell Railroad Company, 4 Cush. 400. Assuredly, a safe passage way to and from the cars is a subsidiary arrangement which passengers have a right to require to be safe. The wharf was this passage-way for those going to the boat from the cars or

the duty of a good business man — *diligentia boni patrisfamilias* — to keep the railway, at his own risk, clear from cattle? Of course, in traversing uninhabited wastes, this, as is seen in another connection, is not to be expected; but in a state where it is the railway's duty to fence (whether this duty be statutory or imposed by the nature of things) the railway company is re-

coming to the cars from the boat. A railway company, for the more convenient access of passengers between the two platforms of a station, erected across the line a wooden bridge, which the jury found to be dangerous; held, that the company were liable for the death of the passenger, through the faulty construction of this bridge, although there was a safer one about one hundred yards further round, which the deceased might have used. Longmore *v.* G. W. Railway Co., E. C. L. 183. In Nicholson *v.* L. & Y. Railway Co. 3 Hurlstone & Coltman, 534, the plaintiff sued the defendants, common carriers, for not sufficiently lighting their depot, and for not providing proper and sufficient accommodation for their passengers to depart safely from their station after their arrival, and for leaving hampers in the way of passengers departing, over which the plaintiff falling was injured. The facts were these. The plaintiff, a passenger by the defendants' railway, was set down at T., after dark, on the side of the line opposite to the station and the place of egress. The train was detained more than ten minutes at T., and, from its length, blocked up the ordinary crossing to the station, which is on the level. The ticket collector stood near the crossing with a light, telling passengers to "pass on." The plaintiff passed down the train, to pass behind it, and, from the want of light, stumbled over some hampers put out of the train, and was injured. The practice of passengers had been to cross behind the train, when long, without interference from the railway company; held, that these facts disclosed evidence for the jury of negligence on the part of the company. In Martin *v.* The Great N. Railway Co. 30 E. L. & Eq. 473, the defendants, sued as common carriers, were held liable for so negligently managing and lighting their station, that the plaintiff, being a passenger by the railway, was thrown down, while on his way to the carriages. In March *v.* Concord Railroad Corporation, 29 N. H. 9, it was held that the owners of railroads, which are public highways, are bound to make such landings and places of access to their roads, as are necessary for the public accommodation, and to keep them in a suitable and safe state for the accommodation of persons who may reasonably be expected to use them. In Penn. Railroad Co. *v.* Henderson, 51 Penn. (1 Smith) 315, the railroad corporation was held liable, as common carriers, for an injury occasioned by not having a safe and convenient platform, the court terming the want of such platform "an imperfection or defect in the road." So the ferryman is bound to have his landing in a complete state of repair for the reception of travellers, and to furnish proper easements for entering the boat, and to provide fastenings to keep the boat in a firm and steady position while passengers are being received. Cohen *v.* Huml, 1 McCord (S. C.), 439."

sponsible to passengers for any damage to them occurring through neglect in fencing.[1]

§ 660. *Passengers leaning out of carriage windows, pressing against doors or windows, standing on platform of cars, passing from car to car when in motion, getting on or off a train negligently.* — These topics, belonging more properly to the subject of contributory negligence, will be hereafter discussed under that head.[2]

§ 661. *Burden of proof.* — It has been frequently ruled that an accident being proved, in a suit by passenger against carrier for injuries sustained by the passenger, the burden is thrown on the defendant to show that he exercised due care.[3] But this depends upon the nature of the case the plaintiff makes out. If such case indicates *vis major*, for instance, the plaintiff must go beyond this, and show that the *vis major* could have been avoided or overcome. It is only when the injury occurred from agencies within the defendant's power that he can be presumed, without proof, to have acted negligently.[4]

[1] Sullivan *v.* Phil. & Read. R. R. 30 Penn. St. 234.

[2] See supra, § 360.

[3] Carpue *v.* London & B. R. R. 5 Q. B. 747; Briggs *v.* Taylor, 28 Vt. 180; Hegeman *v.* West. R. R. 16 Barb. 353; Holbrook *v.* U. & S. R. R. 16 Barb. 113 (but see Holbrook *v.* U. & S. R. R. 12 N. Y. 534); Sullivan *v.* Phil. & R. R. 30 Penn. St. 234; Meier *v.* Penn. R. R. 64 Pa. St. 225; Yeomans *v.* Contra Costa S. N. Co. 44 Cal. 71; Laing *v.* Colder, 8 Penn. St. 479; Galena & C. R. R. *v.* Yarwood, 15 Ill. 468; Pittsburg, C. & L. R. R. *v.* Thompson, 56 Ill. 138; Zemp *v.* Wilmington, 9 Rich. Law, 84; Stokes *v.* Saltonstall, 13 Pet. (U. S.) 181; *contra*, Caldwell *v.* N. Jersey Steamboat Co. 47 N. Y. 282; Curtis *v.* Rochester & S. R. R. 18 N. Y. 534, which throw the burden of negligence on plaintiff. See supra, § 422.

[4] Running cars off track is *primâ facie* evidence of negligence in a horse railway. Feital *v.* Middlesex R. R. 109 Mass. 398; Le Barron *v.* R. R. 11 Allen, 312; Carpue *v.* R. R. 5 Q. B. 747. See Bird *v.* R. R. 28 L. J. Ex. 3.

Where a train of cars upon the defendant's railway, in which the plaintiff was a passenger, was met by a construction train coming from the opposite direction, which had upon it a bar of iron projecting five or six feet, in a slanting direction, so that it would necessarily run into anything it came against, and such bar struck the car in which the plaintiff was sitting, and injured him: Held, that in the absence of everything tending to explain or show how the iron bar was placed in the position that produced the injury, the inference was plain that the injury resulted from the inattention and negligence of the persons having the control and management of the construction train. Walker *v.* The Erie Railway Company, 63 Barb. 260.

So, a collision between trains of the same company is *primâ facie* evi-

§ 662. *Liability to passenger for want of punctuality.* — As a general rule, a railroad is liable for damage accruing to a passenger from a negligent failure on its part to keep the time it promises. But to entitle the plaintiff to recover, there must be proof of negligence. Neither time or advertisement is a warranty of punctuality.[1]

dence of negligence. Skinner *v.* The London & Brighton Railway Co. 5 Ex. 787. Where a stage-coach, which is overloaded, breaks down, the excess in the number of the passengers has been held to be evidence that the accident arose from overloading. Israel *v.* Clark, 4 Esp. 259.

[1] The authorities bearing on this point are fully and faithfully discussed by Smith, J., in Gordon *v.* M. & L. R. R. 52 N. H. 596.

Smith, J. . . . "Undoubtedly, 'the representations made by railway companies in their time-tables cannot be treated as mere waste paper.' Lord Campbell, C. J. in Denton *v.* Great Northern Railway Co. 5 El. & Bl. 860, p. 865. It must be conceded that such a public advertisement at least imposes on the defendants the obligation of using due care and skill to have their trains arrive and depart at the times thus indicated. For any want of punctuality which they could have avoided by the use of due care and skill, they are unquestionably liable. Nor can they excuse a non-conformity to the time-table for any cause, the existence of which was known or ought to have been known to them at the time of publishing the table. 'They make the time advertised a criterion of ordinary reasonable time.' The publication of the time-table cannot amount to less than this, viz.: a representation that it is ordinarily practicable for the company, by the use of due care and skill, to run according to the table, and an engagement on their part that they will do all that can be done by the use of due care and skill to accomplish that result. Does it go beyond this? Does it amount to an absolute and unconditional engagement that the trains shall arrive and depart at the precise moments indicated in the table? Does it make the company warrantors or insurers of punctuality, and liable for delays which are due, not to their fault, but to pure accident?

"If these questions are answered in the affirmative, a very singular result will follow. Railroad companies will be under a much more onerous obligation to run punctually than to run safely. They may, then, on the same state of facts, be held liable for the loss of an hour's time, and not liable for the loss of a year's time, or for the loss of a limb. As to safety, they are bound only to use due care and skill to attain it. They are not liable for mishaps which are not attributable to their negligence. Readhead *v.* Midland R. Co. L. R. 4 Q. B. 379, p. 381."

"In Howard *v.* Cobb, 19 Monthly Law Reporter, 377, the contract related only to a single trip of a steamer But here there is no ground for asserting that the defendants made any different agreement relative to their morning train on September 8, so far as punctuality is concerned, from that entered into respecting all their other regular trains throughout the whole year. Practically, the question is, whether they have undertaken to guarantee exact punctuality in the arrival and departure of all their trains throughout a whole year. We are

§ 663. *Auxiliary Lines.* — For the purposes of convenience, the authorities bearing on the relations of auxiliary carriers, both of

not reduced to the dilemma of considering the time-table as evidence of such a guaranty, or else giving it 'no meaning and effect at all.' As has already been intimated, much effect can be given to it, as increasing the obligations of the defendants, without construing it as an absolute warranty of punctuality.

. . . . "An examination of reported decisions does not disclose any strong preponderance against the views now expressed. In most cases, the negligence of the carrier has been proved or admitted.

"Haweroft *v.* Great Northern R. Co., as sometimes cited, might seem strongly against the defendants; but, as reported, its bearing in that direction is not so obvious. It is a case decided by Patteson, J., and Wightman, J., in the queen's bench, in 1852, and is reported in 16 Jurist, 196; 8 Eng. Law & Eq. 362; and more fully in Law Journal, vol. 30 N. S., vol. 21 Q. B. 178. The plaintiff purchased an excursion ticket from Barnsley to London and return. Upon the back of the ticket were the words, 'To return by the trains advertised for that purpose on any day not beyond fourteen days after date hereof.' The defendants advertised certain trains for excursion ticket holders, including one train leaving London at 6.45 A. M. on Saturday, and another at 9.15 P. M. Upon all the facts, the court seem to have concluded, and we think correctly, that the plaintiff had a right to understand that both trains were advertised as carrying through to Barnsley. The plaintiff went to the London station as early as 6 A. M. on Saturday; but the pressure of persons wishing to be passengers by that train was so great that he was unable to obtain a seat in it, although it consisted of thirty carriages drawn by two engines. The company caused an extra train of twenty-three carriages to be sent about noon, but this train was also filled without the plaintiff's being able to procure a place. The company made every exertion to procure and send off another extra train during the day, but were unable to do so for want of sufficient engines, carriages, and servants at the London station to meet the extraordinary influx of returning excursion passengers on that morning, although they were sufficiently supplied for the ordinary excursion traffic of the company. The defendants contended that it would have been unsafe to have dispatched the 6.45 A. M. train with more than two engines, or with a greater number of carriages; but it was conceded that a sufficient number of trains to convey all excursion ticket holders might have been dispatched with safety long before noon, if the company had been provided with a sufficient number of engines, cars, and servants for the purpose at the London station. It was claimed that the transportation provided would have been sufficient to accommodate all applicants on any other Saturday morning for two months, and that the number of applicants on the Saturday morning in question was greater than on any other Saturday. The plaintiff took passage in the 9.15 P. M. train, which carried him only as far as Doncaster. No arrangement had been made for carrying him thence to Barnsley, and no train ran thither until Monday. The county judge, at the trial, ruled that there was a special contract binding the defendants to carry the plaintiff by the 6.45 A. M. train, or by some other

passengers and of goods, have been massed in prior sections, to which reference is now made.[1]

train within a reasonable time after that hour; that carrying by the 9.15 P. M. train was not a sufficient compliance with the contract, but, if so, there was a breach in carrying no further than Doncaster; that the extraordinary influx of passengers was no defence, but the company were bound to provide sufficient accommodations at or within a reasonable time after the hour advertised for all excursion ticket holders. In arguing to set aside the verdict for the plaintiff, rendered under these rulings, the counsel for the defendants said: 'Could the company be sued if they had refused to carry a passenger when there was no room for him? They were common carriers, and bound to carry safely.' Thereupon, Patteson, J., remarked: 'They should have made it a condition of their contract that they would not carry unless there was room.' The court refused to grant a new trial. Patteson, J., said: 'The defendants, in refusing to take the plaintiff by the morning train, were right, because the train was too full to allow him to be carried with safety. But if they put him off and kept him until the evening, they should have made some special provision for carrying him on to Barnsley at once. I do not think that they had any right to keep him in London until the 9.15 evening train. They should have sent another train. The case finds that they might have done so without danger.' Wightman, J., said: . . . . 'I think that by going by the evening train he has waived any right to complain of having been kept until the evening. But if he was content to wait and go by the evening train, he ought to have been carried on as far as Barnsley, unless they had told him what the state of the case was with respect to the stopping at Doncaster, or had made some special terms with him.'

"In that case it is clear that the company were liable, at all events, for failing to make any attempt to carry the plaintiff through to Barnsley by the evening train. Wightman, J., rests his decision entirely on this, and it is questionable whether the case can be regarded as an authority for anything beyond this. The county judge at the trial seems to have ruled that the defendants complied with their contract if they carried the plaintiff within a reasonable time after the hour advertised. This is all that the defendants can ask in the case at bar. It means 'reasonable under all the circumstances of the case;' and such a ruling is inconsistent with the theory of an absolute guaranty of punctuality. The *dictum*, and the decision of Patteson, J., may be susceptible of the construction that the company had failed to use due foresight to anticipate and provide for the emergency, and that they were liable on that ground. We think that the case cannot be regarded as an authority entitled to controlling weight in the present instance (see 2 Redf. on Railways, 5th ed. p. 281); and we have stated it thus fully, not so much by reason of its intrinsic importance, as on account of the frequency with which it has been cited elsewhere.

"Other cases will be noticed more briefly. In Sears *v.* Eastern R. R. Co. 14 Allen, 433, the company were liable for not using due care to give notice of the change in the starting time of the train. In Lafayette R. R. Co. *v.* Sims, 27 Ind. 59, the company did not at-

[1] See supra, § 577 *et seq.*; and as to passenger carriers, supra, § 584–5.

tempt to show that they had used due care to provide accommodations. They demurred to the replication, instead of rejoining that there was an unexpected rush of passengers which they could not reasonably have anticipated. Dunlop *v.* Edin. & Glasg. R. Co. 16 Jurist, part 2, 407, 408, was a case where the company were clearly in fault. In Denton *v.* Great Northern R. Co. 5 El. & Bl. 860, the defendants were liable for falsely representing that a train would start when they knew it would not. There was no attempt on their part to comply with the advertisement. Weed *v.* Panama R. R. Co. 17 N. Y. 362, is a case where the delay was held chargeable to the fault of the defendants, on the principle that the act of their servant was their act. See also Blackstock *v.* N. Y. & Erie R. R. 20 N. Y. 48. In Deming *v.* Grand Trunk R. R. Co. 48 N. H. 455, it appeared that, on February 21, the plaintiffs told the defendants that they had wool to send to Boston, which had been contracted for and which they were very anxious to have go forward immediately, and that unless it could be sent forward from Northumberland the next day, it must go by another railroad route. The defendants thereupon received the wool, and agreed to forward it from Northumberland on February 22, but did not forward it until March 16. The defendants offered to show that, owing to the approaching termination of the reciprocity treaty, there was at this time a great and unusual rush of freight, and that this occasioned the delay. They did not offer to prove that the rush commenced after the making of their contract with the plaintiffs, or that the plaintiffs had knowledge of it. The evidence was rejected. (See the ruling on p. 461.) That case differs from the present in at least two vital particulars: First, the special stress laid on punctuality in the negotiation tended to show an absolute contract to carry within a prescribed time, and the jury found such a contract. See Harmony *v.* Bingham, 12 N. Y. 99; Wilson *v.* York, Newcastle & Berwick R. Co. 18 Eng. Law & Eq. 557, in note; Mullin, J., in Van Buskirk *v.* Roberts, 31 N. Y. 661, pp. 674, 675. Second, the existence of the alleged cause of delay was, for aught that appeared, fully within the knowledge of the defendants at the time they contracted with the plaintiffs. They were in fault for knowingly undertaking more than they could perform. See 17 Mo. 290. In New Orleans, &c. R. Co. *v.* Hurst, 36 Miss. 660, the company offered no excuse whatever for running past the station; and in Heirn *v.* M'Caughan, 32 Miss. 17, there was evidence tending to show want of due effort to stop. In Strohn *v.* Detroit & Mil. R. R. Co. 23 Wisc. 126, it seems to have been held that a mere statement by the carrier's agent that the ordinary time for transportation of freight is a certain number of days, is not sufficient to show a contract to carry within that time. In Angell on Carriers, 4th ed. sec. 527 *a*, it is said that the time-tables are 'in the nature of a special contract, so that any deviation from them renders the company liable;' but we think no authority there cited, unless it be Hawcroft *v.* G. W. R. Co., directly sustains this position.

"It would seem that the English railway companies are now in the habit of inserting notices in their time-tables that they do not warrant that the trains will arrive and depart at the precise time indicated. See Bovill, C. J., in Lord *v.* Midland R. Co., L. R. 2 C. P. 339, p. 345; Hurst *v.* Great Western R. Co. 19 C. B. N. S. 310; Prevost *v.* Great Eastern R. 13 Law Times N. S. 20; Buckmaster *v.* G. E.

R. Co. 23 Law Times N. S. 471. But this practice may have been adopted from abundant caution, and does not seem to us to furnish decisive evidence of the understanding of the legal profession that the time-table, without the notice, would import a warranty. In this country nearly all the railroads publish time-tables, and delays, not attributable to negligence, are not uncommon; yet suits to recover damages for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented, 'shows very strongly what has been understood to be the law upon the subject.'"

It was accordingly held that the publication of a time-table, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated in the table; but it does not import an absolute and unconditional engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence.

CHAPTER VII.

CUSTODIA, § 665.

§ 665. *Nature of.* — In certain cases where one person has the goods of another in charge, the Roman law exacts what is called *custodia*, or absolute responsibility of custody. In such case the custodiary is liable for every injury of the thing held by him, as well as for theft; though he is relieved when the damage is through accident, or superior force. The cases in which *custodia* is exacted are those (1) of the warehouseman, who undertakes for pay safely to keep;[1] (2) of the shipper, innkeeper, or stable-keeper, who receives the goods of a traveller as a traveller;[2] (3) of the operative, who undertakes the *conductio operis* or *operarum;* in other words, when he receives goods from his employer to work upon;[3] (4) of the vendor, who sells goods by measure, until the goods are set apart by measure;[4] (5) of the commodatary, when he pays nothing, and in any way forces himself into the trust;[5] (6) of the volunteer agent, or *negiotorum gestor*, when he has intruded in the trust.[6]

§ 666. *Diligence exacted in.* — It must be however kept in mind that the better opinion is that *custodia*, in its absolute sense, is virtually undistinguishable from the *custodia diligentis patrisfamilias*. Hence it is concluded that the custodian is presumed to be liable in all cases of damage or loss, and that the burden is on him to show that the injury came from *casus* or from superior force. Baron, an eminent contemporaneous jurist, rejects this view, holding that the utmost care to be exacted from a custodian is the *diligentia diligentis patrisfamilias*, or the diligence which an honest and capable business man in the particular department would show in the particular transaction.[7]

[1] L. 1. C. de loc. 4. 65. L. 19. D. Comm. 13. 16. L. 40. L. 41. D. loc. 19. 2.

[2] L. 3. § 1. L. 4. pr. L. 5. D. nautae, 4. 9. L. 14. § 17. D. de furt. 47. 2.

[3] L. 5. pr. D. nautae, 4. 9; L. 12. pr. L. 14. § 17. L. 48. § 4. D. de furt. 47. 2; L. 13. § 5. L. 25. § 7. L. 62. D. loc. 19. 2.

[4] L. 1. § 1. L. 2. § 1. L. 3. D. de per. &c. Comm. 18. 6.

[5] L. 18. pr. L. 5. § 2–6. 9. 13. 15. D. Comm. 13. 6, and other passages cited by Baron, § 237.

[6] L. 5. 3. § 3. D. de furt. 47. 2; and other passages cited by Baron, § 237.

[7] Baron, Pandekten, 1873, § 237.

CHAPTER VIII.

COMMODATUM.

Characteristics of, § 667. | Liability of commodatary for negligence, § 668.

§ 667. *Characteristics of.* — *Commodatum* or loan is a contract by which one contractor, the *commodans*, passes to another, the *commodatary*, for the latter's gratuitous use, a thing to be subsequently returned to the commodans. *Property* in the thing loaned the commodans need not have. It is enough if he has an interest therein. The thing is to be returned in specie at a given time, at the close of the contract, or when its use by the commodatary is over, or when it is needed by the commodans. But the commodans cannot capriciously require the return of the article; and it is in this respect that commodatum differs from precarium.[1]

§ 668. *Liability of commodatary for negligence.* — The commodatary, from the facts, that the contract is solely for his benefit and that it is gratuitous, is liable for *culpa levis* (special negligence) as well as for *culpa lata* (gross negligence). In other words, he is held bound to bestow on the thing loaned to him the care which a good business man, versed in the use of such particular thing, would, under the particular circumstances, exhibit.[2]

A borrower is bound to special diligence and is liable for slight neglect.[3] At the same time he is not bound, as has just been stated, to *diligentia diligentissimi*, in other words, it is sufficient if he brings to bear the diligence which a good business man is accustomed to exert in a similar case. Thus in a North Carolina case,[4] where a horse, loaned by plaintiff to defendant, was carried to defendant's house and placed in the common horse lot, so used for many years, though it was somewhat slanting, and the horse,

[1] Holtz. in loco.

[2] Vangerow, § 629; Baron, § 275.

[3] Kennedy *v.* Ashcraft, 4 Bush, 530.

[4] Fortune *v.* Harris, 6 Jones N. C. 532.

being nearly blind, and the weather being wet, slipped and fell upon a stump, breaking its thigh, it was held that these facts did not import such negligence as to render the defendant liable for the loss of the property.[1]

[1] Pearson, C. J.: "It is not necessary for us to inquire whether, if one borrows a horse, and it is injured so that it cannot be returned in as good condition as when received, the *onus* of proving how the injury occurred is upon the bailor or bailee; for admitting that, as the bailment was for the benefit of the bailee alone, she was liable for slight neglect; and admitting also that the *onus* of exculpation, by disproving any degree of neglect on her part, was on the defendant, we concur with his honor, that, upon the state of the facts assumed, she was not guilty of even slight neglect, as the damage was the effect of a mere accident."

CHAPTER IX.

PIGNUS OR PAWN.

Characteristics of, § 670.
Liability of bailee for theft, § 671.
Degree of diligence exacted in, § 672.

§ 670. *Characteristics of.* — A pawn or *pignus*, so far as concerns the present inquiry, is where goods are hypothecated by a debtor to a creditor as security for the debt. The holder of the pawn is bound, it is clear from the very nature of the transaction, to exercise the diligence of a good business man when in his particular circumstances; for, says Ulpian, *non solum dolus malus verum culpa quoque debeatur.*[1] *Culpa* is here used for *culpa omnis*, embracing necessarily *culpa levis*, or the lack of the diligence of a good business man in his specialty.[2] So, in another passage, Ulpian speaks of *instruere pignoratos servos;* and goes on to declare *negligere enim creditorem dolus et culpa, quam praestat, non patitur.*[3] *Culpa*, but not *vis major*, we are expressly told is to be charged.[4] Pignus, indeed, is declared to be governed by the same law in this respect as commodatum.[5]

§ 671. *Liability of bailee for theft.* — Lord Coke's opinion,[6] that "If goods be delivered to one as a gage or pledge, and they be stolen, he shall be discharged, because he hath a property in them; and therefore he ought to keep them no otherwise than his own," is peremptorily rejected by Sir W. Jones,[7] who maintains that a bailee cannot be considered as using ordinary diligence, who suffers the goods to be taken by stealth out of his custody. But for this position, replies Judge Story, "he cites no common law authority, except a dictum of Mr. Justice Cottesmore, in 10 H. 2, 21, 5, who said: 'If I grant goods to a man to keep for my use, if the goods by his default (*mesgarde*, *i. e.* inattention) are stolen, he shall be chargeable to me for the same

[1] L. 9. § 5. de reb. auct. jud.
[2] See supra, § 32.
[3] L. 25 D. de pign. act.
[4] See other passages cited, supra, § 69.
[5] L. 13. § 1. L. 14. D. de pign. act.
[6] 1 Inst. 89 *a*; 4 Rep. 83 *b*.
[7] Jones on Bailm. 75.

goods; but if he is robbed of the same goods, he is excusable by law.'[1] Now the case here put is plainly a mere deposit, where the bailee is responsible only for gross neglect; and if Mr. Justice Cottesmore meant more, he was wrong in point of law. But in fact he was not drawing any distinction between cases of theft and cases of robbery, as to the presumption of neglect; but between cases of losses by theft by neglect of the bailee, and cases of robbery by superior force, as affecting, in opposite manners, the responsibility of the bailee. The dictum, therefore, furnishes no authority to the purpose; and, exclusively of this dictum, the sole reliance of Sir William Jones is on the text of the Roman law and the commentaries of the civilians."[2] "It may perhaps after all admit of doubt," Judge Story argues in a note, "whether, as a general rule, theft was deemed even in the civil law as necessarily *per se* importing negligence, or presumption of negligence. The text of the Digest relied on by Sir William Jones to establish it, is that which makes a partner liable for a loss by theft of a flock of sheep left with him by his partner to depasture. Damna, quae imprudentibus accidunt (says the Digest, lib. 17, tit. 2, 1, 52, § 3; Pothier, Pand. lib. 17, tit. 2, n. 36), hoc est, damna fatalia, socii non cogentur praestare. Ideoque, si pecus aestimatum datum sit, et id latrocinio aut incendio perierit, commune damnum est; si nihil dolo aut culpâ acciderit ejus, qui aestimatum pecus acciperit. Quod si à furibus subreptum sit, proprium ejus detrimentum est, quia custodiam praestare debuit, qui aestimatum accepit. Haec vera sunt, et pro socio erit actio, si modo societatis contrahendae causa, pascenda data sunt, quamvis aestimata. Now, in the case of a flock of sheep, it may be that there could scarcely be a loss by theft without some negligence, or even without gross negligence, when in other cases theft might be without any the slightest negligence. Upon this text in Van Leeuwen's edition of the Corpus Juris Civilis (1726), with Gothofred's notes, is the following commentary: Socius socio non praestat damnum fatale a Latronibus acceptum, licet a furibus praestet. Cur? Adversus Latrones parum prodest custodia; adversus furem prodesse potest, si quis advigilet. Latrocinium fatale damnum; sed casus fortuitus est; at non furtum. The reasoning can only apply, where vigilance would in the ordinary

[1] Jones on Bailm. 44, note; Ibid. p. 79. [2] Story on Bailments, § 334.

course of things have guarded against the theft, and therefore, where the omission implied negligence. But there are many cases where theft may be committed, against which no reasonable diligence could guard the bailee. Besides, in many cases, where the thing bailed is valued, the Roman law presumed that the party took upon himself extraordinary risks." The true issue however, as Judge Story subsequently very properly states, is, whether the theft was induced by any negligence on part of the bailee. If so, — if the bailee kept the pledge less carefully than a good business man would under the circumstances be accustomed to do, — then is the bailee liable.[1]

§ 672. *Degree of diligence exacted in.* — The bailee in *pignus*, as has been seen, is required to exert the *diligentia* of a *bonus et diligens paterfamilias;* in other words, the diligence that a good business man would exert under the circumstances. Thus the officer who seizes cattle in satisfaction for debt or taxes is liable to the owner if they suffer from want of food.[2]

So, in a case in South Carolina, the question being whether bankers in Columbia, who had received on deposit certain collaterals, as security for money loaned by them to the bailor, were responsible to the latter for the loss of the collaterals from their banking-house by robbery, it was held to be correct for the circuit judge to decline to instruct the jury "that the bailees cannot be said to have exercised ordinary care, unless it be found that they have availed themselves of all the means for securing their deposits that art and mechanical skill could afford; and it is a proper inquiry for the jury to say whether proper efforts were made by the plaintiffs to ascertain and secure those mechanical implements of the age, which, without extraordinary diligence, could have been secured." At the same time, it was held error for the judge to instruct the jury "that the court could not prescribe any absolute rule or measure of diligence; and that whether ordinary care devolved it upon the bailees, bankers in Columbia, to employ all the means of security known to art, and applicable to their business, was exclusively a question of fact for the jury." The last instruction wrongfully left it to the jury to establish *culpa levissima*.[3]

[1] Story on Bailments, § 335, citing Vere *v.* Smith, 1 Ventr. 121; 2 Kent Com. Lect. 40.

[2] L. 2. § 20. vi bon. rapt. 47. 8.

[3] Scott *v.* Crews, 2 Rich. (N. S.) 522.

CHAPTER X.

INNKEEPERS AND LIVERY STABLE-KEEPERS.

Innkeeper liable for losses except by *vis major*, or inevitable accident, § 675.
Liable for thefts as well as negligence of servant, § 676.
But not for burglaries or robberies accompanied by *vis major*, § 677.
Who are inkeepers, § 679.
Not "restaurants" or saloons, § 680.
Nor lodging-house keepers, § 681.
Nor boarding-house keepers, § 682.
Who are guests, § 683.
For what goods liability exists, § 684.
Liability extends to horses, § 685.
How long liability continues, § 687.
Innkeeper's absence at time, no defence, § 688.
Limitation of liability by notice, or statute, § 689.
Not liable when loss is attributable to guest's negligence, § 690.
Burden of proof, § 692.
Livery stable-keepers not innkeepers, but liable for diligence of good business men in their specialty, § 693.

§ 675. *Innkeeper liable for all losses except those by vis major, or by inevitable accident.* — The liabilities of the innkeeper by the Roman law have been already noticed.[1] In our own law there has been much fluctuation of opinion; but the following points may be considered as accepted.

§ 676. *Liable for thefts as well as negligences of servant.* — That such liability exists is agreed by all the authorities.[2]

§ 677. *But not for burglaries and robberies accompanied by vis major.*[3] — Thus, although a common carrier is liable for all losses occasioned by an armed mob (not being public enemies), an innkeeper is not (as it should seem) liable for such a loss.[4]

But unless accompanied by violence liability is not relieved.[5]

§ 678. *Nor for inevitable accident.*[6] — Fire, which could not

[1] See supra, § 454, 665.

[2] See cases cited in succeeding sections, and Rockwell *v.* Proctor, 39 Ga. 105; Houser *v.* Tully, 62 Pa. St. 92; Morgan *v.* Raney, 6 H. & N. 265.

[3] Jones on Bailm. 96; Burgess *v.* Clements, 4 Maule & Selw. 306; Lane *v.* Cotton, 12 Mod. 487; Calye's case, 8 Co. 32, 33; 2 Kent Comm. Lect. 40, p. 592, 593, 4th ed.; McDaniel *v.* Robinson, 26 Vt. 317.

[4] Morse *v.* Slue, 1 Vent. 190, 238; Rich *v.* Kneeland, Cro. Jac. 330; S. P. Hob. 17; Lane *v.* Cotton, 12 Mod. 480; Jones on Bailm. 100.

[5] See Mateer *v.* Brown, 1 Cal. 221.

[6] Burgess *v.* Clements, 4 Maule & Selw. 306; Calye's case, 8 Co. 32; Dawson *v.* Chamney, 5 Q. B. 164; McDaniels *v.* Robinson, 26 Vt. 337. In Richmond *v.* Smith, 8 B. & C. 9. Bayley, J., said: "It appears to me that the innkeeper's liability very closely resembles that of a carrier. He is *primâ facie* liable for any loss not occasioned by the act of God or the king's

have been avoided by the innkeeper's diligence, is, by the Roman law a defence; and so has it been held in this country;[1] but the tendency of authority among us is to deny the validity of such a defence.[2]

§ 679. *Who are innkeepers.* — To impose this special and exceptional liability, it is necessary that there should be the assumption by the party charged of the business of receiving "all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a condition in which they are fit to be received."[3] Hence it is not necessary that the house in question should have stables, so as to accommodate horses.[4]

§ 680. "*Restaurants*" *and* "*Saloons.*" — Hence houses merely for the sale of refreshments, not professing to furnish beds and lodging for the night, are not inns.[5]

§ 681. *Lodging-house keepers.* — The special liabilities of an innkeeper do not attach to a lodging-house keeper in respect to the goods of his lodgers; and, accordingly, he is not responsible for a theft of them by a stranger, who came in to view the rooms, which were about to be vacated by the plaintiff; although the

enemies; although he may be exonerated where the guest chooses to have his goods under his own care." This, however, was subsequently qualified in Dawson *v.* Chamney, 5 Q. B. 164, by Lord Denman, who said: "The doubt expressed by Bayley, J., in Richmond *v.* Smith, applies to another branch of the doctrine, namely, the exception from the rule which arises where the guest chooses to take the chattels entirely under his own care." "In truth, however," comments Judge Story (Bailments, § 494), "Mr. Justice Bayley's dictum was not so qualified. He treated the responsibility of the innkeeper as like that of a carrier, to be for all losses not occasioned by the act of God or the king's enemies, adding another exception, that where the party took his goods into his own custody. And the opinion of Bayley, J., is not without the support of several American courts. Norcross *v.* Norcross, 53 Me. 163; Gill *v.* Libbey, 26 N. Y. 70. See cases cited under next section, and Thickstun *v.* Howard, 8 Blackf. 535; Pinkerton *v.* Woodward, 33 Calif. 557; Sibley *v.* Aldrich, 33 N. H. 553." See Comments of Pollock, C. B., infra, § 686. As to meaning of inevitable accident, see supra, § 553.

[1] Merritt *v.* Claghorn, 23 Vt. 177.

[2] Hulett *v.* Swift, 33 N. Y. 571; Mateer *v.* Brown, 1 Cal. 221; Shaw *v.* Berry, 31 Me. 478; Mason *v.* Thompson, 9 Pick. 280; Manning *v.* Wells, 9 Hump. 746.

[3] Best, J. — Thompson *v.* Lacy, 3 B. & A. 283; Parker *v.* Flint, 12 Mod. 255.

[4] Thompson *v.* Lacy, *ut supra.*

[5] Doe *v.* Laming, 4 Camp. 77. See supra, § 454.

plaintiff was then absent, and the stranger was allowed to look at the rooms by the defendant himself.[1]

§ 682. *Boarding-house keepers.* — The duty of boarding-house keepers in this respect was much discussed in England in a case[2] where on the trial it appeared that the plaintiff had been received as a guest in the defendant's boarding-house, at a weekly payment, upon the terms of being provided with board and lodging and attendance. The plaintiff being about to leave the house, sent one of the defendant's servants to purchase some biscuits, and he left the front door ajar; and whilst he was absent on the errand a thief entered the house and stole a box of the plaintiff's from the hall. The judge directed the jury that the defendant was not bound to take more care of the house and the things in it than a prudent owner would take, and that she was not liable if there were no negligence on her part in hiring and keeping her servant; and he left it to the jury to say whether, supposing the loss to have been occasioned by the negligence of the servant in leaving the door ajar, there was any negligence on the part of the defendant in hiring or keeping the servant. It was held by the court of queen's bench, that at least it was the duty of the defendant to take such care of her house and the things of her guests in it as every prudent householder would take; and by Lord Campbell, C. J., and Coleridge, J., that she was bound not merely to be careful in the choice of her servants, but absolutely to supply the plaintiff with certain things, and to take due and reasonable care of her goods; and if there had been a want of such care as regarded the plaintiff's box, it was immaterial whether the negligent act was that of the defendant or her servant, though every care had been taken by the defendant in employing such servant; and, consequently that the direction of the learned judge was not correct; but, by Wightman, J., and Erle, J., that the duty of the defendant did not require that she should do more than take all requisite care to employ and keep none but trustworthy servants; and that if that had been done, the defendant was not liable for the single act of negligence on the part of the servant in leaving the door open; and therefore that the direction at the trial was right.

§ 683. *Who are guests.* — It may be a matter of doubt whether

[1] Holder *v.* Soulby, 8 C. B. (N. S.) 254. *Aliter* by Roman law. Supra, § 454.

[2] Dansey *v.* Richardson, 1 E. & B. 165; 25 Eng. L. & E. 76.

a person depositing valuables with an innkeeper is a guest, or simply a casual visitor desiring to avail himself of the innkeeper's protection of a temporary deposit. In such case the question of relationship is for the jury. Thus in a Pennsylvania case,[1] the evidence was that T. went to H.'s inn, purchased liquor, &c., and gave money for safe keeping to one in the bar-room, as to whom there was evidence that he was bar-keeper; and the money was lost. The court properly instructed the jury that if T. was a guest and gave his money to the bar-keeper, or to one who, if not in fact bar-keeper, was acting in a capacity from which an authority to receive the money on the credit of the house might be inferred, T. could recover, if the money was intrusted on the credit of the inn; but if T. was not a guest, or intrusted the money on the individual credit of the bar-keeper, he could not recover.

§ 684. *No liability for goods such as it is without the scope of an inn to receive.* — Nor should this high liability be stretched beyond articles which are the ordinary accompaniments of a lodger.[2] An innkeeper is under no obligation to receive such articles (*e. g.* a piano), and hence is only to be regarded as to such articles as a depositary for hire.[3]

§ 685. *Liability for horses received.* — Where an innkeeper undertakes the charge of horses, then he is specially liable for their custody in the same sense that he is of baggage.[4] Thus in a New York case, the evidence was that the plaintiffs, being the owners of a stallion, agreed with defendant, an innkeeper, that he should be at his inn for a certain number of days in each week, during a certain season, in charge of one of the plaintiffs. The plaintiffs were to have the choice of one of two stalls in the wagon-house of the inn for his accommodation. The price of oats and meals was fixed at a lower rate than customary, but there was no agreement as to the price for lodging, hay, or use of stall. Pursuant to this agreement, one of the plaintiffs took the horse to the defendant's inn, and lodged and took his meals there on the days agreed upon, kept the horse in a stall provided, under his own lock and key, and took care of him, fed and groomed him, and the wagon, harness, &c., of plaintiffs were kept in the wagon-house. It was ruled that the relation of inn-

[1] Houser *v.* Tully, 62 Pa. St. 92.

[2] See as to meaning of baggage, *supra*, § 607.

[3] Broadwood *v.* Granara, 10 Ex. 423.

[4] See Hill *v.* Owen, 5 Blackf. 323.

keeper and guest existed between plaintiffs and defendant, and that the defendant was, therefore, liable to the plaintiffs for loss, by accidental fire in the wagon-house, of the horse, wagon, and other property of plaintiffs, while there in pursuance of such agreement.[1]

§ 686. It is true that a looser doctrine seems once to have been adopted in England,[2] but the case where the liability was relaxed has not been subsequently followed.[3] Thus Pollock, C. B., commenting on it, says: "It is true the expression in the forms in tort is that the loss was 'propter defectum,' but we think the cases show that there is a defect in the innkeeper, wherever there is a loss not arising from the plaintiff's negligence, the act of God, or the queen's enemies. The only case that points the other way is Dawson *v.* Chamney, 5 Q. B. 164. According to the report, however, of that case in 7 Jurist, 1037, 'there was no evidence of the manner in which the horse received the injury.' This may be the explanation of that case; for though damage happening to the horse from what occurred in the stable might be evidence of 'defectus' or neglect, still if it was not shown how the damage arose, it was not even shown that it arose from what occurred in the stable. This would reconcile that case to the general current of authorities."[4]

§ 687. *How long liability as innkeeper continues.* — It is an interesting question, how long, when a guest leaves his baggage with an innkeeper, the innkeeper is liable, as innkeeper, for such. Judging from the analogy obtaining as to common carriers,[5] we would conclude that the exceptional and onerous insurance liability of the innkeeper would not continue after the guest has permanently left the inn, allowing, of course, for a few hours which may be necessary for porters to effect a removal. At the same time the following observations of a learned Georgia judge,[6] are not without weight: "We think in such case that the innkeeper with whom the baggage of his guest is left with his consent, though he gets no additional compensation for taking care of it, is still liable for it as innkeeper, for a reasonable time, to

[1] Mowers *v.* Fethers, 6 Lansing, 112, affirming Washburn *v.* Jones, 14 Barb. 193.

[2] Dawson *v.* Chamney, 5 Q. B. 164.

[3] See supra, § 678.

[4] Morgan *v.* Ravey, 6 H. & N. 277.

[5] See supra, 569-75.

[6] Brown, C. J. — Adams *v.* Clem, 41 Ga. 67.

be estimated according to the circumstances of the case, after which he would be only a bailee without hire, and liable as such." The innkeeper, however, continues liable during the guest's *temporary* absence.[1]

§ 688. *Innkeeper's absence at time is no defence.* — In case of a loss at an inn, the innkeeper is liable, although sick, or absent.[2]

§ 689. *Limitation of liability by notice or statute.* — Where an innkeeper for the purpose of securing the safety of the goods of his guests, makes a reasonable and proper rule or requirement, to be observed by them, or he will not be responsible therefor, and the goods of a guest having knowledge of the rule are lost from the inn solely by reason of his neglect to comply therewith, the innkeeper is not liable for the loss thus occasioned by the negligence of the guest.[3]

Thus where a guest, after notice from the innkeeper that a safe was provided for money and that he would not be responsible for its loss, unless deposited therein, left $2,000 in gold coin in a trunk in his room during his absence to dinner in a hotel in New York city, he was held guilty of negligence and without remedy against the innkeeper, although he had locked the door, and handed the key to the innkeeper while he was at dinner, during which time the room and trunk were broken open and the money stolen.[4] Such agreement, however, cannot operate to relieve the innkeeper from the consequences of his own negligence.[5]

The mere posting in the room of a guest a notice limiting the liability of the innkeeper for losses by theft, unless certain directions are observed, does not operate as notice to the guest of its contents without proof that the guest read it, or his attention was called to its contents.[6]

Statutes are in force in New York, New Jersey, and other states, which prescribe that when the landlord provides a safe for valuables, and posts a notice to this effect in his rooms, if the guest declines so to deposit valuables the landlord shall not be liable for their loss. These statutes have been held to apply to

[1] Baker *v.* Day, 2 Hur. & C. 171.
[2] Houser *v.* Tully, 62 Pa. St. 92.
[3] Fuller *v.* Coats, 18 Oh. St. 343; Houser *v.* Tully, 62 Pa. St. 92.
[4] Purvis *v.* Coleman, 21 N. Y. 111.
[5] Supra, § 586–9.
[6] Bodwell *v.* Bragg, 29 Iowa, 232 See supra, § 587.

all money, jewels, and ornaments of the guest.[1] When the guest has time and opportunity to make the deposit, but neglects so to do, this releases the landlord.[2] It is otherwise, however, when he has no such opportunity; *e. g.* when the theft occurs when he has packed up, and is about leaving.[3]

§ 690. *Not liable when loss is attributable to personal negligence of guest.* — The innkeeper may be exonerated by showing that the guest has taken upon himself exclusively the custody of his own goods, or has by his own neglect exposed them to the peril.[4] Hence where a guest at an inn takes his goods from his room into his personal custody, and puts them into a place in the inn not designated by the innkeeper, and without his knowledge, and such place is one unusual, and manifestly hazardous and improper therefor, and they are thereby lost, the innkeeper is not liable for the loss.[5] Nor can liability attach where a guest at an inn, instead of confiding his goods to the innkeeper, of choice commits them exclusively to the custody of another person, who is living at the inn.[6]

So the liability of the innkeeper has been held to cease where a traveller had some boxes of jewelry, and desired a room to himself for the purpose of opening and showing it to customers: and he had the room assigned to him, and the key delivered to him, with directions about locking the door; and he used the room accordingly, and unpacked his jewelry: and he afterwards went away, and left the room for some hours, with the key in the lock on the outside of the door, and some of his boxes of jewelry were stolen.[7]

§ 691. So a guest who exhibits valuables in the presence of strangers, and then leaves them in his room, without locking the

[1] Hyatt *v.* Taylor, 51 Barb. 632; 42 N. Y. 258; Rosenplaenter *v.* Roessle, 54 N. Y. 262; overruling Gile *v.* Libby, 36 Barb. 70.

[2] Rosenplaenter *v.* Roessle, 54 N. Y. 262.

[3] Bendetson *v.* French, 46 N. Y. 266.

[4] Story on Bailments, § 483; Calye's case, 8 Co. 32; 2 Kent Comm. Lect. 40, p. 592, 593, 594, 4th ed.; Com. Dig. Action on the Case for Negligence, B. 1, 2; Armistead *v.* Wilde, 17 Q. B. 261; 6 Eng. Law & Eq. 349; Read *v.* Amidon, 41 Vt. 15; Fuller *v.* Coats, 18 Ohio St. 343; Fowler *v.* Dowlen, 24 Barb. 384; Seymour *v.* Cook, 53 Barbour, 452; Houser *v.* Tully, 62 Pa. St. 92; Cashill *v.* Wright, 6 E. & B. 890.

[5] Fuller *v.* Coats, 18 Oh. St. 343. See Purvis *v.* Coleman, 21 N. Y. 111.

[6] Houser *v.* Tully, 62 Penn. St. 92; Sneider *v.* Geiss, 1 Yeates, 34.

[7] Burgess *v.* Clements, 4 Maule & Selw. 306; *S. C.* 1 Stark. 251 n.

door, or in other unguarded places, is guilty of such negligence that he cannot recover from the innkeeper in case of theft.[1] The mere leaving of a chamber door unlocked, however, is not negligence that relieves the innkeeper, even though the latter had given the lodger a key;[2] but it is otherwise where the lodger uses the particular room as a warehouse;[3] and where there are other circumstances combining to show negligence in the lodger. "The fact of the guest having the means of securing himself, and choosing not to use them, is one which with the other circumstances of the case should be left to the jury."[4]

§ 692. *Burden of proof.* — The loss of the goods of a guest while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics.[5]

The question of contributory negligence is for the jury.[6]

[1] Armistead *v.* Wilde, 17 Q. B. 261; Cashill *v.* Wright, 6 E. & B. 891.

[2] Calye's case, 8 Co. Rep. 32 (a), 33 (a): Morgan *v.* Ravey, 6 H. & N. 265; Mitchell *v.* Woods, 16 L. T. (N. S.) 676. See Burgess *v.* Clements, 4 M. & S. 306.

[3] Farnworth *v.* Packwood, 1 Stark. 249; Burgess *v.* Clements, 4 M. & S. 306.

[4] Montague Smith, J., in Oppenheim *v.* White Lion Hotel Co., L. R. 6 C. P. 522.

In Oppenheim *v.* White Lion Hotel, L. R. 6 C. P. 515, the plaintiff, a traveller, went to a hotel at Bristol, arriving at eleven P. M. In the commercial room he took from his pocket a canvas bag containing £22 in gold, some silver, and a £5 note, and took out 6*d.* to pay for some stamps. He was then shown to a bedroom on an upper story, the door of which had a lock and a bolt, and the window of which looked out on to a balcony. He was cautioned by the chambermaid that the window was open, but nothing was said about locking the door. On going to bed he closed the door, but did not lock or bolt it, and placed his clothes (the bag of money being in one of the pockets) on a chair at his bedside. During the night some one entered his room by the door while he slept, and stole the bag and money.

The judge (of a county court), in summing up the case to the jury, after explaining to them the law as to the liability of innkeepers for the safe custody of the property of their guests, told them that the question for their consideration was whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances. The jury found for the defendants.

Held, that the direction was right, and the verdict warranted by the evidence.

[5] Jones on Bailm. 96; Bennett *v.* Mellor, 5 Term R. 276: Hill *v.* Owen, 5 Blackford, 323. See Metcalf *v.* Hess, 14 Ill. 129: Johnson *v.* Richardson, 17 Ill. 302; Merritt *v.* Cleghorn, 23 Vt. 177: Keston *v.* Hildebrand, 9 B. Monroe, 72: Howth *v.* Franklin, 20 Texas, 798; McDaniels *v.* Robinson, 26 Vt. 316; Laird *v.* Eichold, 10 Ind. 212; supra, § 422.

[6] Cashill *v.* Wright, 6 E. & B. 891; supra, § 423.

§ 693. *Livery stable keepers.* — A livery stable exclusively for horses is not an "inn;" and hence the keeper of such a stable is not liable for any loss which is not imputable to his negligence. He is bound, however, to exert in his calling the diligence which good business men in this specialty are accustomed to exert.[1] This obligation involves, among other things, an obligation to take reasonable care that any building used for the purpose is in a proper state, so that the thing deposited may be reasonably safe in it; but no warranty or obligation is to be implied by law on his part that the building is absolutely safe. In a case where this principle was recently determined,[2] the plaintiff brought his horses and two carriages to defendant, a livery stable-keeper; the carriages were placed under a shed on defendant's premises, a charge being made by defendant in respect of each. The shed had just been erected, the upper part being still in the hands of workmen. The defendant had employed a builder to erect the shed for him as an independent contractor, but not as defendant's servant, and he was a competent and proper person to be so employed. The shed was blown down by a high wind, defendant being ignorant of any defect in it, and the carriages were injured; upon which plaintiff brought an action against defendant. At the trial, the above facts having been admitted, the judge rejected evidence to prove that the fall of the shed was owing to its being unskilfully built through the negligence of the contractor and his men; and he nonsuited the plaintiff, ruling that the defendant's liability was that of an ordinary bailee for hire,[3] and that he was only bound to take ordinary care in the keeping of the plaintiff's carriages, and that if he had exercised in the employment of the builder such care as an ordinary careful man would use, he was not liable for damage caused by the carelessness of the builder of which he, the defendant, had no notice. It was held by the queen's bench that the nonsuit and ruling were right.[4]

[1] See supra, § 48, 492.

[2] Searle *v.* Laverick, L. R. 9 Q. B. 122.

[3] "Ordinary" is here used to represent the *diligentia diligentis*, as distinguished from the *diligentia diligentissimi* of the Schoolmen, a term sometimes used to describe the special liability of the innkeeper and carrier.

[4] Blackburn, J.: . . . . "This kind of bailment is included in what, in the celebrated case of Coggs *v.* Bernard (2 Ld. Raym. at p. 917–918), Lord Holt classes as the fifth sort, viz., 'a delivery to carry or otherwise

manage for a reward to be paid to the bailee;' as to which, says Lord Holt, 'Those cases are of two sorts, either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events.'

"The language of Lord Holt is general, and applies this to all that exercise 'a public employment;' and in the Praetor's Edict, 'Nautae caupones et Stabularii,' which is generally considered the origin of this head of the law, stable-men are expressly named. See Dig. lib. iv. tit. ix. l. 1. But we take it to be established law that, by the custom of England, this extreme liability, making the bailee an insurer, is confined to carriers and innkeepers, and that livery stable-keepers and warehousemen come within what Lord Holt calls the second sort, as to which he says, 'The second sort of bailiffs, factors, and such like.' As to this sort, he says the bailee is only bound to take reasonable care; and '*the true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it.* But it is allowed in other cases' (*i. e.* the carrier and innkeeper) 'by reason of the necessity of the thing.'

"The obligation to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing therein deposited may be reasonably safe in it.

"If the obligation of a livery stable-keeper goes no further than this, the defendant in the present case has fulfilled it, and the nonsuit was right. But the argument of the plaintiff's counsel was that the two cases of Readhead *v.* Midland Ry. Co. (Law Rep. 4 Q. B. 379, see supra, § 631), and Francis *v.* Cockrell (Law Rep. 5 Q. B. 184, 501), both decided in the exchequer chamber, establish that a carrier of passengers, who for reward furnishes a carriage, and a person who lets sittings in a temporary stand built for the reception of spectators at a race, are under an obligation as to the sufficiency of the carriage and the stand which they supply, much more extensive than this.

"The point decided in Readhead *v* Midland Ry. Co. (Law Rep. 4 Q. B. 379) was that the obligation did not extend so far as to make the carrier responsible for a latent defect, which neither he nor those who made the carriage could by proper care have prevented or detected. In Francis *v.* Cockrell (Law Rep. 5 Q. B. 184, 501), which was the case of a temporary stand erected by independent contractors for the defendant, and then let out by him in separate sittings to, amongst others, the plaintiff, the case is treated as strictly analogous to the case of the carrier of passengers, who, having got a carriage, in the way he finds most convenient for himself, uses it for the carriage of the passenger. And in the judgment of this court, carefully prepared and delivered in writing by my brother Hannen, the question is thus stated: 'It becomes necessary, therefore, for us to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care had been used, not only by the defendant and his servants, but by the persons whom he employed as independent contractors to erect the stand. It is said in the judgment in Readhead *v.* Midland Ry. Co. (Law Rep. 4 Q. B. at p. 392), "Warranties implied by law are for the most part founded on the presumed

intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given." Applying this rule to the present case, we think that the contract of the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work, as well as by himself.' Law Rep. 5 Q. B. at p. 193.

"This decision was affirmed in the exchequer chamber. Law Rep. 5 Q. B. 501. The judgments there were not written, and in some of them, as reported, expressions are used much more favorable to the extension of the doctrine of an implied warranty than the language used in the written judgment of the same court in Readhead *v.* Midland Ry. Co. (Law Rep. 4 Q. B. 379), but the two decisions are not in conflict, and both are binding on us.

"We think that, where the matter is not already decided by authority, the principle by which the court is to be guided in determining what is the obligation implied by law is that given by Lord Holt in Coggs *v.* Bernard (2 Ld. Raym. at p. 918), 'that it would be unreasonable to charge the bailee with a trust further than the nature of the thing puts it in his power to perform it.' Which is, we think, the same principle as is expressed in the passage from the judgment in Readhead *v.* Midland Ry. Co. (Law Rep. 4 Q. B. at p. 392), above cited by Hannen, J., in Francis *v.* Cockrell, Law Rep. 5 Q. B. at p. 193.

"And we may observe that in Pothier, Du Contrat de Louage, partie 2nde, chap. 1, No. 118, 119, 120, we find a similar principle laid down, though not in the same language, as being that of the old French law. That very learned author lays it down, that where the person who lets a thing on hire knows of a defect in the thing which he lets, making it unfit for the purpose for which it is let, he is responsible in damages for it. And, though he does not actually know it, that if the circumstances are such that he ought to have had a suspicion of it and made inquiry, and does not either inquire or inform the hirer, so that he may inquire for himself, he is liable, — which is so far equivalent to saying that he is bound to reasonable care and good faith. And further that, if the letter follows a trade which makes it his duty to know whether the thing has faults or not, he is liable without proof that he did know. He puts as an example, the case of a cooper, who supplies wine casks made of bad wood, so that they leak. Pothier says: 'The cooper shall not be permitted to set up as a defence that he did not know the bad quality of the wood, for his profession bound him to know the quality of the wood he used, and to supply none but of good quality.' This seems to us to say, in other words, that from the nature of the employment a warranty of the quality of the wood should be implied. But says Pothier, 'Except in those cases the letter, if he neither knows nor is bound to know the fault in the thing let, is not responsible in damages.'

"The difficulty, in a case not already settled by decision, is to apply these principles, and to say whether the nature of the relation between the parties is such that a warranty to any, and if to any, to what extent, should be implied.

"On this part of the case the observations of Crompton, J., in Brass *v.* Maitland (6 E. & B., at pp. 490–493;

26 L. J. (Q. B.) at pp. 56–58), are weighty.

"The plaintiff's counsel on the argument in this case relied mainly on the decision in Francis *v.* Cockrell (Law Rep. 5 Q. B. 184, 501), and very properly, for we feel that unless there is a real difference between the relation of a person who takes a seat in a temporary stand to the person who furnishes the ticket admitting him to that stand, and the relation of the person who sends his carriage to stand in a coach-house to the livery stable-keeper who supplies the coach-house, the contract to be implied in the two cases should be the same. And we feel also that it is not desirable to make nice distinctions.

"It is very difficult to draw the precise line between cases in which the warranty or obligation — it matters not which it is called — should be implied, and those in which it should not. But, to borrow an illustration from my brother Bramwell, though it may not be easy, or indeed possible, to say where the line should be drawn which divides day from night, it is quite clear that noon is on the one side of that line and midnight on the other; and it is enough for the decision of this case if we can see that the present case is not one in which this warranty or obligation should be implied by law. And there seem to us to be sufficient reasons for saying that it should not in this case be implied, though it was implied in the case of the carrier of passengers supplying a carriage, and in the case, considered analogous, of the person furnishing a seat in a temporary stand.

"In the first place, it is to be observed that in most cases where a bailee takes care of goods he must lodge them, if dead goods, in a building so as to shelter them from the weather; if live animals, either in a stable or a fenced field; and it must have often happened that the goods were injured or lost in consequence of some defect in the building or fences. In Broadwater *v.* Blot (Holt, N. P. 547), the action was against an agister for losing a horse. On an application for a nonsuit, Gibbs, C. J., said: 'All the defendant is obliged to observe is reasonable care. He does not insure; and is not answerable for the wantonness or mischief of others. If the horse had been taken from his premises, or had been lost by accidents which he could not guard against, he would not be responsible. I admit that particular negligence must be proved, by occasion of which the horse was lost, or gross general negligence, to which the loss may be ascribed, in ignorance of the special circumstances which occasioned it. If there be a want of due care and diligence generally, the defendant will be liable. *The question is, were the defendant's fences in an improper state at the time the horse was taken in to agist?* Did he apply such a degree of care and diligence to the custody of the horse as the plaintiff, who had intrusted the horse to him, had a right to expect? I shall leave it to the jury.'

"The passage above in italics was cited on the argument, as showing that, in the opinion of that very learned and accurate judge, the agister would be liable if the fences were in an improper state, however caused. But it seems to us that, when taken with the context, the fair conclusion is, that the alleged improper state of the fences was such that the agister, if he took proper care, could not have been ignorant of it, and that it was only mentioned by Gibbs, C. J., as an instance of the absence of due care and diligence.

"With this exception, no case was cited in which it was ever suggested

that there was any warranty, however limited, as to the state of the place in which goods are deposited beyond what was expressed in the ruling of my brother Pollock at the trial of the case at bar.

"And as far as our own research goes, there is no such case; nor can we find any suggestion to that effect in any of our text writers. In the case of the carriage supplied by a carrier, either by land or by water, it had been long a debated question whether there was not an absolute warranty; as may be seen from the authorities collected in Readhead *v.* Midland Ry. Co., Law Rep. 2 Q. B. 412; 4 Q. B. 379.

"We are, therefore, as far as authority goes, at liberty to apply the principles before stated to this case, and see if any warranty or obligation should be implied.

"There is, we think, a real difference between the case of one who supplies a carriage, or a seat in a temporary stand, which is in the nature of a chattel, and one who supplies room for goods in a permanent building. We think that we must take notice of the fact, that in the general and more ordinary state of things, a warehouseman or livery stable-keeper is tenant of the buildings in which he lodges the goods intrusted to him; and we know that in the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord to his tenant that the building shall be fit for the purpose for which it is let. See Hart *v.* Windsor, 12 M. & W. 68.

"We think, therefore, that in such cases an implied warranty as to the state of the building would, to borrow Lord Holt's language already cited, be unreasonable, as charging him with a trust beyond what the nature of the thing puts it in his power to perform. 2 Ld. Raym. at p. 918. It is reasonable to require him to use due care to ascertain whether the building is fit, and by himself and servants to take due care to maintain it in a proper state, but it would be unreasonable to go further.

"It is true that, in some cases, the bailee is owner in fee of the building; and in some, as in the present case, he has it built for him; and even where as lessee he might take special covenants. But these are exceptional cases; and in *ea quae fraequentius accidunt praeveniunt jura.* We must imply the warranty, or obligation, which would be reasonable in the ordinary state of things, and no more, even though in exceptional cases it might be reasonable to imply more, and though the particular case may be one of those exceptions.

"We think, therefore, that the ruling of the learned judge was right, and that the rule should be discharged."

CHAPTER XI.

EXPRESSMEN.

Are common carriers, § 697.
Cannot exonerate themselves by agreement from negligence, § 698.
But may limit their special liability to their own route, § 699.
Must deliver at address or personally, § 700.
Consignor may recover from railroads, § 701.

§ 697. *Express companies are common carriers.* — Expressmen, though using exclusively the carriages of other carriers, are nevertheless themselves common carriers, and subject to the liabilities of such.[1]

§ 698. *Cannot exonerate themselves by agreement from the consequences of their negligence.* — Hence expressmen cannot exonerate themselves by contract from injuries done by their negligence or the negligence of those whom they employ.[2] As their employees in this sense are to be viewed the railroad and other companies who carry for them.[3]

§ 699. *Company may restrict its liability to its own route.* — An express company, however, may decline to be liable, except as a forwarder, beyond its own route, and in such case its special liability as insurer is confined by this limitation. Thus in a Pennsylvania case, an express company received a package of money from a bank at Titusville to be transmitted to Lancaster. In their printed receipt, they undertook to "forward to the nearest place of destination reached by this company." By conditions printed with the receipt, they were not to be liable "except as forwarders only, ... or for any default or neg-

[1] Buckland *v.* Adams Express Co. 97 Mass. 124; Sweet *v.* Barney, 23 N. Y. 335; Ketchum *v.* Am. Un. Ex. Co. 32 Mo. 390; Russel *v.* Livingston, 19 Barb. 346; Christenson *v.* Am. Ex. Co. 15 Minne. 270; Belger *v.* Dinsmore, 51 N. Y. 166; Am. Un. Ex. Co. *v.* Robinson, 72 Penn. St. (22 P. F. Smith) 274; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; Baldwin *v.* Am. Ex. Co. 23 Ill. 197.

[2] Ibid.; Ketchum *v.* Am. Un. Ex. Co. 32 Mo. 390; Balt. & Ohio R. R. *v.* Rathbone, 1 West Va. 87; American Ex. Co. *v.* Sands, 55 Penn. St. 53; Adams Ex. Co. *v.* Stettaners, 61 Ill. 185. Supra, § 598.

[3] Hooper *v.* Wells, 27 Cal. 11; Christenson *v.* Ex. Co. 15 Minn. 270; *contra*, Bank *v.* Adams Ex. Co. Alb. L. J. Aug. 29, 1874, 131; Cent. L. J. Sept. 3, 1874, 436.

ligence of any person or corporation to whom" the package should be delivered, "at any place of the established route run by this company," and such person, &c., was to be taken to be the agent of the consignor. To reach Lancaster the package was carried by three other express companies. The consignee at Lancaster refused to receive it, and directed it to be returned to Titusville, to which place it was carried by the same routes. On its arrival there it was found that part of the money had been abstracted. It was held by the supreme court that at most the company were liable as carriers only to the end of their own route, and afterwards were forwarders, responsible only for reasonable care and diligence in selecting proper carriers.[1]

§ 700. *Must deliver at address or personally.* — The duty of an express company, when the address of the consignee is placed on the parcel, or when such address is, by the ordinary diligence of a good business man ascertainable (as where the name of the consignee is given, and the village in which he dwells, in which his residence is generally known, or when his address can be obtained by reference to a directory), is to deliver at the consignee's place of business or residence at such address, if not personally. Hence, on failure to do so, the expressman is liable, unless it should appear that he exercised the diligence which a good business man in this particular department would do under the circumstances.[2] And on the principle that common carriers are insurers of goods, he is liable for the conversion if he lose the goods by delivery to a wrong person or a wrong place, or if they are destroyed before delivery, unless he can prove that the destruction is by inevitable accident or the act of God. But if the consignee cannot be found, then the expressman is released from his common law liability as insurer, and is only liable for the *diligentia diligentis*, *i. e.* for the diligence a good business man would under such circumstances show.[3] Even where an express-

[1] Am. Ex. Co. *v.* Bk. of Titusville, 69 Pa. St. 394. As to forwarding merchants, see infra, § 703.

[2] Haslam *v.* Adams Ex. Co. 6 Bosw. 235; Am. Un. Ex. Co. *v.* Robinson, 72 Penn. St. (22 P. F. Smith) 274. See Stephenson *v.* Hart, 4 Bingh. 476; Golden *v.* Manning, 2 Wm. Bl. 916; 3 Wil. 429; Tooker *v.* Gormer, 2 Hilton, 71; Finn *v.* West. R. R. 102 Mass. 283; Baldwin *v.* Am. Ex. Co. 23 Ill. 197; *S. C.* 26 Ib. 504; *S. C.* 2 Redf. Am. R. R. Ca. 72; Marshall *v.* Am. Ex. Co. 7 Wisc. 1; Adams Ex. Co. *v.* Haynes, 42 Ill. 89; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184. Supra, § 569.

[3] Adams Express Co. *v.* Darnell, 31 Ind. 20.

man has no agent at a distant point at which he agrees to deliver a parcel, he is liable for negligence in non-delivery at such point: and the better opinion is that he is liable as insurer, as an ordinary common carrier, under the distinctive Anglo-American law, and not simply for the *diligentia diligentis*.[1]

[1] Place *v.* Union Ex. Co. 2 Hilton, 19; 2 Redfield on R. R. § 170, disapproving of Hersfield *v.* Adams, 19 Barb. 577; Adams Ex. Co. *v.* Stettaners, 61 Ill. 184.

Am. Ex. Co. *v.* Hockett, 30 Ind. 250, was a suit against an express company for the value of a package of money received by it to be carried and delivered to the plaintiff, which it failed to do. Answer, that the package was duly received at the office of defendant at the town to which it was directed; that defendant upon inquiry could not find the residence of the plaintiff to be in said town or its vicinity, and being ignorant of his real place of business or post-office address, the defendant on the day of the arrival of said package, wrote a notice informing the plaintiff of its arrival at said office, and that it was ready for delivery, and inclosed said notice in an envelope addressed to the plaintiff at said town and duly stamped, and dropped the same into the post-office at said town, and placed said package in a safe owned by the defendant, wherein the defendant kept all money packages arriving by express for parties, and safely locked the same, the package thus remaining securely locked up for several days, and no one calling for it till it had been stolen by burglars, who in the night-time violently broke into the office of defendant, where said safe was, and, without the knowledge of defendant, broke open said safe, and feloniously stole, took, and carried away said package of money, without any fault or neglect of the defendant. *Held*, that the facts alleged in the answer were not sufficient to discharge the express company from liability as a common carrier; and that if they could be so deemed, still, the answer failed to show that the defendant exercised reasonable care with the package as bailee after the termination of such liability.

In American Union Express Co. *v.* Robinson, supra, the opinion of the court was delivered by Read, J., as follows: "The subject of the duties and liabilities of express companies has been very fully discussed by Judge Redfield, in his 2d volume of the Law of Railways, pages 15, &c., and in his Treatise on the Law of Carriers of Goods and Passengers, chapter 5, page 47, and chapter 4, page 31. At section 50, page 38, of this last work, the learned author says: 'One of the distinctive characteristics of this mode of transportation is that the companies, whether their line is by land or by water, or partly of each, undertake to deliver to the consignees in the same manner all common carriers by land did before railways came into general use; it being now well established, that in the ordinary railway transportation of goods by common carriers of goods there is no obligation after the goods reach their appointed destination, but to put them safely in warehouse. It was mainly to remedy this defect in railway transportation of parcels of great value in small compass, that express companies were first instituted in America. That these companies are to be held ordinarily to personal delivery, has been so often decided as scarcely to require the citation of cases.' The court were there-

The custom exists in our great cities for travellers expecting to take passage from a railroad depot to send their trunks in advance by an expressman to such depot. An expressman under the circumstances discharges his duty by leaving a trunk so given to him at the baggage office of the depot where travellers are accustomed to check their trunks.[1]

§ 701. *Consignors may recover from railroad.* — Persons sending goods by express companies may recover against the railroad or other common carrier employed by such express company for negligence in the carriage. The express company is to be regarded as the agent of the owner, who is entitled to sue in his own name on the contract made between the express company and the principal carriers, and to proceed against the latter for negligence, to the same extent as could the express company were it suing the principal carriers.[2] Thus where the owner of specie employed an expressman to transport it for him, and the expressman employed a transportation company to carry the specie, under a contract providing that the carriers were not to be held in any way responsible for loss or damage, it was ruled by the supreme court of the United States that the company was liable directly to the owner for loss occasioned by the company's negligence; it being held that though the owner could only recover on the contract made with the company by the expressman, yet that this contract could not be so construed as to relieve the company for liability for negligence, such limitations being against the policy of the law.[3] The same rule is maintained in England, though there the limitation of responsibility is allowed a wider range.[4]

fore right in saying: 'Further than this, as to express company, we think the sound rule to be a personal delivery either to residence or place of business of the consignee.' In fact, any other rule would be destructive of the business of express companies, who receive a larger compensation, because they contract for a personal delivery of goods intrusted to them as common carriers."

[1] Henshaw *v.* Rowland, 54 N. Y. 242.

[2] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 344; Langworthy *v.* N. Y. & H. R. R. 2 E. D. Smith, 195; Southern Express Co. *v.* Newby, 36 Ga. 635; Buckland *v.* Express Company, 97 Mass. 124.

[3] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 Howard, 344.

[4] Baxendale *v.* West. R. R. Co. 5 C. B. (N. S.) 336; Garten *v.* Bristol R. R. 1 B. & S. 112; Branly *v.* S. E. R. R. 12 C. B. (N. S.) 63.

CHAPTER XII.

FORWARDING MERCHANTS.

§ 703. FORWARDING merchants, or forwarders, are a class of business men who store and forward goods by other agencies, they receiving a commission from the owner for their trouble in storing, and in selecting such carrying agencies. Forwarders, therefore, are distinguished from expressmen by not being impressed with the special and extraordinary insurance liabilities of common carriers. Hence forwarders are liable only as ordinary bailees for hire, who need only satisfy the jury by the best evidence in their power of their due care and fidelity; and that the loss was not from default of themselves or their servants.[1] Hence it is, that a person who receives goods in his own store, standing upon his own wharf, for the purpose of forwarding them, is deemed but a mere forwarding warehouseman, and responsible only for the diligence shown by good agents of this class, even although he holds himself out to the public as ready and willing to take goods for persons generally, on storage, and to forward them to their destination.[2] Hence if, in such a case, his store is broken open, and the goods stored are stolen therefrom by thieves, without any default on his part, or any want of ordinary care, he will not be responsible for the loss.[3]

[1] American Express Co. *v.* Bank of Titusville, 69 Pa. St. 394; supra, § 699; Maybin *v.* R. R. 8 Rich. 240; Platt *v.* Hibbard, 7 Cowen, 497; Streeter *v.* Horlock, 1 Bing. 34; Brown *v.* Dennison, 2 Wend. 593; Forsythe *v.* Walker, 9 Barr, 148; Bush *v.* Miller, 13 Barbour, 488; Forward *v.* Pittard, 1 Term R. 27; Hyde *v.* Trent Navigation Company, 5 Term R. 389; Hooper *v.* Wells, 27 Cal. 11. See Quiggin *v.* Duff, 1 Mees. & Wels. 174; Powers *v.* Mitchell, 3 Hill, 545; Story on Bail. § 502. Supra, § 571, 572.

[2] Platt *v.* Hibbard, 7 Cowen, 497; Roberts *v.* Turner, 12 Johns. 232; Brown *v.* Dennison, 2 Wend. 593.

[3] Platt *v.* Hibbard, 7 Cowen, 497; Campbell on Negligence, § 482.

CHAPTER XIII.

FERRYMEN.

When common carriers of goods, § 706.
Diligence required from, § 707.
When passenger relieves ferryman from liability, § 708.

§ 706. *Common carriers of goods.* — A ferryman, who undertakes to carry goods from point to point for hire, is a common carrier;[1] though if not undertaking to carry goods, his liability in this respect is denied.[2]

§ 707. *Diligence required of.* — When a common carrier of goods, the ferryman is subject to the liabilities of common carriers of goods, as already stated. When not a common carrier, he is bound to the diligence such as is exercised by good and diligent persons in his calling. Hence in New York, where it is held that a ferryman is not technically a common carrier, it is said by Allen, J.:[3] "A ferryman does not undertake absolutely for the safety of the goods carried with and under the control of the owner; but he does undertake for their safety as against the defects and insufficiencies of his boats, and other appliances for the performance of the services, and for the neglect or want of skill of himself and his servants. At the same time the owner of the property, retaining the custody of it, is bound to use ordinary care and diligence to prevent loss or injury. The duties and obligations of a defendant, a ferry company, were defined by the judge to the jury in the very words of Judge Dewey, in White *v.* Winnisimmet Co. 7 Cush. 155. When the only possession and custody by the ferryman of a horse and carriage is, as in this case, that which necessarily results from the traveller's driving

[1] Babcock *v.* Herbert, 3 Alab. 392; Smith *v.* Seward, 3 Barr, 342; Willoughby *v.* Horridge, 12 C. B. 742; Slimmer *v.* Merry, 23 Iowa, 90; Fisher *v.* Clisbee, 12 Ill. 344; Powell *v.* Mills, 37 Miss. 611; Wilson *v.* Hamilton, 4 Ohio St. 722.

[2] White *v.* Winnisimmet Co. 7 Cush. 154; Wells *v.* St. Nav. Co. 2 Comst. 208; Alexander *v.* Greene, 3 Hill N. Y. 19; Wyckoff *v.* Queen's County Ferry Co. 52 N. Y. (7 Sickles) 32.

[3] Wyckoff *v.* Queen's County Ferry Co. 52 N. Y. 35.

his horse and wagon on board the boat, and paying the usual ferriage, the ferryman is not chargeable with the full liabilities of a common carrier. The duties and liabilities of the ferryman to persons thus using the ferry is thus stated by Judge Dewey: It is the duty of a ferry company "to have all suitable and requisite accommodations for the entering upon, the safe transportation while on board, and the departure from the boat of all horses and vehicles, passing over such ferry.' . . . . 'They are also required to be provided with all proper and suitable guards and barriers on the boat for the security of the property thus carried, and to prevent damage from such casualties as it would naturally be exposed to, though there was ordinary care on the part of the traveller.'" [1]

[1] The same principle was adjudged in Clark *v.* Union Ferry Co. (35 N. Y. 485); and the defendant was held liable for the loss of a horse occasioned by the insufficiency of the chain used as a guard or barrier at the rear of the boat. See also Willoughby *v.* Horridge, 12 C. B. 742; Walker *v.* Jackson, 10 M. & W. 161.

In Hazman *v.* Hoboken Land and Imp. Co. 50 New York, 53, it was ruled that it is the duty of a ferry company not only to carry its passengers safely, but not to injure them by any act of carelessness or negligence. It is negligence for its employees to order teams to pass off its boat before the bridge, prepared for that purpose, is properly adjusted. In this case the facts were that the plaintiff was passing on to one of defendant's ferry-boats. In consequence of the crowd moving off the boat, he was obliged to step upon the stringer, separating the passage from the carriageway. The plaintiff's witnesses testified that before the bridge was adjusted to the level of the boat, and while it was some eight or nine inches above it, defendant's employees dropped the chain, and ordered the teams to pass off. A horse, attached to a heavily laden cart, in attempting to do so, struck his foot against the bridge and fell; the shaft of the cart struck plaintiff and broke his leg. The jury found a verdict for plaintiff. It was held, that ordering the teams from the boat before the bridge was properly adjusted was a negligent act, likely to produce the result which followed to the horse; that it was not negligence, as matter of law, for the plaintiff to be going upon the boat, according to the usual custom, before those disembarking had all passed off, nor, under the circumstances, to be standing upon the stringer; and that the evidence was, therefore, sufficient to go to the jury and to sustain their finding. *S. C.* 2 Daly, 130. See also Ferris *v.* Union Ferry Co. 36 N. Y. 313.

In an action against a ferryman, on his contract for the transportation of animals which fell off the ferry-boat and were drowned, through his alleged carelessness in not furnishing the boat with a barrier where they fell, evidence is inadmissible that just such a boat had been used to transport animals over the ferry daily for thirty years, and no accident had ever occurred before. Lewis *v.* Smith, 107 Mass. 334.

§ 708. *When passenger relieves ferryman from liability.*— Should a passenger take his baggage, or other property in his charge, under his exclusive care, in such a way as to discharge the ferryman from giving personal attention, then, for any damage occurring through the passenger's negligence, the ferryman is not liable.[1] It is otherwise, however, when the care given by the passenger is merely supplementary to that to be exercised by the ferryman.[2] In such case the passenger is regarded as the agent of the ferryman, and not as his substitute; and the ferryman is liable for any damage not accruing from the direct negligence or misconduct of the passenger.[3]

[1] White *v.* Winnisimmet Co. 7 Cush. 155; Wilsons *v.* Hamilton, 4 Ohio, N. S. 722. See supra, § 600.

[2] Powell *v.* Mills, 37 Miss. 691.

[3] Fisher *v.* Clisbee, 12 Ill. 344.

CHAPTER XIV.

LOCATIO (HIRING).

Definition, § 710.
Classification, § 711.
Hiring of a thing, § 712.
Duties of letter, § 712.
Duties of hirer, § 713.
Hirer liable for his subaltern's negligence, § 714.
Hiring horses, § 715.
Burden as to negligence, § 718.
Hiring of service, § 719.
Negligence by employer of service, § 720.
Negligence of servant or employee, § 721.
Hiring by job. *Locatio conductio operis*, § 724.
Negligence by employee in such case, § 725.
Negligence of employer, § 726.
When employee is at liberty to substitute other stuff for that given, he is liable for all kinds of loss, § 727.
Hiring of seats in public theatres or buildings for spectacles ; hiring of storage in warehouses, § 728.

§ 710. *Definition.* — Hiring: *Locatio conductio*, in the Roman law : Miethe, in the German law, is a consensual contract which arises when one person (the *locator*) agrees for a settled price to give to another (the *conductor*) the use of a particular thing, or a particular amount of labor.[1]

§ 711. *Classification.* — Hiring, therefore, falls into two heads : the hiring of a thing, *locatio conductio rei ;* and the hiring of labor, *locatio conductio operarum.* Under the latter head falls as a subdivision the hiring of a job, or labor necessary to complete a particular work ; *locatio conductio operis.*

§ 712. *Hiring of a thing. Locatio conductio rei. — Duties of the letter*, negligence in respect to which makes him liable, in case damage ensue to the hirer : 1. Delivery of the thing to the hirer, unless prevented by necessity.[2] 2. Preservation of the thing, from the time of hiring down to the time of delivery, in such a condition that the hirer, when he takes it, can receive its fruits.[3]

§ 713. *Duties of the hirer.* — He must (independently of the question of rent, which does not belong to this treatise) keep and redeliver the thing hired in good condition ; and he is liable

[1] Dig. t. xix. 2: locati conducti. Cod. t. iv. 65 ; de locato et conducto. Vangerow, § 638 ; Baron, § 292.

[2] L. 7–9. § 1. L. 15. § 8. L. 35. pr. D. h. t. 19. 2 ; Baron, § 294. See supra, § 181 ; infra, § 791.

[3] L. 19. § 1. D. h. t. 19. 2, and other passages cited by Baron, § 294.

for negligence in this respect, if such negligence be productive of damage to the owner.[1] As has been already seen,[2] the *conductor* or hirer is liable in such case for *culpa levis* (special or slight negligence) as well as for *culpa lata* (gross negligence). In other words, he is liable not merely for the lack of that general diligence which notices what every one notices (*quod omnes intelligunt*), but for the lack of the special diligence which a person ought to have and exercise who undertakes to do any work requiring special qualifications. He is only relieved from liability on account of damage to the thing leased if he can show that he is chargeable with no such negligence.[3] But he is in no sense an insurer, nor is he liable for *culpa levissima*, or that apocryphal phase of infinitesimal negligence which stands in antithesis to the *diligentia diligentissimi*, or intense diligence, which, as has been already shown,[4] the law does not, as a continuous service, exact. The Roman law is clear to this point. The hirer is not liable for damages induced by extraordinary catastrophes, unless it should be proved that these could have been averted by such diligence on his part as is usually shown by persons undertaking to lease property of the same character as that whose charge he has. Hence he is not ordinarily liable for damages produced by inundation, by fire, by riot, or by the act of a public enemy.[5] Nor is he liable for thefts by his servants, unless there is some negligence on his part facilitating such theft.[6] But if the theft be attributable to his want of care, he is liable.[7]

[1] See Batson *v.* Donovan, 4 B. & A. 21. Infra, § 723.

[2] Ante, § 69.

[3] Cayzer *v.* Taylor, 10 Gray, 274; Maynard *v.* Buck, 100 Mass. 40; Sullivan *v.* Scripture, 3 Allen, 564, and cases cited infra, § 723.

[4] Ante, § 63–5.

[5] See L. 15. § 2–4; D. h. t. 19. 2; Menotone *v.* Athawes, 3 Burr. 1592; Longman *v.* Galini, Abbott on Shipp. P. 4, ch. 6, p. 389, note *d*, 7th ed.; 1 Bell Comm. p. 453, 455, 458, 5th ed.; 1 Bell Comm. § 394, 4th ed.; Reeves *v.* The Ship Constitution, Gilp. 579.

[6] See Finucane *v.* Small, 1 Esp. 315; Brind *v.* Dale, 8 Carr. & Payne, 207; *S. C.* 2 Mood. & Rob. 80; Butt *v.* Great Western Railway Co. 7 Eng. Law & Eq. 448; 11 C. B. 140; Great Western Railway Co. *v.* Rimell, 27 Law Journ. C. P. 201; 6 C. B. (N. S.) 917 (Am. ed.); 18 C. B. 575.

[7] See Dansey *v.* Richardson, 25 Eng. Law & Eq. 90; 3 El. & Bl. 722; Broadwater *v.* Blot, Holt N. P. 547; Jones on Bailm. 91, 92; Bryan *v.* Fowler, 70 N. C. 596; Mansfield *v.* Cole, 61 Ill. 191.

According to Judge Story (Bailments, § 399), the hirer of the thing is responsible only for that degree of diligence which all prudent men use, that is, which the generality of mankind use, in keeping their own goods of the same kind. For this he cites

§ 714. *Hirer liable for his subaltern's negligence.* — The hirer is liable for the default and negligence of servants, domestics, and children, and of all acting under him.[1] If, therefore, a hired horse is ridden by the servant of the hirer so immoderately that he is injured or killed thereby, the hirer is personally responsible.[2] The same rule applies where the servant of the hirer carelessly and improperly leaves open the stable-door of the hirer, and the hired horse is stolen by thieves.[3] And where the injury

Jones on Bailm. 88; Handford *v.* Palmer, 2 Brod. & Bing. 359; Batson *v.* Donovan, 4 Barn. & Ald. 21; Reeves *v.* The Ship Constitution, Gilp. 579, 585, 586; 2 Kent Comm. Lect. 40, p. 586, 587, 4th ed.; Maynard *v.* Buck, 100 Mass. 40. "It is very clear that he can be liable only for such injuries as are shown to come from an omission of that diligence; or, in other words, for ordinary negligence." Reeves *v.* The Ship Constitution, Gilp. 579, 585, 586; Sullivan *v.* Scripture, 3 Allen, 564; Eastman *v.* Sanborn, 3 Allen, 594; Whalley *v.* Wray, 3 Esp. 74; Ames *v.* Belden, 17 Barbour, 513; Salter *v.* Hurst, 5 Louisiana (Miller), 7.

"If a man hires a horse," he continues, "he is bound to ride it moderately, and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food. Jones on Bailm. 88, 89; Pothier, Contrat de Louage, n. 190; Edwards *v.* Carr, 13 Gray, 234. And if he does so, and the horse in such reasonable use is lamed or injured, he is not responsible for any damages. Milton *v.* Salisbury, 13 Johns. 211; 1 Bell Comm. p. 453, 454, 5th ed.; 1 Bell Comm. § 389, 4th ed.; Story on Agency, § 452 to 461; Reeves *v.* The Ship Constitution, Gilpin, 579, 591; Harrington *v.* Snyder, 3 Barbour. 381. If two persons jointly hire a horse and chaise on joint account, both are answerable for any misconduct or negligence of either in driving, and for any other want of proper care. Davy *v.* Chamberlain, 4 Espin. 229. But it would be otherwise where one is the sole hirer, and the other is merely invited to ride; for, in such a case, the hirer alone will be responsible."

If by "ordinary negligence," in the passage just given, Judge Story means *culpa levis*, or the negligence of a specialist, as distinguished from *culpa lata*, or gross negligence, being the negligence of a non-specialist, his views are in harmony with the Roman law and with those of the authorities to which he appeals, however comparatively conflicting may be their phraseology. For whoever undertakes as a business transaction the care of a particular thing professes to be *pro tanto* a specialist as to such particular thing, and is liable for negligence if he fail to be that which he undertakes.

Lord Holt says: "That if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses." Coggs *v.* Bernard, 2 Lord Raym. 916; Jones on Bailm. 86. And in Buller's Nisi Prius, 72, it is laid down, that "The hirer is to take all imaginable care of the goods delivered for hire." Jones on Bailm. 6; Ibid. 86. See also 1 Bell Comm. § 394, pp. 367–370, 4th ed.

[1] See as to servants, supra, § 156.

[2] Jones on Bailm. 89; 1 Black. Comm. 430, 431; Story on Bailments, § 400.

[3] Jones on Bailm. 89; Salem Bank *v.* Gloucester Bank, 17 Mass. 1. See

is done by sub-agents, employed by the hirer, the same responsibility for the negligent acts of the former, about the thing bailed, is incurred by the latter.[1]

§ 715. *Hiring horses.* — The duty which arises on hiring horses may be taken as an illustration of this class of obligations. Where a horse falls sick during a journey, the hirer ought to call in a farrier, if one can be obtained within a reasonable time or distance; and if he secures such aid, he is not responsible for any mistakes of the farrier in the treatment of the horse. But if, instead of procuring the aid of a farrier, when he reasonably may, he himself prescribes unskilfully for the horse, and thus causes his death, he will be responsible for the damages, although he act *bonâ fide*.[2] Again: If a hired horse refuses its feed from fatigue, the hirer is bound to abstain from using the horse; and if he pursues his journey with the horse, he is liable for all the injury occasioned thereby.[3] Any neglect on the hirer's part as to suitable care will make him responsible to the owner for the damage sustained thereby.[4]

§ 716. In a German case reported by Mommsen, a student hired from a livery-stable a one-horse wagon to drive to a specified place. When arrived at a tavern in the place of destination, he gave the horse to the hostler, who fastened the horse so negligently in the stall that it was suffocated and died. What is the student's liability? Undoubtedly, had he driven negligently, it would have been *culpa levis*, either because he did not know how to drive, in which case he is liable for negligence in undertaking to do that for which he is incompetent, or because though competent he did not apply his competency. But the charge was not negligence in *driving*. The livery-stable man could not rightfully have expected from the student more than that, when arriving at the tavern, he would put the horse under the charge

Dansey *v.* Richardson, 25 Eng. Law & Eq. 90; 3 El. & Bl. 722.

[1] Story on Agency, § 308, 311, 452, 457; Randleson *v.* Murray, 3 Nev. & Per. 239; *S. C.* 8 Adolph. & Ellis, 109; Bush *v.* Steinman, 1 Bos. & Pull. 409; Laugher *v.* Pointer, 5 Barn. & Cress. 547, 553, 554; Milligan *v.* Wedge, 12 Adolph. & Ellis, 737; Quarman *v.* Burnett, 6 Mees. & Welsby, 499; and cases cited supra, § 157.

[2] Dean *v.* Keate, 3 Camp. 4.

[3] Bray *v.* Mayne, 1 Gow, 1; Thompson *v.* Harlow, 31 Geo. 348. See Eastman *v.* Sanborn, 3 Allen, 595; Edwards *v.* Carr, 13 Gray, 234.

[4] Handford *v.* Palmer, 2 Brod. & Bing. 359; *S. C.* 5 Moore, 74; Moore *v.* Cass, 10 Kans. 288.

of a proper attendant, with the proper orders. So argues Mommsen, on the ground that the student could not be reasonably expected to know about fastening a horse; and that he is liable for ignorance only of what he could be reasonably expected to know. But this conclusion cannot be accepted for two reasons: First, if I hire a horse, I must see that he is safely kept as well as safely driven, and if I take the horse under my care, the owner of the horse has as much right to presume that I know how to tie him as that I know how to drive him. Secondly, even supposing the first point fail, the maxim *respondeat superior* here comes in. The hostler who puts up my horse under my directions is my servant; and I am as much liable for his negligence as for my own.

§ 717. So in an interesting case in New York,[1] it was held that where the hirer of a horse stopped at an inn, and ordered the horse to be put into the barn, and fed, and owing to the neglect of the hostler to put the bits in the horse's mouth, on bringing him up, the horse was unmanageable, and ran away, damaging himself, the buggy, and harness; the hirer of the horse was held liable to the owner for the damages occasioned by the negligence of the hostler.

§ 718. *Burden as to negligence.* — This topic has been already independently discussed.[2] In cases of theft, it may be here particularly noticed that Judge Story dissents from Pothier and Sir William Jones, who hold that a loss by theft is *primâ facie* evidence of negligence,[3] and he argues that no such rule exists in the English law, however it may exist in the Roman law, or in the French law.[4] He adds, however, that if there be such a rule, it is but a bare presumption, and capable of being rebutted by proof that the theft was by no negligence of the hirer.[5]

§ 719. *Hiring of service* (*locatio conductio operarum*), *Dienstmiethe.* — Hiring of service (*locatio conductio operarum*) is a contract peculiarly applicable to engagements of manual labor for fixed wages, distinctively called in the Roman law *operae locari solitae*, *illiberales*. Here we strike at the true distinction be-

[1] Hall *v.* Warner, 60 Barbour, 198.

[2] Supra, § 422.

[3] Jones on Bailm. 43, 44, 76, 78, 98, 110; Pothier, Prêt à Usage, n. 53; Pothier, Contrat de Louage, n. 429; Pothier, Pand. Lib. 19, tit. 2, n. 28; Vere *v.* Smith, 1 Vent. 121.

[4] Pothier, Contrat de Louage, n. 429; Pothier, Pand. Lib. 19, tit. 2, n. 28.

[5] Jones on Bailments, 96, 98; Coggs *v.* Bernard, 2 Lord Raymond, 909, 918.

tween the Mandate and the Hiring, or *locatio conductio operarum*. This distinction is not, as has been supposed,[1] because hiring is for pay, while mandate is gratuitous, for the mandatary could and constantly did recover remuneration for his services by a *conditio extraordinaria*, or a special equitable suit; but because in hiring the pay is fixed wages, suitable to cases where only manual labor is given, and recoverable by ordinary suit at law, while in mandate the compensation is an *honorarium salarium philantropium*,[2] suitable to the discretionary powers the agent is expected to exercise for his principal, and recoverable, not by suit for a specific sum, but by a suit in the nature of *quantum meruit*, through the special equitable remedy afforded by the *conditio extraordinaria*. In other words, the distinction between the *locatio conductio operarum*, or hiring, and mandate, is, so far as concerns compensation, about the same as that between wages, in our own popular use, and fees, or salary. The first is a mere contract for labor; the second, a contract for labor with discretion and intelligence. The first does not involve; the second, as is elsewhere shown, does involve, a confidential relation between the parties.

§ 720. *Negligence by the employer (conductor operarum) in contracts for manual labor.* — Hence we understand the rulings of the Roman jurists and their successors,[3] that as the employer is bound by the nature of his contract (*conductor omnia secundum legem conductionis facere debet*),[4] so he is bound to the servant to supply the latter with proper materials for work, and to surround him with such guards as will enable the work to be safely performed by the servant. If, through the employer's negligence in this respect, the servant is injured, the master is liable to the servant to make good the damage. This arises from the nature of the contract of hiring. The master says to the servant go, and he goeth, and come, and he cometh. There is no discretion reserved to the servant, except that ordinary discretion which sees what everybody sees. He is a mere laborer, selling only his labor, and the master or employer is bound to exercise that special discretion as to selection of material and application of protective agencies which the laborer is cut off from exercising. Hence the employer is liable not only for *culpa lata*, or

[1] See supra, § 486.

[2] See Demangeat, Cours, &c. II. 345.

[3] See Vangerow, § 645, 650; Baron, § 608; Demangeat, II. 318, 444.

[4] Inst. § 5, de locat. et conduct.

gross negligence, which consists in not seeing what every one sees, but for *culpa levis*, or special negligence, which consists, in this relation, in not providing each particular industry with the materials and guards by which such industry can be safely conducted. He is not, of course, liable for lacking that intense diligence (*the antithesis of culpa levissima*), which, as it has been shown, the law does not and cannot exact.[1] But he is liable for *culpa levis* or special negligence, or the lack of that special diligence which prudent business men in his particular department show. Yet at the same time, in dangerous industries, laborers who undertake the work with their eyes open cannot recover for injuries sustained by them from dangers of which they had notice.[2]

§ 721. *Negligence of servant or employee; locator operarum. Negligence in doing his work.* — In ordinary cases of hiring manual labor, the laborer or servant is responsible not only for gross negligence, *i. e.* neglecting to see that which persons not specialists see, but for special negligence, *i. e.* for neglecting to see that which a laborer in his particular kind of labor should see.[3] He is liable for negligence, not merely in doing the work carelessly, but in entering on the work, as will presently be seen, without due skill. Thus, if I employ a person claiming to be a proper mechanic or artisan to erect a stove in a shop, and lay a tube under the floor for the purpose of carrying off the smoke, and the plan should fail, he is liable to me for want of skill as well as for want of diligence.[4] "Of course," as Judge Story adds,[5] "this doctrine is subject to the exception, that the undertaker is permitted to act upon his own judgment; for if his employer chooses to supersede the judgment of the undertaker, and requires his own to be followed, he must not only bear the loss, but pay the full compensation.[6]

§ 722. Skill, of course, cannot be insisted on in cases where the employer, at the time of the employment, knew there was no skill.[7] Thus if a person who has a disorder in his eyes should employ a farrier to cure the disease, and he should lose his sight

[1] See supra, § 57.
[2] Supra, § 201–6.
[3] See supra, § 30.
[4] Duncan *v.* Blundell, 3 Stark. 6; Farnsworth *v.* Garrard, 1 Camp. 39; Moneypenny *v.* Hartland, 1 Carr. & Payne, 352; 2 Carr. & Payne, 378.
[5] Bailments, § 378.
[6] Duncan *v.* Blundell, 3 Stark. 6.
[7] See Story on Bailments, § 435.

by using the remedies prescribed in such cases for horses, he would have no legal ground of complaint.[1] So, to take a case from Sir W. Jones, if a person will knowingly employ a common mat maker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly.[2]

§ 723. *Negligence in management of thing given him to work upon.* — Suppose, however, the laborer or operative has given to him a particular article to work at, *e. g.* cloth to be made into a coat, or gold to be made into a ring; what phase of diligence is he to exert in the keeping of such article? The natural answer is, such special diligence as a person qualified to do such work should in such case exert. But on this point the Roman jurists apply a more stringent rule. By the Roman law bailees of a certain class are held liable for *custodia;* that is to say, they are, like common carriers by Anglo-American law, insurers of articles committed to their care, and are liable not merely for injuries but for theft, unless they can prove that the loss occurred through accident, *casus*, or a superior force.[3] And as subjected to such liability is specifically enumerated the laborer or operative to whom a particular article is given to be worked on or manufactured. He stands in this respect in the same position as the innkeeper who has received goods from a guest.[4] Our own law is not so onerous. It undoubtedly holds that where skill, as well as care, is required in performing the undertaking, there, if the party purports to have skill in the business, and he undertakes it for hire, he is bound, not only to ordinary care and diligence in securing and preserving the thing, but also to the exercise of due and ordinary skill in the employment of his art or business about it; or, in other words, he undertakes to perform it in a workmanlike manner.[5] Where a person is employed in a work of skill, the employer buys both his labor and his judgment. He ought not to undertake the work unless he be skilful; and he should know whether he is skilful or not.[6]

Return of article in case of loss. — If the article given to the

[1] Jones on Bailm. 99, 100; Beauchamp *v.* Powley, 1 Mood. & Rob. 38.

[2] Jones on Bailm. 99, 109.

[3] L. 25. § 7. D. loc. 19. 2; L. 41. D. loc. 19. 2; Vangerow, § 105; Baron, § 237.

[4] Ibid.

[5] Story on Bailments, § 431; Jones on Bailm. 91; 1 Bell Comm. 459; Kuehn *v.* Wilson, 15 Wisc. 104.

[6] Duncan *v.* Blundell, 3 Stark. 6; Moneypenny *v.* Hartland, 1 Carr. & Payne, 352; *S. C.* 2 Carr. & Payne, 378.

operative to be worked upon is damaged or lost by his negligence, he is liable to the employer for the article itself, or its value.[1] Thus where a watch was deposited with a watchmaker for repairs, and it was left in his shop in a less secure repository than that in which he kept his own, and it was stolen by his servant, the watchmaker was held liable for the value of the watch.[2] But he is not an insurer of the article given to him to work upon; and if it is taken from him by *casus* or *vis major*, this is a defence. Thus he is not liable to the employer for the accidental loss of such article by fire.[3]

Agisters of horses. Pasturers. — When a horse is given to an agister or pasturer to be pastured, the agister is liable for *culpa levis*, or lack of diligence of a good agister or pasturer.[4] He is not liable for theft, or for *casus*, unless it be induced by his negligence, in which case liability attaches to him.[5]

§ 724. *Hiring by job. Locatio conductio operis.* — The jobbing of a work, or *locatio conductio operis* (in German *Verdingung eines Werkes*), exists where one person agrees with another to undertake, for a fixed price (in the Roman law for a fixed sum of money), to perform a particular work. *Locatio conductio operis*, by the Roman law, is very comprehensive. It includes the building of a house, the transport of person or goods by land or sea, the instruction of another in any manual industry, the cutting and setting of a jewel, the cleaning and mending of garments, the painting of a picture, the sculpturing of a statue.[6] It is essential, however, in the Roman law, to constitute this particular service, that the employer should give some part of the material to the employee to work upon; if the employee gives both material and labor (*e. g.* in house-building gives land and building stuff entire), the transaction is not a *locatio conductio operis*, but a sale.[7]

[1] Story on Bailments, § 431; Jones on Bailm. 91; Kuehn *v.* Wilson, 15 Wisc. 104; Bryan *v.* Fowler, 70 N. C. 596; Mansfield *v.* Cole, 61 Ill. 191; Batson *v.* Donavan, 4 B. & A. 21.

[2] Clarke *v.* Earnshaw, 1 Gow, 30.

[3] Henderson *v.* Bessent, 68 N. C. 223; Bryan *v.* Fowler, 70 N. C. 596; supra, § 713, and cases there cited.

[4] Mansfield *v.* Cole, 61 Ill. 191; Umlauf *v.* Bassett, 38 Ill. 96.

[5] Dansey *v.* Richardson, 3 E. & B. 722; Broadwater *v.* Blot, Holt N. P. 547; Morgan *v.* Crocker, 3 N. Y. Supreme Ct. 301.

[6] The authorities for these specific enumerations will be found in Vangerow, § 645; Baron, § 297.

[7] L. 2. § 1. D. h. t. 19. 2, and other authorities cited by Baron, § 297.

§ 725. *Negligence by the employee or jobber, in locatio cond. operis.* — The employee in this contract is liable according to the principles already sufficiently expounded, not merely for gross negligence, *i. e.* negligence in failing to see that which any person would ordinarily see, but for that special negligence which fails to see that which a specialist competent to undertake the particular contract ought to see. Hence, as has been already noticed,[1] he is liable for the negligence of his subalterns, for in this respect applies the maxim *respondeat superior*.[2] But the Roman law does not stop here. It declares that in addition to this the person who under such a jobbing contract gets possession of goods, is liable for *custodia*, *i. e.* can only be relieved from restoring them by proving *casus* or superior force.[3]

§ 726. *Negligence of employer in loc. cond. operis.* — The employer, who puts certain goods in the hands of another on a special contract, not of day labor, but that the work should be completed by the employee, for a given price, is liable, according to the Roman law, for negligence, should the materials be such as to injure the employee in their use, provided the defect is attributable to the negligence of the employer. Of course the diligence the employer is required to give in the selection of the materials is the special diligence of a business man acting prudently in his particular department; and hence he is liable for *culpa levis*, or special negligence, as well as for *culpa lata*, or gross negligence.[4] The adjudications to the same effect in the Anglo-American courts are very numerous and have been already considered.[5]

§ 727. *When employee can substitute another stuff for that given.* — Should the contract be that the employee should be at liberty to prepare the article either out of the particular stuff given to him, or out of some other similar stuff, then, according to the Roman law, he becomes possessor of the stuff given to him, and bears all the risk of its loss.[6]

§ 728. *Hiring of seats in public theatres or buildings for spectacles: hiring of storage in warehouses.* — It has been held in Eng-

[1] Supra, § 714.

[2] L. 25. § 7. L. 13. § 5. L. 62. D. h. t. 19-2.

[3] Supra, § 723, and authorities cited by Baron, § 297.

[4] See Vangerow, § 645.

[5] See supra, § 206-223.

[6] L. 31. D. h. t. 19. 2. L. 34. pr. D. de auro. 34. 2.

land, in a case hereafter more fully discussed,[1] that he who lets to another a seat in a building erected for the purpose of witnessing a public exhibition impliedly warrants not only that there has been due care by himself and his servants, but that there has been due care on the part of the contractors employed by him to erect the building. So far as concerns the letting of storage in a warehouse the law has been more accurately expressed in a case in the supreme court of Pennsylvania, where it was held that where the owner of a warehouse or place hired for storage has taken proper care in its erection, he is not liable for occult defects, of which he had no means of knowledge.[2]

[1] See infra, § 775; Francis *v.* Cockerell, 5 Q. B. 184, 503; and see this case discussed supra, § 693, note.

[2] Walden *v.* Finch, 70 Penn. St. 461.

In this case, Agnew, J., said: . . . . "The principle would be one of unusual and unreasonable scope, if the owner of a building should be held to be liable to the depositors of goods, for unknown and hidden defects in the structure, when he has taken all proper care to make it safe. As life and personal security are more valuable than goods, the principle would extend to a dwelling-house; and one who has friends to dine with him, or who has invited them to a reception, might find himself ruined in fortune, as well as agonized in feelings, by an untoward accident which has maimed or killed his guests. Those things which we now term accidents or misfortunes would then be faults, and be followed by civil penalties. But merely good faith and reasonable prudence are all that can be required of the owner of such a building; and when he has shown that he has honestly taken all the pains he can to make his structure safe and adapted to the purpose for which it is to be used, the person who stores his property in it, if he would require a greater security, should provide for it in his contract. A severer rule would lead to consequences so harsh, no one would reasonably undertake to suffer them when he builds, and would indeed tend to discourage improvement." See infra, § 775, 791; supra, § 693.

CHAPTER XV.

PHYSICIANS.

General statement of liability, § 730.
If undertaking case, liable for due diligence, § 731.
Incompetent volunteer excluding expert, liable for *culpa levis*, § 732.
Physician to be competent according to school he professes, § 733.
Test of "average capacity" inadequate, § 734.
Not liable for *culpa levissima*, § 735.
Not liable if there be no injury, § 736.
Not liable if patient was the direct cause of the injury, § 737.

§ 730. *General statement of liability.* — The liability of a physician is to be determined by the same rules as have heretofore been stated in reference to business experts in general. He is bound, in every case which he undertakes, to exhibit the *diligentia* of a *diligens paterfamilias;* in other words, to express this concretely, he is obliged in each case to apply such diligence as good physicians, called under similar circumstances, are accustomed to apply. At the same time it must be remembered that when he professes to be an expert in a specialty, and is employed as such, he must possess the education and skill,[1] and must show the diligence of an expert in such specialty. The simple question is, did he, in the particular department he undertook to fill, exhibit such diligence as good physicians in such department (be it general or special) are accustomed to exhibit? These several qualifications of liability will now be examined in detail.

§ 731. *While entitled to decline the charge of a patient, yet if undertaking such charge, liable for omitting to bestow proper care.* — No question can exist as to the legal right of a physician, unless he be an officer of the government charged with specific duties which he thereby violates, to decline to take charge of a

[1] Supra, § 50; Rich *v.* Pierpoint, 3 F. & F. 35; Hancke *v.* Hooper, 7 C. & P. 84; Lamphier *v.* Phipos, 8 C. & P. 479; Wilmot *v.* Howard, 32 Vt. 447; Long *v.* Morrison, 14 Ind. 595; Wood *v.* Clapp, 4 Sneed, 65; Patten *v.* Wiggin, 15 Me. 591; Howard *v.* Grover, 28 Me. 97; Bellinger *v.* Craigne, 31 Barb. 534; Carpenter *v.* Blake, 60 Barb. 480; Fowler *v.* Sergeant, 1 Grant, 355; Ruddock *v.* Lowe, 4 F. & F. 519; 2 Wh. & St. Med. J. § 1090.

particular case. When in charge, however, he is liable for any negligence, whether of omission or of commission, which may produce injury to his patient. *Voluntatis est suscipere mandatum, necessitas est consummare.*[1]

§ 732. *An incompetent volunteer who excludes a competent expert is liable for want of competency.* — No doubt an inexperienced volunteer who acts when no expert could be obtained is liable only for *culpa lata*, or gross negligence.[2] But if by forcing himself into the case he excludes a competent physician, he is liable for *culpa levis*, or the lack of the diligence of a specialist.[3]

§ 733. *Physician to be competent according to the school he professes.* — He is a specialist, but a specialist only in the kind of practice he professes. Thus a botanic physician, employed as such, is gauged according to the botanic system,[4] and a homeopathic physician by the homeopathic system.[5]

§ 734. *Test of "average capacity" inadequate.* — The average skill of a profession, taking in good and bad, young and old, as a mass, is difficult to reach; and if we count into the aggregate the young who have had no practice, and the old who have retired from practice, the average would give a standard lower than that which should be required. Nor is this all. Even supposing such a standard could be reached and should be adequate, it is too inflexible to be indiscriminately applied. In a city, there are many means of professional culture which are inaccessible in the country. In a city, hospitals can be readily walked, and new books and appliances promptly purchased, and libraries easily visited; and in a city, also, exists that intercourse with prominent professional men which leads not only to the promotion of keenness and culture, but to the free interchange of new modes of treatment. In the country, such opportunities do not exist. What is due diligence, therefore, in the city, is not due diligence in the country; and what is due diligence in the country is not due diligence in a city. Hence the question of diligence in each par-

[1] It has been said that when the service is gratuitous, then the physician is only liable for gross negligence — *culpa lata*. Ritchey *v.* West, 23 Ill. 385. This, not merely for humane considerations, but for the reasons stated in prior sections (supra, § 437, 640), I cannot accept.

[2] See supra, § 26–48.

[3] Supra, § 534; Hood *v.* Grimes, 13 B. Mon. 188; Ruddock *v.* Lowe, 4 F. & F. 519.

[4] Bournan *v.* Woods, 1 Iowa, 441.

[5] Corsi *v.* Maretzek, 4 E. D. Smith, 1.

ticular case is to be determined, not by inquiring what would be the average diligence of the profession, but what would be the diligence of an honest, intelligent, and responsible expert in the position in which the defendant was placed.

That we cannot take the average diligence of others as a standard is illustrated by several distinct lines of adjudication. Thus in an action for negligence in omitting to put up adequate guards around an excavation on a highway, it is no defence that the guards were such as builders usually put up; it must be shown that the guards were such as would be thought sufficient by a builder of ordinary care and prudence, in view of the particular excavation.[1] So in other cases of engineering heretofore noticed;[2] where it is ruled that no "average" practice will excuse a failure to adopt improvements which experience has shown to be practicable and efficacious.[3]

§ 735. *Not liable for culpa levissima.* — That there is no such distinct grade of *culpa* as *culpa levissima* has been already abundantly shown,[4] and of the absurdity in applying such a test no more striking illustrations can be found than in medical practice. There is scarcely a case in which a physician is called in which he may not be charged with *culpa levissima*, and if *culpa levissima* makes him liable, then his liability becomes almost coextensive with his practice. Observe this with regard to the qualifications he brings to bear on his work. According to the well known axiom, *imperitia* is to be imputed as *negligentia*, but who, in a science so vast, so complicated in its connections, so uncertain in its boundaries, so fluctuating in its standards, so manifold in its schools, can divest himself of the charge of *imperitia levissima?* Is there not some recess of information to which he has not penetrated, some remedy which he has not tested, some particular possible line of practice with which he has not familiarized himself? So, also, with regard to the mechanism of his practice. Is there not some instrument, if the case be one in which instruments are required, which might aid his patients, but which he has not procured? Is there not some new mode of nursing by which pain could be mitigated and recovery hastened, but which he has not applied? And then, once more, with regard to his personal at-

[1] Koester *v.* City of Ottumwa, 34 Iowa, 41.

[2] Supra, § 52, 635.

[3] Steinweg *v.* Erie R. R. 43 N. Y. 123.

[4] See supra, § 65.

tendance. It is possible for a physician never to leave a particular patient; and in such case, if he leave the patient, and mischief thereby ensue, he is guilty of *culpa levissima*. It is no use to say in reply that if he gives all his time to one patient he can give no time at all to the other patients. Undoubtedly by thus utterly neglecting his other patients he would be guilty of *culpa lata* towards them; but unless he was thus guilty of *culpa lata* to them, he would be guilty of *culpa levissima* to the patient whom he thus temporarily left. In other words, he must be guilty of *culpa levissima* to each of his patients if he is a physician in general practice; yet, unless he be a physician claiming to practise, he cannot, on the grounds heretofore specified, be chargeable even with *culpa levis*. The only relief from this absurdity is by rejecting the doctrine of *culpa levissima*, and holding the physician specially liable, as is the mandatary and agent, only for *culpa levis; i. e.* the lack of that diligence which would be exhibited by good physicians, of the school and specialty with which he connects himself, when practising in a case similar to that under investigation.[1] He must familiarize himself with the literature of his profession, but this must be according to the opportunities of his place.[2]

[1] See cases cited supra, § 730; Simons *v.* Henry, 39 Me. 135; Leighton *v.* Sargent, 7 Foster, 460; Carpenter *v.* Blake, 6 Barb. 488; McCandless *v.* McWha, 22 Penn. St. 261; Tefft *v.* Wilcox, 6 Kans. 46; Ritchey *v.* West, 23 Ill. 385; McNevins *v.* Lowe, 40 Ill. 210; Heath *v.* Gilson, 3 Oregon, 64; Hancke *v.* Hooper, 7 C. & P. 81; Landon *v.* Humphrey, 9 Conn. 209.

[2] Carpenter *v.* Blake, *ut supra*.

In McCandless *v.* McWha, 22 Penn. St. 261, although there is much said by Judge Lewis inconsistent with this view, the law, as stated by Woodward, J., and Black, C. J., is that a physician is liable only for such skill and diligence as are ordinarily exercised in his profession. "Extraordinary skill, such as belongs only to a few men of rare genius and endowments," is not required, "but that degree which ordinarily characterizes the profession." In Iowa, in 1872, it was held error to charge the jury that a physician is bound to exercise "such reasonable skill and diligence as are ordinarily exercised in the profession by thoroughly educated surgeons, having regard to the improvements and advanced state of the profession at the time;" and it was held by a majority of the supreme court, that a physician or surgeon was bound only to exercise ordinary skill and diligence, the average of that possessed by the profession as a body, and not of the thoroughly educated only. Smothers *v.* Hanks, 34 Iowa, 287, Beck, C. J., dissenting.

But the true rule is, not what the *average* of a profession would do, but what an intelligent, responsible, and respectable member of the profession would under the circumstances do.

§ 736. *No recovery can be had where there is no injury.* — It must be remembered that the implied liability of a physician or surgeon, retained to treat a case professionally, extends no further, in the absence of a special agreement, than that he will indemnify his patient against any injurious *consequences* resulting from his want of the proper degree of skill, care, or diligence in the execution of his employment. And in an action against the surgeon for malpractice, the plaintiff, if he shows no *injury* resulting from negligence, or want of due skill in the defendant, will not be entitled to recover even nominal damages.[1]

§ 737. *Not liable if patient was direct cause of the injury.* — If the patient, by refusing to adopt the remedies of the physician, frustrates the latter's endeavors, or if he aggravates the case by his misconduct, he cannot charge to the physician the consequences due distinctively to himself.[2] At the same time we must remember, to adopt the language of Chapman, C. J., that "a physician may be called to prescribe for cases which originated in the carelessness of the patient; and though such carelessness would remotely contribute to the injury sued for, it would not relieve the physician from liability for his distinct negligence, and the separate injury occasioned thereby. The patient may also, while he is under treatment, injure himself by his own carelessness; yet he may recover of the physician if he carelessly or unskilfully treats him afterwards, and thus does him a distinct injury."[3]

[1] Craig *v.* Chambros, 17 O. St. 253.

[2] McCandless *v.* McWha, 22 Penn. St. 261; *S. C.* 25 Penn. St. 95. Supra, § 300 *et seq.*

[3] Chapman, C. J. — Hibbard *v.* Thompson, 109 Mass. 288. Supra, § 343.

CHAPTER XVI.

SOCIETAS: PARTNERSHIP.

Definition, § 740. | Liability of partners for neglect, § 741.

§ 740. *Definition.* — *Societas*, in the Roman law, is a consensual contract in which two or more persons agree to pursue a common purpose with common means.[1]

§ 741. *Liability of partners for neglect.* — A partner, as has been already seen, is liable to his associates for neglect of duty on the test of *diligentia quam suis;*[2] in other words, he is bound to bestow on the partnership affairs the same diligence that he is accustomed to bestow on his own.[3] The reasons for this are (1) that it would be, in a joint transaction, where the parties are interdependent, illogical to apply the test of a good business man, since a good business man would do what the partnership requires, which involves a *petitio principii;* and (2) because the ground on which a partner selects his associates is the very *diligentia quam suis* which is here invoked.

At the same time when the partnership assigns certain goods to a partner at a valuation, then he is liable to his partners for the same in *custodia* in its narrow sense.[4] By our own law the same doctrine is vigilantly applied. Good faith, in its highest and purest sense, is required between partners; and even in matters of honor, negligence imposes liability.[5]

[1] Vangerow, § 651, 655; Baron, § 300; Demangeat, II. 323.

[2] See supra, 54–6, 69.

[3] The passages sustaining this are, L. 52. § 2. 3. L. 72; D. h. t. 17. 2, and others cited by Baron, § 301.

[4] L. 52. § 3. D. 3. 25.

[5] Blisset *v.* Daniel, 10 Hare, 522; Stone *v.* Marsh, P. & M. 304; 6 B. & C. 551; 8 D. & R. 71; Keating *v.* Marsh, 2 Cl. & F. 250.

CHAPTER XVII.

LAWYERS.

Degree of diligence to be exacted, § 744.
Not bound to *diligentia diligentissimi*, § 745.
Perfect knowledge and skill impracticable, § 746.
Test is not *diligentia quam suis*, § 748.
True test is the diligence which a good lawyer, under similar circumstances, is accustomed to apply, § 749.
Specialist must show skill in specialty, § 751.
Burden on plaintiff to show negligence, § 752.
Lawyer liable for acts of agent, § 753.
Only liable when confidence is imposed, § 754.

§ 744. *Degree of diligence to be exacted.* — What is the degree of diligence to be exacted from a lawyer? For, upon this depends the determination of the issue of negligence. If he is liable for *levissima culpa*, or the slightest negligence, this is because he is bound to *diligentia diligentissimi*, or the diligence of the most diligent. So, if he is liable for negligence in case he bestows on his client's affairs less care than he bestows on his own, this is because he is bound to *diligentia quam suis*, or to that phase of diligence which requires an agent to show the same attention to his principal's business as he shows to his own. In order, therefore, to dispose of these preliminary questions, we now proceed to show that to the relation of lawyer and client neither of these two phases of diligence applies.

§ 745. *Not bound to diligentia diligentissimi, and hence not liable for culpa levissima.* — *Diligentia diligentissimi*, with its antithesis of *culpa levissima*, have been already fully discussed, and it has been shown that the idea was unknown to the practical jurists of imperial Rome; was a mere fiction of the scholastic jurists of the Middle Ages, who, from lack of actual business to deal with, created distinctions which are merely speculative and unreal; and is inconsistent with any jurisprudence based on actual life. But as in respect to the relation of lawyer and client the theory of *culpa levissima* has been sometimes strenuously urged, it may properly here receive a few words of special consideration in its present immediate bearings.

§ 746. *Perfect knowledge and skill prevented by comprehensive-*

ness of profession. — From the peculiar combination of faculties required to make a perfect lawyer, we cannot expect to see a lawyer who is perfect. It may be said that at the English bar, and to some extent, at the bar of our great American cities, the profession is so subdivided that no man is expected to be an expert in more than a particular branch. But apart from the fact that this subdivision only exists exceptionally so far as concerns the United States, no man can undertake the management of a particular suit as counsel without advising its conduct in all its stages. He must be, or understand how to be, a calm and accurate judge of the probabilities of success so as to enable him to determine the preliminary question of suing or settling; he must understand the preparation, collection, and marshalling of evidence; he must be acquainted with pleading and practice so as to bring the suit in a proper technical shape before the court; he must possess the power of lucid, exact, and persuasive statement, so as to make an effective opening speech; he must have the rare gift of examining his own witnesses judiciously, and the still rarer of cross-examining with skill and penetration those of his opponent; he must have *nisi prius* law, in all its numberless ramifications, not merely in his head but on his tongue, so as to bring it out on immediate notice to meet each of the varying emergencies of his case; he must have the capacity to instantaneously perceive what part of the testimony he objects to is inadmissible, and what is not, and what is the proper form in which his objection is to be couched, lest from his clumsiness in this respect he lose the opportunity of correcting in error an unfavorable but unjust ruling of the judge at *nisi prius*, and he must exercise the same prompt sagacity in the statement of the objects for which his own evidence is offered; he must adopt such a tone as at least will not force either court or jury into unnecessary antagonism to himself, and hence to his client; he must possess the tact, the experience, and the argumentative power necessary to a successful summing up; and above all he must be recognized as governed by that high principle the want of which diminishes more or less appreciably a lawyer's power. Nor is this all. A case does not terminate with the verdict. A new tribunal is to be addressed, invoking the use of a class of faculties distinct from those which are successful at *nisi prius*. Slow, not quick thought is here is required; not only the capacity to recall a decision, settling a point suddenly pre-

sented, but the capacity to revolve the "conflicting analogies" (of which law, according to Bentham, is the science) which bear on a particular case, so as to rise to those higher principles which form part of the atmosphere of pure jurisprudence. Then we must remember that this capacity is not required only in one particular line. The perfect lawyer is not merely perfect in the English common law. He must be perfect in admiralty and in equity; he must be perfect in the canon law, on which our law of marriage and of wills so largely rests; and in the Roman law, without understanding which so much of the true meaning of our law is lost. Yet who can combine these various qualifications in perfection? Who, to take up a single line of them, has been even perfect master of such as are necessary to constitute a complete *nisi prius* lawyer? Can we recall such either in England or the United States? We can recall, indeed, men eminent for their calm judiciousness in the preparation of a case. We can recall men eminent for their sagacity in cross-examination. We can recall men distinguished for their tact in so offering or checking evidence that defeat, if it occurred at *nisi prius*, could often be retrieved in error. We can recall men who, one for one kind of power, another for another kind of power, were very effective in addressing juries. But we hear of no man who was equally great in each of these departments; or if we do, we find on examination that his greatness was that of respectability — the *diligentia diligentis* — not that of pre-eminence, the *diligentia diligentissimi*. And even, if in some rare case an ideal hero is produced to us by forensic history as having attained preëminence in each department of *nisi prius* practice, we find, independently of the absurdity of making so exceptional a character the standard by which the average lawyer is to be tried, that the more extraordinary were the gifts, the more conspicuous were the collateral deficiencies which the splendor of these gifts disclosed. Cicero's timidity caused him sometimes to withhold unpopular truths which a less eloquent but more courageous advocate would have stated at least with force enough to save himself from discredit, and his client sometimes from ruin. Erskine's negligence in preparation was almost as great as his genius when the time came for display. And of Brougham, the most versatile forensic genius of his day, Lord Melbourne once said in the house of lords, with a truth which could not be gainsaid: "You have just listened to a splendid effort of eloquence; you

must judge how great must be the defects as to judgment and temper which have made it impossible for this, and will make it impossible for any other administration, to avail itself of the services of a man whose oratorical powers are so superb." So far as concerns skill, therefore, whether in the mastery of the learning of the profession, or in the mastery of self, if we should require perfection, we would have to exclude the great lawyers of the past, and any possible lawyer of the future.[1]

[1] This question has been heretofore generally discussed at § 52, 414, 635. As sustaining the text, we may notice an opinion of Lord Campbell, in a case before the house of lords. "In an action such as this," he says, "by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. I am sure I should have been sorry, when I had the honor to practise at the bar of England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions, and I think it was Mr. Justice Heath who said that it was a very difficult thing for a gentleman at the bar to be called upon to give his opinion, because it was calling on him to conjecture what twelve other persons would say upon some points that had never before been determined. Well, then, this may happen in all grades of the profession of the law. Against the barrister in England, and the advocate in Scotland, luckily, no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee binding themselves, in giving legal advice and conducting suits at law, to be always in the right." Purves *v.* Landell, 12 Clark & Finnelly, 91. See also Baikie *v.* Chandless, 3 Camp. 17; Pitt *v.* Holden, 4 Burr. 2060; Pitt *v.* Galden, 4 Burr. 2066; Montriou *v.* Jefferys, 2 Car. & P. 113; Laidler *v.* Elliott, 3 B. & Cr. 738; Elkington *v.* Holland, 9 M. & W. 661; Chapman *v.* Van Toll, 8 Ell. & Bl. 407; Bulmer *v.* Gilman, 4 Man. & Gr. 108.

"God forbid," says Abbott, C. J., in Montriou *v.* Jefferys, "that it should be imagined that an attorney or a counsel, or even a judge, is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such as a cautious man might fall into." "This," says Mr. Campbell, in his work on Negligence, § 47, "is really all that is meant in this class of cases, where, with an affectation of learning borrowed from the Pandects, the expressions *culpa lata*,

§ 747. *So the uncertainty of future litigation precludes perfect sureness of opinion.* — The contingencies even of a single suit are so many and often so unexpected, that perfect judgment in dealing with all of them is out of the range of ordinary calculation. "He wins at last," so a great strategist once said, "who makes the fewest mistakes." If a single inflection from perfect judiciousness and in the management of a case be negligence which gives the client a cause of action against his counsel in case of defeat, then in every case the ultimate party to pay would be the lawyer, for no lawyer can conduct a case with perfect judiciousness. We must hence, applying the reasoning already more generally developed, conclude that the standard of diligence with lawyers is not the *diligentia diligentissimi;* and that consequently a lawyer, when sued by his client for negligence, cannot be made liable for *culpa levissima*, or negligence in falling below the standard of ideal perfection.

§ 748. *Nor is a lawyer bound to diligentia quam suis, or to exhibit the same diligence in his client's affairs as he does in his own.* — Already have we shown that the *diligentia quam suis* is a standard only applicable in certain exceptional cases of partnership and trusteeship; and that in any sense it is simply a subordinate phase of the *diligentia diligentis patrisfamilias*, or diligence of a good business man. That such a standard (that of the *diligentia quam suis*) is, as a general rule, inapplicable, is nowhere so effectively illustrated as in the class of cases immediately before us. In a suit against a lawyer for negligence, can the plaintiff make the defendant's management of his own affairs the standard? What lawyer of eminence ever conducted his own lawsuits? Or, in such a suit could the defendant set up as a defence that he was as negligent in his own business as he was in his client's? If so, lawyers with the largest and most successful practice would often be exempt from all liability for negligence in their client's affairs

crassa negligentia, have been used. The expression, *considerable* negligence, which is used in some of these cases, is much preferable, and may well be employed to indicate culpable default as contrasted with that occasional failure in diligence or knowledge which the inherent difficulty of the subject renders almost inevitable."

No doubt the application to any specialist, acting as such, of the term *culpa lata*, is wrong, if *professional* ignorance is what is intended to be imputed. Such a *culpa* is *culpa levis* — the negligence of failing in *professional* knowledge. Supra, § 414.

[1] See ante, § 57–65.

on the ground of their admitted negligence in their own. Thus, to give a single illustration, no lawyer was more accurate, no judge of keener or exacter perception, than the late Lord Westbury, yet, as we are informed at the period when these pages go to press, his will, prepared by himself, is couched in terms so vague that it has several times already gone to the courts for judicial construction, and at last is declared by the master of the rolls to contain at least one provision whose meaning no rational system of interpretation can solve.[1]

§ 749. *The true test is the diligence of a diligens paterfamilias, or, applying this to the present branch of agency, such diligence as a good lawyer is, under similar circumstances, accustomed to apply.* — We have already shown that this is the general law in all cases of mandate and agency, irrespective of the question of money consideration. To apply this rule specifically

[1] "By a deed of settlement, made in pursuance of an agreement contained in a memorandum drawn on a sheet of paper by the testator before the marriage of his eldest son, the present Lord Westbury, the testator settled on his daughter-in-law an annuity of £400 a year for his and her joint lives, and covenanted that he would, by his will, direct his executors to invest in such securities in such manner and with such power of variation or transposition as he should thereby direct, the sum of £10,000, the trustees under the settlement to hold the same upon certain trusts.

"Afterward, by his will, the testator gave all his property to trustees, directing them to pay certain annuities to various members of his family during the period of five years from his death, and to accumulate and invest the residue of the income of his estate during that period, and at the expiration of it to pay 'to my son Richard's wife and children the sum of £10,000 upon the trusts and for the purposes of the settlement made on Richard's marriage.'

"The question now was whether this was a sufficient performance of the covenant, or whether the trustees of the settlement were entitled to be admitted as creditors of the estate to the amount of £10,000.

"The master of the rolls, Sir George Jessel, in pronouncing for the latter alternative, observed that this was the third time he had been called on to construe a passage in the late Lord Westbury's will. Two more difficult documents to construe than this will and this settlement he had never seen. He would have been glad to decline to construe either of them, on the ground that they could not be construed, but for a decision of the late Lord Westbury himself, which precluded the court from taking that course." Pall Mall Gazette, April, 1874.

Lord Kenyon when at the bar gave more opinions as counsel than any of his contemporaries; yet Lord Kenyon, when investing on his own behalf, "frequently," says his biographer (Kenyon's Life of Lord Kenyon, London, 1873, p. 394), "bought with very indifferent titles," trusting to luck and time to bring them right.

to the relation of lawyer and client the following observations are to be made : —

Competent knowledge of law must be brought to the service. — Not *perfect* knowledge of the law, for this can be predicated of no one ; but such average knowledge as is usual in the particular locality for the management of the particular suit. Is the process the ordinary collection of a debt? The lawyer undertaking to collect such a claim must be familiar with and apply the practice by which such collection can be enforced.[1] Is it the trial of a case before a jury ? Then there must be familiarity with *nisi prius* law and practice. Is it the argument of a case before a court of law ? Then it must be such acquaintance with the settled law and the mode of presenting it as is usual with respectable counsel when undertaking such arguments.[2] Is it the conduct of a suit in equity ? Then acquaintance with equity law and pleading is in like manner requisite. The standard to be reached in each of these cases is not, as has been seen, that of the ideal great lawyer ; nor is it that of the lawyer in question, when trying cases either for others or for himself. But it is the standard which is presented by the custom of good and diligent lawyers at the particular bar in managing a case such as that under investigation. For this purpose there must be a familiarity with the adjudicated local law as well as the statute law bearing on the particular point ; and there must be a knowledge of the legal machinery necessary for the application of this law. To undertake the management of a case without such knowledge is negligence which makes the lawyer liable for any loss which his client may thereby incur. But he is not liable for the consequences of his ignorance of foreign or of remotely applicable jurisprudences, even though these jurisprudences might be powerfully used in his argument ; nor is he liable for deficiency in that capacity in penetrating to subtle though effective analogies, or in that energy of close and vehement argumentation, or in that magnetism in manner, by which consummate advocates may be distinguished. He is required to possess ordinary, not extraordinary preparation and power. But

[1] Gleason *v.* Clark, 9 Cow. 57. See Varnum *v.* Martin, 15 Pick. 440 ; Walker *v.* Goodman, 21 Ala. (N. S.) 642 ; Grayson *v.* Wilkinson, 5 Sm. & M. 268 ; Evans v. Watrous, 2 Porter, 205,

[2] Supra, § 438, 503 ; Donaldson *v.* Holdane, 7 C. & F. 762 ; Gambert *v.* Hart, 44 Cal. 542.

if he undertakes to conduct a case without ordinary preparation and power, this is negligence, whose consequences, if injurious to his client, he must personally bear.[1]

§ 750. *The business undertaken must be managed with the diligence and skill usual with good lawyers versed in the particular practice at the particular bar.* — We have no right to apply a metropolitan standard to a purely rural bar. An admiralty case, for instance, may arise in one of the Lake Superior villages which no doubt could be conducted with greater skill in New York by those practising almost exclusively in admiralty, than it could be by lawyers unfamiliar with practice in this particular specialty. A criminal trial, we might also say, would be managed with greater dexterity and argued with greater eloquence by one of those eminent counsel who in the bar of a great city have been singled out for this particular practice, than it could be by a particular lawyer who is chosen by the defendant or assigned by the court out of a bar which is comparatively small. But such standards as these are not to be applied. The client, we must assume, in litigating his case before a particular court, is confined to the bar practising in that court; and even as to this test, he cannot set up, when suing his lawyer for negligence, the possible case of what some particularly brilliant or shrewd member of that bar might have done; but he must confine himself to showing that the defendant neglected to do that which would have been done by a lawyer of respectable parts and skill, — a lawyer who represents the *bonus et diligens paterfamilias* of the Roman standard, a lawyer who is a good business man in his specialty, exercising the diligence which good business men in such specialty are, *in such locality*, accustomed to exercise.[2]

§ 751. *Specialist required to exhibit skill in specialty.* — It must not, however, be forgotten, that a lawyer who holds out to specially practise in a particular department must possess the skill and exhibit the diligence proper for those practising in such a de-

[1] Hart *v.* Frame, 6 Cl. & Fin. 210; Allen *v.* Clark, 1 N. R. 358 (Q. B.); Parker *v.* Rolls, 14 C. B. 691; Bakie *v.* Chandless, 3 Camp. 17; Purvass *v.* Landell, 12 C. & F. 91; Wilson *v.* Russ, 20 Me. 421; Goodman *v.* Walker, 30 Ala. N. S. 482; Gambert *v.* Hunt, 44 Cal. 542; Cox *v.* Sullivan, 7 Ga. 144; Walpole *v.* Carlisle, 32 Ind. 415; and cases hereafter cited in notes to § 751.

[2] See ante, § 30; Wilson *v.* Russ, 20 Me. 421; Goodman *v.* Walker, 30 Ala. (N. S.) 482; Pennington *v.* Yell, 6 Eng. 212; and cases hereafter cited.

partment. This, *mutatis mutandis*, follows from the doctrine of *diligentia diligentis* which we have already discussed. Just as a person claiming to be an ordinary practising lawyer must possess the skill and exhibit the diligence of lawyers in ordinary; so a person claiming to be an admiralty or equity lawyer, while not required to be an expert out of the department thus specified, must, in it, exercise due skill and diligence.[1]

[1] See supra, § 33, 45, 46.

"By the English law," says Mr. Green, in a valuable note to his edition (1874) of Story on Agency, § 27, "counsel are not, while attorneys are, responsible to their clients for negligence. In this country there is no distinction in this respect between counsel and attorneys: both are responsible in the same manner, and generally to the same extent, as the attorney is by the English law. 'It would be extremely difficult,' said Tindal, C. J., in Godefroy *v.* Dalton, 6 Bing. 460, 467, 'to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa*, mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction.'" See also Lamphier *v.* Phipos, 8 C. & P. 475; Purves *v.* Landell, 12 C. & F. 91; Hart *v.* Frame, 6 C. & F. 193; Mercer *v.* King, 1 F. & F. 490; Parker *v.* Rolls, 14 C. B. 691, and cases there cited by counsel; Lewis *v.* Collard, 14 C. B. 208; Kemp *v.* Burt, 4 B. & Ad. 424; Shillcock *v.* Passman, 7 C. & P. 289; Crosbie *v.* Murphy, 8 Ir. C. L. R. 301; Williams *v.* Gibbs, 6 N. & M. 788; Cox *v.* Leech, 1 C. B. N. S. 617; Lee *v.* Dixon, 3 F. & F. 744; Hunter *v.* Caldwell, 10 Q. B. 69, 83; Godefroy *v.* Jay, 7 Bing. 413; Watson *v.* Muirhead, 57 Penn. St. 161; A. B.'s Estate, 1 Tucker (N. Y.) 247; Harter *v.* Morris, 18 Ohio St. 492; Walpole *v.* Carlisle, 32 Ind. 415; Stephens *v.* Walker, 55 Ill. 151; Arnold *v.* Robertson, 3 Daly (N. Y.), 298; Pidgeon *v.* Williams, 21 Gratt. (Va.) 251.

"The following," says Mr. Campbell, in his Treatise on Negligence (§ 45), when enumerating acts of attorneys which are deemed negligent, "have been held to amount to breaches of this obligation. Misdescription in the particulars of sale prepared for a sale under the authority of the court of chancery. Taylor *v.* Gorman, 4 Ir. Eq. Rep. 550. Vendor's solicitor causing abortive expenses to be incurred by his client executing a conveyance, while the title deeds were (as he knew) in the hands of an adverse party. Potts *v.* Dutton, 8 Beav. 493. Allowing client to enter into unusual covenant without explaining

§ 752. *Burden on plaintiff.* — Special negligence being alleged in such a suit, when an action is brought by a client against

to him the liability incurred. Stannard *v.* Ullithorne, 10 Bing. 491. Solicitor of purchaser or intending lessee omitting to investigate the title as far as the conditions of sale will allow him. Knights *v.* Quarles, 2 Bro. & B. 102; Allen *v.* Clark, 1 N. R. 358. Omitting (in a case where counsel is employed) to lay before counsel the whole abstract received from the purchaser. Treson *v.* Pearman, 3 Barn. & Cress. 799. Solicitor of intending mortgagee omitting to make the proper searches. Cooper *v.* Stephenson, 21 L. J. N. S. (Q. B.) 292; Graham (Court of Session), Mar. 4, 1831, 9 Sh. 543; or to give the proper notices to secure priority of title. Watts *v.* Porter, 3 Ell. & Bl. 743; Lillie (Court of Session), 13 Dec. 1816, F. C."

(As American authorities on the last point see Clark *v.* Marshall, 34 Mo. 429; Gore *v.* Brazier, 3 Mass. 543; Sprague *v.* Baker, 17 Mass. 586.)

"It is not, however, the proper duty of the solicitor to ascertain the value of the subject of the mortgage. Hayne *v.* Rhodes, 8 Ad. & Ell. N. S. 342; nor is it incumbent on him to warn the client against every possible folly. So in a case where the mortgagee, unknown to his solicitor, advanced the money without first obtaining the security, the solicitor was not deemed guilty of negligence for not having cautioned him not to do so. Brumbridge *v.* Massey, 28 L. J. (N. S.) Ex. 59.

"When a solicitor undertakes to prepare a security for money, under circumstances which import neither a good legal consideration nor a transaction *contra bonos mores*, it seems that a solicitor preparing the security by way of mere agreement, and not by deed under seal, would be guilty of negligence. Parker *v.* Rolls, 14 C. B. 691. Again, a solicitor having taken upon himself the office of receiver of rents, though without any appointment as receiver, has been held liable for the rents which he omitted to collect. Wood *v.* Wood, 4 Russ. 558. He has been held liable for the expense caused by the omission to get immediate correction of a mistake in drawing up in a decree of the court (In Re Bolton, 9 Beav. 272); and for all expenses and loss caused by an order got from the court of chancery upon a misrepresentation of facts when the truth might have been ascertained by reasonable care. Re Spencer, 18 W. R. (Ch.) 240.

"The liability of an attorney or solicitor in the conduct of causes is well summarized by C. J. Tindal as follows: 'He is liable, generally, for the consequences of ignorance or non-observance of the rules of practice of the court (in which he proceeds); for the want of care in the preparation of the causes for trial, or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law.' Godefroy *v.* Dalton, 6 Bing. 468.

"This short statement of principle by C. J. Tindal is borne out by the following cases: On the first branch, *i. e.* where liability attaches — neglect or ignorance of rules of the court, Cox *v.* Leach, 1 C. B. (N. S.) 617; Hun-

his attorney or solicitor for negligence, he must state and prove the negligent act, or at least state and prove circumstances from

ter *v.* Caldwell, 10 Ad. & Ell. (N. S.) 69; Frankland *v.* Cole, 2 Cromp. & Jervis, 590; Huntley *v.* Bulwer, 6 Bing. N. C. 511; Stokes *v.* Trumper, 2 K. & J. 232. Seeing to attendance of witnesses, Reeves *v.* Rigby, 4 Barn. & Alder. 202. Neglecting to retain counsel, Rex *v.* Tew, Sayer, 50; to deliver the brief, De Roupigny *v.* Peale, 3 Taunt. 484; and to attend the trial himself or by one of his clerks so as properly to instruct counsel, Hawkins *v.* Harwood, 4 Ex. 503. To attend at an arbitration where counsel were not retained, Swannell *v.* Ellis, 1 Bing. 347. Neglecting to inform client that if he proceeded in an action without the consent of the creditors, he would be liable for the costs, Allison *v.* Rayner, 7 B. & C. 441. Abandoning case without reasonable notice to the client, although not supplied with funds, Hoby *v.* Built, 3 Barn. & Ald. 349. Neglecting while suing upon French bills of exchange to ascertain whether they had been indorsed as required by French law, Long *v.* Orsi, 18 C. B. 610."

Negligence in compromising. — "The foregoing cases," says Mr. Green, in the excellent note already referred to, "are cited so fully because they exhibit clearly the principles upon which the authority, the duty, and the liability of attorneys rest. The result of the cases appears to be that an attorney is the general agent of his client in all matters which may reasonably be expected to arise in the progress of the cause. He has authority to compromise by accepting less than the amount sued for, or, when the action is for the price of goods sold, by receiving back the goods, or by consenting to judgment against his client. If he enter into a compromise without his client's consent, he is not liable to an action, if he act *bonâ fide*, with reasonable care and skill, and not in defiance of any express prohibition; and instructions to limit his authority must be direct and positive. Chambers *v.* Mason, 5 C. B. N. S. 59. If he enter into a compromise against the express direction of his client, such compromise will, nevertheless, be binding on the client, unless the other party had notice of this limitation of his authority; but for making such compromise he will be liable to his client in damages. In all cases, however, his authority is limited to the cause in which he is employed, and does not extend to collateral matters. The American decisions generally agree in this respect with those of the English courts. In some of the states, however, it has been held that an attorney has no implied authority to compromise a suit. This has been held in Vail *v.* Jackson, 15 Vt. 314; Smith *v.* Dixon, 3 Met. (Ky.) 438; Derwent *v.* Loomer, 21 Conn. 245. Holker *v.* Parker, 7 Cranch, 452, is often referred to as an authority in support of the position that an attorney has no implied power to compromise. It was there held that under the special circumstances of that case an award of referees, founded upon an agreement of the attorneys, was not binding upon the plaintiff; and Marshall, C. J., used these expressions: 'Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise, yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney had been imposed upon, or not fairly ex-

which negligence is implied by necessary legal inference.[1] But when negligence has been proved in consequence of which judg-

ercised in the case. But where the sacrifice is such as to leave it scarcely possible that, with a full knowledge of every circumstance, such a compromise could be fairly made, there can be no hesitation in saying that the compromise, being unauthorized, and being therefore in itself void, ought not to bind the injured party. . . . . This opinion is the more reasonable, because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining.' Although this language is somewhat ambiguous, yet all it appears to mean is, that a compromise wrongfully made, and made under such circumstances that the opposite party knows that it is wrongfully made, will not bind the client; but that, if not so made, it will bind him. This view appears to have been taken of this decision in Potter *v.* Parsons, 14 Iowa, 286, 289. In Massachusetts, in a recent case (Wieland *v.* White, 109 Mass. 392), where the question was whether a plaintiff was bound by an agreement made by his attorney while the action was pending, that the plaintiff should have judgment by default, and that execution should not issue for a certain number of days thereafter, the court held the agreement binding, saying: 'It is important to parties that such an authority should be liberally construed; for many exigencies are likely to arise, in the progress of a cause, that demand the exercise of discretion when there is no opportunity to consult with a client, and an attorney is sometimes obliged to act upon reasons which cannot be explained at the time. Accordingly it has been held that a general authority to an attorney to conduct a cause implies an authority to compromise in good faith, and in a reasonable manner, if there is no express prohibition.' Citing Chown *v.* Parrott; Prestwich *v.* Poley, supra; and Butler *v.* Knight, L. R. 2 Ex. 109." See, however, *contra*, Bronson, C. J., in Shaw *v.* Kidder, 2 How. Pr. 244.

Law and fact. — It is said in California, that in actions against attorneys for negligence or want of skill in the management of suits, when the facts are ascertained, the question of negligence or want of skill is a question of law for the court; and it has been ruled to be a want of ordinary care and skill in an attorney to submit a motion for a new trial before the statement in support of it is certified. Gambert *v.* Hart, 44 Cal. 542. As a rule, however, it is for the jury, under direction of the court. Rhines *v.* Evans, 66 Pa. St. 192; Pennington *v.* Yell, 6 Eng. 212; Hunter *v.* Caldwell, 10 Q. B. 69; Reece *v.* Rigley, 4 B. & A. 202. Supra, § 420.

Delay in bringing suit. — In an Indiana case, an attorney commenced an action on a replevin bond placed in his possession for that purpose by the plaintiff, and two years afterwards suffered it to be dismissed. Four years thereafter he recommenced the action as on a lost bond, and after two years, without the knowledge or consent of the plaintiff, dismissed it as to all the solvent defendants, they having denied the execution of the bond under oath, and took judgment against the others, whereby the plaintiff lost

[1] Purves *v.* Landell, 12 Cl. & Fin. 91. Supra, § 422.

ment has gone against the client, it is not incumbent on the client to show that but for the negligence he could have succeeded in the action. It is for the solicitor to defend himself if he can by showing that the client has not been hurt by his negligence.[1]

§ 753. *Liable for acts of agents.* — The attorney or solicitor is equally responsible whether the breach of duty has arisen through his own default or through the default of his agent,[2] of his partner,[3] or of his clerk.[4]

his claim. After the attorney's death the bond was found in his office. It was held, in a suit by said plaintiff against the administrator of the attorney's estate for negligence these facts appearing in evidence, that they warranted the jury in finding that the attorney was guilty of negligence. And it was further ruled, that the fact that no evidence was offered that the plaintiff was prepared in the action on the bond to prove the execution thereof by the defendants, who had denied its execution under oath, would not defeat a recovery in this action. Walpole *v.* Carlisle, 32 Ind. 415.

The question of delay is thus discussed by Agnew, J., in Rhines *v.* Evans, 66 Pa. St. 192: . . . "What is a reasonable time is a question most frequently dependent on circumstances, and therefore to be submitted in such cases to the jury. In the case of Livingston *v.* Cox, 6 Barr, 360, a suit against an attorney for neglect of duty, six months' failure to commence a suit against a debtor in failing circumstances seems to have been held an unreasonable time, and the plaintiff Cox recovered against Livingston. And where the duty is immediate, as in the collection of money, the right of action accrues and the statute begins to run from the time of the attorney's receipt of the money, even though he gives no notice of its collection, the law deeming it gross negligence on the part of the creditor to neglect to make inquiry for six years, unless the attorney has been guilty of concealment or of some act to put his client off his guard. Such is the modern doctrine qualifying and to some extent overruling McDowell et ux *v.* Potter, 8 Barr, 189, and some previous cases. See Campbell's Administrator *v.* Boggs, 12 Wright, 524; Downey *v.* Garard, 12 Harris, 52, and authorities therein cited. The same duty of diligence on the part of the creditor to prevent the bar of the statute is to be found in analogous cases; as where a call for instalments under a subscription to stock is necessary. Railroad Co. *v.* Byers, 8 Casey, 22." And see Hoppin *v.* Quin, 12 Wend. 517; Smedes *v.* Elmendorf, 3 Johns. 185; Stevens *v.* Walker, 55 Ill. 151.

[1] Godefroy *v.* Jay, 7 Bing. 413. But see Harter *v.* Morris, 18 Ohio St. 491, where it is intimated that plaintiff must prove injury.

[2] Collins *v.* Gritlin, Barnes, 37. See Simmons *v.* Rose, 31 Beav. 11;

[3] Norton *v.* Cooper, 3 Sm. & Giff. 375, 384; Warner *v.* Griswold, 8 Wend. 665; Livingston *v.* Cox, 6 Pa. St. 360.

[4] Floyd *v.* Nangle, 3 Atk. 568. See Campbell, *at supra*, § 59.

§ 754. *Only liable when confidence is imposed.* — This point is discussed elsewhere,[1] and it is seen that a lawyer is not usually liable for negligence to a person who does not employ him professionally. A lawyer, however, who appears for another without authority is of course liable to such person for injuries received by this intrusion.[2]

Corporation of Ruthin *v.* Adams, 7 Sim. 345 ; Bradstreet *v.* Everson, 72 Pa. St. 124. In this case Bradstreet had a "commercial agency" at Pittsburg, to which Everson delivered acceptances payable in Memphis, and took a receipt for them, "for collection." Bradstreet sent them to an agent in Memphis, who collected the money and kept it. The court held that Bradstreet was liable. After citing and commenting upon Cox *v.* Livingstone, 2 W. & S. 103 ; Kraus *v.* Dorrance, 10 Barr, 462 ; and Rhines *v.* Evans, 66 Pa. St. 192, the court said : "These cases show the understanding of the bench and bar of this state upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not responsible. He is therefore liable, by the very terms of his receipt, for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client." The same view is taken in the following cases : Lewis *v.* Peck, 10 Ala. 142; Pollard *v.* Rowland, 2 Blackf. (Ind.) 22; Cummins *v.* McLean, 2 Pike (Ark.), 402; Wilkinson *v.* Griswold, 12 Smedes & Mar. 669.

[1] Supra, § 439–441 ; Fish *v.* Kelly, 17 C. B. (N. S.) 194.

[2] Bradt *v.* Walton, 8 Johns. 298; O'Hara *v.* Brophy, 24 How. Pr. 379.

CHAPTER XVIII.

TELEGRAPH COMPANIES.

Liability of company to sender of message, § 756.
To sendee of message, § 757.
To receiver of message, § 758.
Of connecting lines, § 759.
Effect of notice restricting liability, § 760.
Notice only affects contracting company, § 761.
Cannot exonerate negligence, § 762.
Limitation as to repeated messages, § 763.
Sender operating through special agent relieves company, § 764.
Burden of proof, § 766.
Damages, § 767.

§ 756. *Liability of company.* — The liability of a telegraph company to the sender of a message is based upon contract, the company being bound to the diligence of good specialists in the particular department. *Perfect* accuracy and promptitude are not exacted;[1] but the accuracy and promptitude displayed must be such as good specialists in this department of business are accustomed to exhibit, and must be in proportion to the critical character of the work.[2]

It is true that if we should hold a telegraph company to be a common carrier of goods, it would be liable as insurer; but (1) it has been already seen that this doctrine of insurance in this relation is peculiar to Anglo-American law, and is so exceptionally onerous that the courts have refused to extend it to any carriers except of goods;[3] and (2) the idea that telegraph companies are common carriers at all is incompatible with the current of adjudications on this particular topic.[4]

[1] See supra, § 45–8.

[2] Ellis *v.* Am. Tel. Co. 13 Allen, 226; Breese *v.* U. S. Tel. Co. 45 Barb. 274; 48 N. Y. 132; Leonard *v.* N. Y. & Alb. Tel. Co. 41 N. Y. 544; De Rutte *v.* N. Y. &c. Tel. Co. 1 Daly, 547; Elwood *v.* W. U. Tel. Co. 45 N. Y. 549; La Grange *v.* S. W. Tel. Co. 25 La. An. 383; N. Y. & W. Tel. Co. *v.* Dryburg, 35 Penn. St. 298; West. U. Tel. Co. *v.* Buchanan, 15 Ind. 430; Wash. & N. Y. Tel. Co. *v.* Hobson, 15 Grat. 122.

[3] See supra, § 586, 626.

[4] Breese *v.* U. S. Tel. Co. 48 N. Y. 132. (*Contra*, Parks *v.* Tel. Co. 13 Cal. 422.) See this well argued by Mr. Bigelow in the Am. Law Rev. for April, 1874, p. 457.

In this article is given a summary of much importance in determining how far a public duty is

757. *Liability to sendee of message for non-delivery.* — Suppose a message given to the company to deliver to A., A. being in this respect a stranger to the company, is lost; can A. maintain a suit for its non-delivery? On the reasoning already ex-

imposed on telegraph companies, it being clear that whenever such a duty is imposed, and yet neglected by them to the injury of an individual, an action lies for the damage. Supra, § 443.

"The English telegraph act provides that 'the use of any telegraph and apparatus erected or formed under the provisions of this act for the purpose of receiving and sending messages shall . . . . be open for the sending and receiving of messages by all persons alike, without favor or preference.'[1] In Playford *v.* United Kingdom Telegraph Co., just cited, it was held, in an action by the receiver of an erroneous message, that this act had not affected the relation of companies to those to whom dispatches are transmitted. The telegraph act of 1868 contains no provision on this point: and the same is true of the later acts.[2]

"The Massachusetts act provides that 'every company shall receive dispatches from and for other telegraph lines, companies, and associations, and from and for any person; and on payment of the usual charges . . . . shall transmit the same faithfully and impartially.' And for every wilful neglect the company are declared liable to a penalty of one hundred dollars to the 'person, association, or company *sending or desiring to send* the dispatch.'

"The statutes of New York, Michigan, Missouri, and Maryland contain provisions and prescribe penalties substantially the same as those in this act.

"The statute of Pennsylvania simply requires the companies to transmit dispatches offered, under a penalty for refusal, with no provision for faithful performance.

"In Maine, it is provided that 'for any error or unnecessary delay in writing out, transmitting, or delivering a dispatch . . . . making it less valuable to *the person interested* therein,' the company 'shall be liable for the whole amount paid on such dispatch; and they shall transmit all dispatches in the order they are received, under a penalty of one hundred dollars, to be recovered with cost by the person whose dispatch is wilfully postponed.'

"Many of the states are without statutory provisions on this particular point; and no act has been found giving a right of action to the person to whom the message is sent, either for non-delivery or for error in transmission, excepting that of Maine above quoted. It must be conceded that in that state the receiver of the message, if he be 'the person interested therein,' has a right of action to the amount paid for transmission. But this would perhaps cover no more than the case of a dispatch transmitted by the plaintiff's agent; and if so, it abridges rather than enlarges the liability of the telegraph company. For, apart from such a provision, the company must be liable for the actual loss to the plaintiff, where the sender acts as agent in the premises. But this article is not predicated of such cases."

[1] See Playford *v.* United Kingdom Tel. Co., Law R. 4 Q. B. 707, note.

[2] 25 & 26 Vict. c. 131, § 61; 31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73, § 23.

pressed, we must answer this question in the negative.[1] It is true that if by statute it is made a duty of the company to faithfully deliver messages to the sendee, then the sendee may sue for failure in this respect.[2] And so, also, without such a statute, it is easy to conceive of cases in which the sendee of a message may occupy such a position to the company as to give him a title to sue. If the company by special contract has agreed to deliver messages to him; if, on the faith of its general announcements, he has put himself in such a position to it that he suffers loss from its negligence; then he may sustain suit. But if there be no such confidence, the company could not be made liable except by adopting a rule that would make a common carrier liable to all parties who may suffer from the non-arrival of a passenger.[3]

§ 758. *Liability to receiver for erroneous transmission.* — Here the company having put itself in relation to the receiver, and given him through its negligence erroneous information, whereby he suffers loss, is liable for negligence. It is true this point has been disputed in England;[4] but it has been in this country maintained, and with justice: because (1) the company is the agent both of the sender and of the receiver; and (2) on the principle *sic utere tuo ut non alienum laedes*, if it undertakes to exercise a franchise, it must do so in a way which may not injure others.[5]

[1] See supra, § 439–41.

[2] Supra, § 443.

[3] See Scott & Jarnagin, Telegraphs, § 95; Parks *v.* A. C. Tel. Co. 13 Cal. 422; True *v.* Inter. Tel. Co. 60 Me. 9.

[4] Playford *v.* U. K. Tel. Co., Law R. 4 Q. B. 706.

[5] See West. Un. Tel. Co. *v.* Carew, 15 Mich. 525; N. Y. & Wash. Tel. Co. *v.* Dryburg, 35 Penn. St. 298; La Grange *v.* S. W. Tel. Co. 25 La. An. 383; Bowen *v.* Lake Erie Tel. Co. 1 Am. Law Reg. 685; De Rutte *v.* New York, Albany, &c. Tel. Co. 1 Daly, 547; Rose *v.* United States Tel. Co. 3 Abb. Pr. N. S. 408; Elwood *v.* Western Union Tel. Co. 45 N. Y. 549; Ellis *v.* Am. Tel. Co. 13 Allen, 226.

"The defendants hold themselves out to the public as being ready to transmit for hire messages for individuals, and to deliver faithfully for others such messages as are intrusted to them. They make themselves the agents of both the sender and receiver, and their failure in their assumed duties creates an obligation in favor of the one who may be thereby injured. *It may, and often does occur, that the party to whom the message is addressed is the only one whose interests are involved, and who is to pay the fee.* In such case he is the one in reality with whom the contract is made." Howell, J. — La Grange *v.* S. W. Tel. Co. 25 La. An. 383.

On this point see Mr. Bigelow's able article in the Am. Law Rev. for April, 1874, p. 457.

In Elwood *v.* W. U. Tel. Co. 45 N.

§ 759. *Liability of connecting lines.* — Here, again, we must view the question as it relates distinctively to the receiver and to the sender. A delivering company (one at the end of several connecting lines) sends an erroneous message, causing the receiver to incur loss. The company, in such case, can defend itself by showing that it exercised due diligence, and that the negligence was in a prior line, supposing there is no partnership between the lines.[1] As concerns the sender of a message, it may be generally said that when the operator of a telegraph company contracts to send a telegram over his own line, and the lines of other connecting companies, he, being so authorized by the other companies, becomes the agent of each company assuming to forward the message, and they are thereupon severally liable (no partnership relation being proved), upon the agreement as made by him.[2] And it has been consequently held, in an action against the last company on the route, for its failure to deliver a message to the proper address, that it was bound to due diligence by the act of the first operator.[3] The primary company is, in such case, by the same rule liable for the negligence of the auxiliary companies.[4]

§ 760. *Effect of notices restricting liability.* — A notice printed on the paper signed by the sender has been held sufficient to restrict the liability of the company.[5] At the same time it is

Y. 549, it was held gross negligence in the operator at a telegraph station to send over the wires a message in the name of, and purporting to come from, a cashier of a bank, and to be dated at another station, at the request of a party known to the operator not to be such cashier, and presenting no evidence of authority to use his name, which message, addressed to a banking house, held out such party as entitled to credit for a large amount; and it was ruled that this negligence occurred so within the scope of the employment of such operator as to make the telegraph company liable to the person to whom such telegram was addressed for the damages occasioned by such negligence.

[1] La Grange *v.* S. W. Tel. Co. 25 La. An. 383.

[2] Leonard *v.* Tel. Co. 41 N. Y. 544.

[3] Baldwin *v.* U. S. Tel. Co. 1 Lansing, 125. See supra, § 577.

[4] De Rutte *v.* Tel. Co. 1 Daly, 547. See Collins *v.* R. R. 7 H. L. Cas. 194; supra, § 577 *et seq.*

[5] Wann *v.* Tel. Co. 37 Mo. 472; Camp *v.* Tel. Co. 1 Metc. Ky. 164; McAndrew *v.* Tel. Co. 17 C. B. 3; Wolf *v.* W. Tel. Co. 62 Penn. St. 83; supra, § 586.

essential that such notice should be brought home to the sender ;[1] and the restriction must be reasonable.[2]

§ 761. *Notice only affects company to which it is confined by contract.* — This view has been held in Massachusetts,[3] in a case where a telegraph company received a message addressed to a place on the line of another company, collected pay for its transmission the whole distance, forwarded it to the terminus of its own line, and delivered it there to the other company, which forwarded it thence to the place to which it was addressed. The paper on which it was written by the sender was headed with the name of the first company, beneath which were printed, " Terms and conditions on which this and all messages are received by this company for transmission," limiting to a small sum the liability of " the company " for error or delay in the transmission or delivery of any message, and providing that " no liability is assumed for any error or neglect by any other company over whose lines this message may be sent to reach its destination ; " subject to which conditions the message was directed to be sent. The sender brought suit against the *second* company for negligence in delivering the message at the place to which it was addressed. It was ruled by the supreme court that the limitation of the liability of " the company " for error or delay in delivering any message applied to his contract with the first company only for the service to be rendered on their line alone.

§ 762. *Company cannot by stipulation relieve itself from consequences of negligence.* — This principle, which has been fully discussed in its relation to carriers,[4] applies with equal force to telegraphic companies.[5]

[1] Baldwin *v.* U. S. Tel. Co. 1 Lans. 125. See supra, § 586, 613.

In Wolf *v.* W. U. Tel. Co. 62 Pa. St. 83, one of the conditions of a telegraph company, printed in their blank form, was that they would not be liable for damages if the claim was not presented in sixty days from sending the message. It was held that the condition was binding on one sending a message on the printed form. The condition was in very small type, but the heading directing to it was in conspicuous type. Held, that it was not obscure and deceptive. Ibid., citing Inland Ins. Co. *v.* Stauffer, 9 Casey, 397 ; Trask *v.* Ins. Co. 5 Ibid. 198.

[2] A condition (incorporated in the margin of a blank message) that the company shall not be liable for mistakes beyond the amount received by the company for sending the message, is unreasonable and invalid. True *v.* Int. Tel. Co. 60 Me. 9.

[3] Squire *v.* W. U. Tel. Co. 98 Mass. 232. See supra, § 583.

[4] See supra, § 589.

[5] Mann *v.* W. U. Tel. Co. 37 Mo.

§ 763. *So far as concerns sender of message, company may restrict its liability to repeated messages.*[1]

§ 764. *But not so as to receiver of message.* — The receiver of a message stands, if the above reasoning be correct, in the attitude of a person who is injured by another in defiance of the maxim *sic utere tuo ut non alienum laedas.* It is true that if the receiver have notice of the qualification as to repeating, and takes the message subject to such qualification, then he is bound thereby. But if the case be simply that of the company negligently making a false statement to him, whereby he suffers injury, then he cannot be affected by any arrangement between the sender and the company.[2]

14. See U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 232; Birney *v.* N. Y. & W. Tel. Co. 18 Md. 341; Sweatland *v.* Tel. Co. 27 Iowa, 433; McAndrew *v.* Elect. Tel. Co. 17 C. B. 3.

[1] Ellis *v.* Am. Tel. Co. 13 Allen, 226; Birney *v.* Tel. Co. 18 Md. 341; Camp *v.* Western Un. Tel. Co. 1 Metc. (Ky.) 164; Wann *v.* Tel. Co. 37 Mo. 472; Breese *v.* U. S. Tel. Co. 48 N. Y. 132; *S. C.* 45 Barb. 275; West. Un. Tel. Co. *v.* Carew, 15 Mich. 525; McAndrew *v.* Elec. Tel. Co. 17 C. B. 3. But see Baldwin *v.* U. S. Tel. Co. 54 Barb. 505. True *v.* International Tel. Co. 60 Maine, 9, holds such a limitation bad in the absence of a requirement that the dispatch should be repeated in order to make the company liable for mistakes. The supreme court of Illinois, in Tyler *v.* Tel. Co., reported in Chic. Legal News for Sept. 13, 1874, have held the repeating restriction void *in toto.*

[2] See La Grange *v.* S. W. Tel. Co. 25 La. An. 383. On this point Mr. Bigelow, in the article already cited, observes: —

"Before proceeding to consider the real nature of the relation of the telegraph company to the sender of a message, another point should be noticed. In most, if not all, of the cases to which we have referred, the telegraph company had limited their liability for mistakes (above the sum paid for the message) to cases in which the dispatch had been repeated by the receiver. Such a limitation was held reasonable in Ellis *v.* American Telegraph Co., supra, and it was remarked by the learned chief justice that the right of the receiver of an unrepeated message could not, at best, rise higher than that of the sender. If this be true, the question we are now considering is of little importance; for it is probable that the blanks of all the companies contain such stipulations. But is this a sound proposition of law? Is the measure of damages of a third person, injured by the breach of a contract, to be limited to the amount recoverable by the other party to the contract? for this seems to be the force of the objection. The interest of the parties to the contract may be very small; while the injury to the third person may be very great. If the third person have a right of action at all, the value of the contract can be of no importance. Suppose the contract were without consideration, could it be contended that, since the parties could maintain no action for a breach of it, a third person, injured by its improper performance, could

§ 765. *Sender employing his special agent cannot charge the company with negligence.* — When the sender employs a special

not? B. allows A. to pasture his cattle, gratis, in his meadow. The cattle break through the fence into C.'s garden, and are chased out and injured. Cannot C. maintain an action against B. for any damage to his crop? And if A. should pay for the privilege of pasture, would B.'s liability be measured by the sum recoverable by A. for the injury to his cattle?"

In Breese *v.* U. S. Tel. Co., supra, Earl, C., said: "The liability of telegraph companies is regulated by contract and the nature of their public employment. In the absence of any special contract limiting or regulating their liability, they do not insure the safe and accurate transmission of messages, but they are bound to transmit them with care and diligence adequate to the business which they undertake, and if they fail in such care and diligence, they become responsible. But while they are bound to transmit all messages delivered to them, they have the right to make reasonable rules and regulations for the conduct of their business. They can thus limit their liability for mistake, not occasioned by gross negligence or wilful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him. Redfield on Carriers, 405; McAndrew *v.* Electric Telegraph Co. 33 Eng. L. & Eq. 180; Birney *v.* New York & Washington Tel. Co. 18 Md. 341; N. Y. & Washington Printing Tel. Co. *v.* Dryburg, 35 Penn. 298; Ellis *v.* American Tel. Co. 13 Allen, 226; Western Union Tel. Co. *v.* Carew, 15 Mich. 525; Wann *v.* Western Union Tel. Co. 37 Mo. 472; Camp *v.* West. Union Tel. Co. 1 Metcalfe (Ky.), 164.

"Here Cuyler wrote the message upon a blank, which had been furnished by the company, specifying that the company would not be held responsible for any error in the transmission of the message, unless it was repeated. He had had the blanks in his possession for some time, and had had abundant opportunity to read them. The blanks contained the terms upon which the company solicited and would accept his business, and when the message was written upon one of them and brought to the office of the company, its agent had the right to assume and believe that he accepted the terms, and assented to and understood the agreement. In the absence of any proof that the blanks were printed in such small type, or otherwise, as to mislead, or that Cuyler was so illiterate that he could not read, he must be presumed to have understood the contents of the blank, and upon the ordinary principle applicable to the doctrine of *estoppel in pais*, he must be held estopped from denying or disputing the agreement. Lewis *v.* Great Western Railway Co. 5 Hurlstone & N. 867; Grace *v.* Adams, 100 Mass. 505; Wolf *v.* Western Union Tel. Co. 62 Pa. 87. This would not be so if the blank had been delivered to Cuyler at the time he wrote the message upon it, and he had no opportunity to read it, and to the knowledge of the telegraph operator had not read it. In such case, there would have been no room for the application of the doctrine of estoppel, and no reason for indulging in presumptions.

"We should reach the same conclusion if we held that defendant was a common carrier, with all the liabilities which attach to such carriers at common law; for it is well settled in this

operator, not the servant of the company, he takes the sole responsibility of the accuracy of the message transmitted.[1]

§ 766. *Burden of proof.* — As has been seen, when the sender sues on the breach of contract, the burden is on the defendant to prove that he complied with his contract.[2] When the *receiver* sues, charging the company with negligently bringing him a false message, the burden is on the plaintiff, though it will be enough to shift this burden to show that the message received was not that sent.[3] But where, in an action for breach of contract to send a telegram, the defence is negligence of the plaintiff, the onus is on the defendant to allege and prove it.[4]

§ 767. *Damages.* — Where no limitation of liability is proved, it has been held that where a company contracted to transmit a message accepting an offer to sell certain goods at a certain place for a certain price, and by their negligence in delivering it, the sender failed to complete the purchase, he could recover from them, in damages, the difference between the price which by the message he agreed to pay, and the price which he would have been compelled to pay at the same place in order with use of due diligence to have purchased goods there of the same kind, quantity, and quality.[5]

The plaintiffs' message, instructing their brokers to "buy five Hudson," was transmitted and delivered by the defendant "buy five hundred." Learning of the error, the plaintiffs telegraphed again to their brokers; but owing to the delay so occasioned, the plaintiffs lost, by the advance in the price of the stock so ordered, $1,375. It was held by the court of appeals in New York, that this sum was the measure of their damages, for which the defendant was liable; and it was intimated, that the action could have been maintained, if no purchase had been made, on proof of the rise in value of the stock.[6]

state that common carriers can contract for exemption from their common law responsibility, as to everything, certainly, except their gross negligence or wilful misconduct. Bissell *v.* N. Y. Cent. R. R. 25 N. Y. 442; French *v.* Buffalo, N. Y. & Erie R. R. Co. 4 Keyes, 111."

[1] Dunning *v.* Roberts, 35 Barbour, 463.

[2] See supra, § 422.

[3] Supra, § 421; Rittenhouse *v.* Ind. Un. Tel. Co. 44 N. Y. 263; *S. C.* 1 Daly, 474; West. U. Tel. *v.* Carew, 15 Mich. 525; Birney *v.* Tel. Co. 18 Md. 341.

[4] Baldwin *v.* United States Telegraph Co. 1 Lansing, 125.

[5] Squire *v.* W. U. Tel. Co. 98 Mass. 232.

[6] Rittenhouse *v.* Ind. Line of Tel. 44 N. Y. 263.

CHAPTER XIX.

VENDOR.

Vendor liable for concealed defects, § 774.
Implied contract that thing sold is fit for use, § 775.
Accident as a defence to non-performance, § 776.

§ 774. *Vendor liable for concealed and dangerous defects.* — The relations of vendor and vendee form a distinct topic of jurisprudence of which it is possible here to touch upon two features. The first is the liability of the vendor to the vendee for concealed defects. And as to these the law is plain that though for ordinary defects the innocent vendor is not liable,[1] yet whenever the vendor has or ought to have notice of defects calculated to do serious harm, and neglects to notify them to the vendee, he is liable to the vendee for damages produced by such neglect.[2] But he is not liable for mischief done to third parties through causes occurring posterior to the sale. Thus it has been held in New York[3] that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials or for any want of care and skill in its construction calculated subsequently to do harm; and if after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer.[4]

[1] Longmeid *v.* Holliday, 16 Exch. 761. Supra, § 180, 440.

[2] Brown *v.* Edgington, 2 M. & G. 279; George *v.* Skivington, L. R. 5 Exch. 1. See Loop *v.* Litchfield, 42 N. Y. 351; and cases cited supra, § 440; infra, § 854–930; and also Benjamin on Sales, § 541-3.

[3] Losee *v.* Clute, 51 N. Y. 494. See infra, § 858.

[4] Lott, Ch. C.: . . . . "In determining whether the complaint was properly dismissed, we must assume all the facts which the evidence tended to show as established, and the question is thereby presented whether the defendants have incurred any liability to the plaintiff. They contracted with the company, and did what was done by them for it and to its satisfaction, and when the boiler was accepted they ceased to have any further control over it, or

§ 775. *Implied contract that thing sold should be fit for use.* — Whenever A. orders B., a specialist, to furnish him with an article in B.'s specialty (whatever the branch may be), there is an implied warranty that B. exercises in the matter the skill of a good specialist in the department.[1] In a case decided in England in 1870[2] this doctrine was pushed to its furthest limit; it being held that where a man causes a building to be erected for viewing a public exhibition, and admits persons on payment of money, the contract between him and the persons admitted is analogous to the contract between a carrier and his passengers; and there is implied in such contract a warranty, not only of due care on the part of himself and his servants, but also of due care on the part of any independent contractor, who may have been employed by him to construct the means of conveyance or support. It was ruled, therefore, that where the defendant, acting on behalf of himself and others interested in certain races, entered into a contract with E., who was a competent person to be so employed, to erect and let to them a grand stand for the purpose of viewing the races; and the defendant, on behalf of himself and his colleagues, received 5*s.* (to be appropriated to the race fund) from every person admitted, of whom the plaintiff was one; and the stand had been negligently and improperly constructed (but not

its management, and all responsibility for what was subsequently done with it devolved upon the company and those having charge of it, and the case falls within the principle decided by the court of appeals in the Mayor, &c. of Albany *v.* Cunliff (2 Comst. 165), which is, that the mere architect or builder of a work is answerable only to his employees for any want of care or skill in the execution thereof, and he is not liable for accidents or injuries which may occur after the execution of the work; and the opinions published in that case clearly show that there is no ground of liability by the defendants to the plaintiff in this action. They owed *him* no *duty* whatever at the time of the explosion, either growing out of contract or imposed by law.

"It may be proper to refer to the case of Thomas *v.* Winchester (2 Selden, 397), cited by the appellant's counsel, and I deem it sufficient to say that the opinion of Hunt, J., in Loop *v.* Litchfield (42 N. Y. 351), clearly shows that the principle decided in that case has no application to this.

"It appears from these considerations that the complaint was properly dismissed, and it follows that there was no case made for the consideration of the jury, and, consequently, there was no error in the refusal to submit it to them."

[1] Shepherd *v.* Pybus, 3 M. & G. 868; Macfarlane *v.* Taylor, L. R. 1 Sc. App. C. 245; Olivant *v.* Bayler, 5 Q. B. 288; Benjamin on Sales, § 542-3.

[2] Francis *v.* Cockrell, L. R. 5 Q. B. 184. See supra, § 728.

to the knowledge of the defendant), and in consequence fell and injured the plaintiff, — that the plaintiff could maintain an action against the defendant for the damages sustained, although the defendant was free from all negligence, and had employed a competent person to erect a stand. The case was affirmed in the exchequer,[1] Kelly, C. B., saying: "But then the second and more important question arises, what was the implied contract, with respect to the sufficiency of the stand for the purpose to which it was to be applied? I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied. That I hold to be a general proposition of law, applicable to all contracts of this nature and character. It is, indeed, subject to a qualification or exception, to which I will hereafter advert, as determined by the case of Readhead *v.* Midland Ry. Co.,[2] but that *qualification extends only to the case of some defect which is unseen and unknown and undiscoverable*, — not only unknown to the contracting party, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination. Let us see how the case stands upon the authorities. It was insisted that there was no such warranty, — that there was no such contract. When we look to the judgment delivered in this case in the court of queen's bench,[3] it appears to have proceeded upon this principle, though the principle is laid down in somewhat different terms from those in which I have expressed it. It appears that the ground of the decision in the court below was, that the defendant had contracted against any defect in the construction of the stand, occasioned by reason of his own negligence or of the negligence of the persons who had erected the stand. Though entirely adopting that as the ground of the decision in the court of queen's bench, I should rather express

[1] Francis *v.* Cockrell, L. R. 5 Q. B. 503. See supra, § 728; see comments on this case by Blackburn, J., supra, § 693, note.

[2] Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.

[3] Ante, p. 191.

myself differently, and say, that what the defendant in a case like this contracted for was, that the stand upon which he supplied a seat to the plaintiff for the pecuniary consideration of 5*s*., should be reasonably fit for the purpose for which it was supplied to him, without any other exception or qualification than that which was held to apply to such a contract in the case of Readhead *v*. Midland Ry. Co.;[1] that is, that the defendant did not contract against any unseen and unknown defect which there was no means of discovering or ascertaining under ordinary and reasonable modes of inquiry or examination. Now that there is an implied contract that an article supplied for hire and reward, or for a pecuniary consideration, shall be reasonably fit for the purpose for which it is to be supplied was, if not decided, assumed and affirmed as established law by the case of Readhead *v*. Midland Ry. Co.,[1] both in the court of queen's bench and in the court of exchequer chamber. But the authority does not rest there. Whether it be a case of a carriage or of a bridge, or, as in the present case, of a stand in which seats are contracted for to witness some public spectacle, the rule of law and the rule of reason and good sense appear to me to be the same. Take the ordinary case of a carriage. If a man engaged, in consideration of, say, a guinea, to supply a carriage such as an omnibus, to hold six persons, to proceed on an excursion to the Crystal Palace, and a guinea is paid, and the carriage is sent, is it possible to conceive that he does not contract, not only that that carriage shall contain seats for six persons, but that it shall be reasonably fit for the purpose? "I cannot understand upon what imaginable ground it is to be supposed that there is not such an implied undertaking in every contract of this description."

Were it not for the qualification contained in the lines in italics this extension of the laws of warranty would be open to serious objections. It is opposed to those sound doctrines of law which require the diligence of a good specialist from all operatives, but not a perfection which is unattainable,[2] and it is in conflict with the almost universal opinion of the courts that the exceptional and onerous doctrine of insurance, as applied to common carriers of goods, is not to be pressed beyond the cases by which it is expressly determined.[3] Far more judicious is Keating, J., in the

[1] Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.

[2] See supra, § 65.

[3] See supra, § 555, 586, 635, 728.

presentation of the reasons that led him to concur in affirming the decision of the queen's bench. "I should prefer, however," he said,[1] "to state the defendant's liability or his undertaking to be that due care, that is, reasonable care, had been exercised in the erection of that stand, which he so let out for the use of the public. It is found upon the case that reasonable care was not exercised, but that negligence occurred in its erection, for which it appears to me the defendant is liable." To the same effect is the subsequent argument of Montague Smith, J.[2]

§ 776. *Accident as a defence to non-performance.* — This point, also, belongs mainly to another department of law. It may be generally stated that when there is an absolute contract to deliver goods of a certain class, the vendor must pay damages in case the goods cannot be delivered, though the occasion of non-delivery is inevitable accident.[3] On the other hand, where the contract is to deliver a specific thing, and this thing perishes by *casus*, or is in any way (not involving the vendor's negligence) non-existent at the time of performance, this excuses performance.[4]

[1] Francis *v.* Cockrell, L. R. 5 Q. B. 513.

[2] See also supra, § 728.

[3] Kearon *v.* Pearson, 7 H. & N. 386.

[4] See Taylor *v.* Coldwell, 3 B. & S. 82; Howell *v.* Copeland, 30 L. T. Rep. N. S. 677; Alb. Law J. Sept. 3, 1874, p. 158.

CHAPTER XX.

DROVERS.

§ 778. A DROVER is bound to use the same care in regard to the cattle that he undertakes to drive for hire that good and faithful drovers are accustomed to exercise when engaged in their particular trade.[1]

[1] Maynard *v.* Buck, 100 Mass. 40; Cayzer *v.* Taylor, 10 Gray, 274; Shaw *v.* Bost. & W. R. R. 8 Gray, 45; Shrewsbury *v.* Smith, 12 Cush. 177; Sullivan *v.* Scripture, 3 Allen, 564. See supra, § 182, 589, 595.

BOOK III.

NEGLIGENCE IN DISCHARGE OF DUTIES NOT BASED ON CONTRACT.

CHAPTER I.

GENERAL PRINCIPLES AND ILLUSTRATIONS.

Roman law: Aquilian statute, § 780.
Expressions of principle in Digest, § 781.
Abuse of legal rights, § 782.
Damage from negligent management of real estate, § 783.
Distinction between contractual and non-contractual duties, § 784.
Levissima culpa not imputable in duties of this class, § 785.
In Anglo-American law doctrine expressed by maxim *sic utere tuo ut non alienum laedas*, § 786.
Distinction between use and abuse of rights illustrated by application of water in such a way as to flood a mine, § 787.
All jointly concerned liable, § 788.
Negligence may consist in omitting to control, § 789.
Special illustration of doctrine, § 790.
Landlord overloading upper floor, § 791.
Landlord negligently repairing, § 792.
Train on railroad negligently cutting hose leading to a fire, § 793.

§ 780. *Roman law: Aquilian statute.* — The Roman law in this respect rests on the principle that the necessity of society requires that all citizens should be educated to exercise care and consideration in dealing with the persons and property of others. Whoever directly injures another's person or property by the neglect of such care is *in culpa*, and is bound to make good the injury caused by his neglect. This general responsibility is recognized by the Aquilian law, enacted about three centuries before Christ, which is the basis of Roman jurisprudence in this relation. *Culpa* of this class consists mainly in commission, *in faciendo*. Thus an omission by a stranger to perform an act of charity is not *culpa*; it is *culpa*, however, to inadvertently place obstacles on a road over which another falls and is hurt; to kindle a fire by

which another's property may be burned; to dig a trench which causes another's wall to fall.[1]

§ 781. *Expressions of principle in Digest.* — In the Digest the principle is repeatedly given as follows: *Nemo cum damno alterius locupletior fieri debet.*[2] In other words, no one can use his property to damage another *for his own benefit.* The Roman maxim, however, to adopt the summary of Wening-Ingenheim,[3] is limited to cases where the act complained of is unlawful. But unlawfulness, in this sense, includes direct and indirect violation of law: the first is called *contra legem facere*; the second, *in fraudem legis facere.* In the latter sense, whatever prejudices another's rights is forbidden as *damnum indirectum.*[4]

By the same principle lawful acts become unlawful when they are so performed as to injure other persons (whether this injury be intentional or unintentional), from want of proper care.[5] So also acts are in this sense unlawful (that is to say, when productive of damage to others they are the subject of action) when they are *contra bonos mores*, as to which the *turpe* and the *injustum* equally operate.[6] Hence we may conclude that the Romans regarded all tortious acts undertaken without legal right as unlawful.[7]

The following exceptions, however, are recognized: 1. When a man does everything in his power to avoid doing the mischief, or when it is of a character utterly out of the range of expectation, then the liability ceases and the event is to be regarded as a casualty.[8] 2. If the injury is due to the fault of the party injured, the liability of the party injuring is extinguished. *Quod quis ex sua culpa damnum sentit, non intelligitur sentire.*[9] But if the fault of the injuring party is gross while that of the party injured is slight then the contributory negligence of the latter does

[1] See fully supra, § 9, for details of Aquilian law.

[2] L. 14. D. de condict. indeb. (12. 6). L. 6. § 2. de jure dotium (23. 3). L. 206. D. de R. J. (50. 17); Wening-Ingenheim, § 23.

[3] Schadenersatze, § 23.

[4] L. 24. § ult. de damno infect. (39. 2). L. 26. eodem.; Wening-Ingenheim, Schadenersatze, § 31.

[5] L. 27. § 9. L. 31. ad L. Aquil. (9. 2).

[6] L. 15. D. de condit. institutione, 28. 7. L. 26. 61. de verb. obl. (45. 1).

[7] L. 1. § 12. L. 2. § 9. D. de aqua et aqua pluv. (39. 3); Wening-Ingenheim, § 31.

[8] *Casum sentit dominus.* L. 1. L. 52. § 4. D. a leg. Aquil. (9. 2). L. 7. ad leg. Corn. de Sicar. (48. 8). L. 9. § 4. L. 10. ad leg. Aq. L. 23. in fine de Reg. jur. (50. 17). L. 15. § 6. D. loc. cond. (19. 2).

[9] Supra, § 300.

not bar the action. *Dolus* (and gross negligence is to be in this sense regarded as *dolus*) *culpa est pejor*.[1] 3. Liability cannot be attached to the bare exercise of a legal right, if the party injuring confine himself strictly to such exercise, and if the hurt done could not have been avoided except by abandoning the right. *Qui jure suo utitur nemini injuriam facit*, or, *neminem laedit*.[2]

§ 782. *Abuse of legal rights.* — No jurisprudence is more determined than the Roman in maintaining the immunity of the individual in the exercise of his rights. *Qui jure suo utitur*, to recur to the maxim just quoted, *nemini facit injuriam*. But this maxim is not to be so construed as to imply that the possessor of a right can exercise it regardless of the effect it produces upon the rights of others. "Expedit reipublicae ne suâ re quis male utatur."[3] I can undoubtedly, in exercise of my rightful liberty, do generally with my property, within its own orbit, what I will; but if I so wield it as to impinge upon the rights of others, then I am liable for the damage so produced. The same jurists who assert the maxim are careful to attach to it this limitation. Thus, I may dig pits at my pleasure on my land; but I will nevertheless be liable if any person having a right or even permission to enter the land falls into one of these pits and is hurt.[4] So I can drive out strange cattle from my close, but for any hurt to them which I arbitrarily inflict I am liable. "Q. Mucius scribit: equa cum in alieno pasceretur in cogendo quod praegnans erat, ejecit. Quaerebatur, dominus ejus possetne cum eo qui coegisset lege Aquilia agere, quia equam in ejiciendo ruperat. Si percussisset aut consulto vehementius egisset, visum est agere posse."[5] I may certainly drive a trespassing animal from my field. I cannot, however, even to expedite matters, rightfully proceed to "perentere." The owner of the land is under even greater restrictions as to the exercise of this right. He must, as the context of the passage last cited shows, "sic illud expellere . . . . quomodo si suum deprehendisset . . . . vel

[1] L. 3. § 3. D. de eo, per quem, f. e. (2. 10). L. 203 de R. J. 50. 17. L. 4. L. 5. procm. ad L. A. (9. 2).

[2] L. 151. de R. J. (50. 17). L. 26, de damn. inf. (39. 2). L. 24. D. eodem. L. 25. cod. L. 1. § 3. sq. de per. et commod. rei vend. (18. 6). L. 36. de dolo malo (4. 3); and other citations given by Wening-Ingenheim, § 33.

[3] L. 1. 8. 2.

[4] L. 28. D. 9. 2.

[5] L. 39. pr. D. ad leg. Aquil.

abigere sine damno, vel admonere dominum, ut suum recipiat."[1] The *publicani*, to take another illustration adduced by Bar, had a lien on cattle impounded by them for taxes, and if they exercised their rights in this respect so as to reserve the rights of property of the owner, no liability attached to them. If, however, they let the impounded beast perish for want of food, they were liable for the loss. "Si publicanus pecus meum abduxerit, dum putat contra legem vectigalis aliquid a me factum, quamvis erraverit, agi tamen cum eo vi bonorum raptorum non posse: sane (si) dolo caret, si tamen ideo inclusit, ne pascatur et ut fame periret, etiam utili lege Aquilia."[2] So also with regard to my neighbor's roof (protectum) which projects from his portico over my land. It is on my land; yet I cannot cut it away, in the exercise of my general right over my land, lest in so doing I injure my neighbor's portico: but I must resort to process of law to abate it if it is offensive. If, however, a stream of water is unlawfully turned on my land by my neighbor, I am permitted, by my own act, to divert the stream so as to keep it out. The distinction, says Ulpian, is, that in the one case, *in suo protexit;* in the other, *ille in alieno fecit*.[3] The overhanging roof is not such an obvious and intrusive violation of my rights as is the turning of a stream upon my land; and for me to tear away the projecting roof involves a more permanent and irremediable harm to my neighbor than does the sending back to him his own stream. It is my right, undoubtedly, to repel a trespass; but I cannot so repel as seriously to injure my aggressor.

§ 783. *Damage accruing from the defendant's negligent management of his own real estate.* — In addition to the points noticed in the last section, it may be here observed that a person who is damaged by the negligent or tortious management by another of the latter's real estate, is entitled to obtain from the latter the *cautio damni infecti;* that is, an express promise that the injury sustained will be made good.[4] The Digest designates several negligences or failures of duty for which the owner of real estate is thus held liable. Among these, under the general head of *vitium aedium, operis*, is noticed the defective construction or management of roofs and porches, of ovens, of fountains and streams, of

[1] Bar, Causalzusammenhange, p. 126: Hasse, p. 147.

[2] L. 2. § 29. 47. 8.

[3] L. 29. § 1. D. ad leg. Aq.

[4] Baron's Pandekten, Leipzig, 1872, § 315.

aqueducts and water, and of piles of manure. It is not necessary to create a right for remuneration that the property injured should immediately adjoin that on which the nuisance is created.[1] The *cautio damni infecti* is extended to cases of nuisances or obstructions either on public roads, rivers, and parks, or on the land of strangers.[2]

§ 784. *Negligence in performance of duties not defined by contract as compared with negligence in performance of duties defined by contract.* — It is maintained by some of the scholastic jurists that negligence in performance of duties not defined by contract (regarding mainly as such those imposed by the Aquilian law) is something different from negligence in performance of duties defined by contract. The principal ground of distinction is the notion, shown elsewhere to be unfounded, that *culpa* in the performance of a contract is *culpa in non faciendo*, while the Aquilian *culpa* is *culpa in faciendo*.[3] Other subtle *differentiæ* were foreshadowed, tending to show that the Aquilian *culpa* presented psychological characteristics distinct from those of the non-Aquilian *culpa*. But the practical jurists of the *Corpus Juris* view *culpa* as they do *dolus*, in the concrete, treating it, not as involving particular dispositions, but as exhibiting itself in particular acts. *Culpa* is indeed spoken of as convertible with *magna negligentia*,[4] but these terms, with *segnitia desidia imperitia*, are applied to non-contractual *culpa* as well as to contractual. The very test used as to contractual negligence, that of the *diligentia* of the *diligens*, is applied to non-contractual negligence. It is of negligence of the latter class that Scævola expressly says, when commenting on the Aquilian law,[5] Culpam autem esse cum quod a diligente provideri poterit non esset provisum.

§ 785. *Levissima culpa not chargeable in processes falling under this head.* — Some confusion has been produced by the saying of Ulpian: In lege Aquilia et levissima culpa venit:[6] and those who maintain the idea of three grades of *culpa*, when compelled to admit that this decision cannot be applied to *culpa* in performance of contracts, have taken refuge in *culpa* outside of contracts, maintaining that here, at least, *culpa levissima* is imputable.

[1] See Digest, 39. 2: de damno infecto et de suggrundis et protectionibus.

[2] Baron's Pandekten, *ut supra*.

[3] See supra, § 79.

[4] L. 226. de V. S. (50. 161).

[5] L. 31. h. t.

[6] L. 44. pr. h. t.

But the context shows that Ulpian intended to establish no such triple grade. What he meant is, that care must be applied in proportion to the dangerousness of the agency used. This, however, is the *diligentia* of a *diligens paterfamilias;* a *diligentia*, failure as to which is *culpa levis*, and not *culpa levissima*. For, as has already been fully shown, by the *diligentia* of a *diligens* or *bonus paterfamilias*, we are to understand the diligence which a conscientious man, versed in a particular business, is accustomed to show when attending to such business. *Culpa levis*, therefore, which is the withdrawal of the diligence of a *diligens paterfamilias*, may, in this as well as in other cases, be properly rendered as *negligence in performance of a specialty*. Nor does it make any difference that this specialty is not one the performance of which is described and required by contract. If I own a house, this is a specialty which requires that the house should be so kept as not to be a nuisance to others. If I run a locomotive, this is also a specialty which requires that I should keep this locomotive from exploding or colliding so as to hurt travellers.[1] It is to this very kind of conscientious diligence, single in principle, but multiform in application, that the *diligentia* of the *diligens paterfamilias* peculiarly applies. Pernice, a recent and able expositor on this topic,[2] shows with much ability that this principle applies fully to *culpa* in acts not limited by contract; in other words, to *culpa* under the Roman Aquilian law, and to negligence in our own law based on the maxim *sic utere tuo ut alienum non laedas*. Answering the objection, that the good "father of a family" would not expose himself if at sea to wind and wave, he argues that though this might apply to the "Hausvater" of a little German town, the term "paterfamilias" in the Roman system presents an entirely distinct idea. That idea is *responsibility*. What would a responsible man, occupying the position in question, do? This is what must be done by the person who undertakes the management of agencies by which the persons or property of others may be hurt.

§ 786. *In Anglo-American law expressed by the maxim sic utere tuo ut non alienum laedas.* — The maxim just cited, which is of mediaeval rather than classical origin, has been constantly

[1] See supra, § 33–45.

[2] Pernice, Sachbeschädegungen, Weimar, 1867, p. 65.

accepted, with qualifications such as those which have been just stated, as expressing the doctrine, that a party who by the negligent use of his own rights inflicts an injury on another's rights is liable to the latter for the damage. On this doctrine hang most of the decisions adjudicated in the following sections;[1] and the maxim applies to every suit in which one person seeks redress from another for a neglect of duty not based on contract. Thus, to quote from Mr. Broom's admirable exposition, "It has been held, that an action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that in consequence of its spontaneous ignition his neighbor's house was burnt down.[2] So, the owners of a canal, taking tolls for the navigation, are, by the common law, bound to use reasonable care in making the navigation secure, and will be responsible for the breach of such duty, upon a similar principle to that which makes a shopkeeper, who *invites*[3] the public to his shop, liable for neglect in leaving a trap-door open without any protection, by which his customers suffer injury.[4] The trustees of docks will likewise be answerable for their negligence and breach of duty causing damage."[5]

§ 787. *Distinction between use and abuse of rights illustrated by the application of water in such a way as to flood a mine.* — An interesting illustration of the principle just stated is to be found in an English case, where the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier be-

[1] See also Schwartz *v.* Gilmore, 45 Ill. 455; Ill. Cent. R. R. *v.* Middlesworth, 46 Ill. 494; Ill. Cent. R. R. *v.* Phillips, 49 Ill. 234; City of Springfield *v.* Le Claire, 49 Ill. 476; Potter *v.* Bunnell, 20 Oh. St. 150; Fehr *v.* Sch. Nav. Co. 69 Penn. St. 161; Homan *v.* Stanley, 66 Penn. St. 464.

[2] Broom's Legal Maxims, p. 383; Vaughan *v.* Menlove, 3 Bing. N. C. 468; Tuberville *v.* Stampe, Ld. Raym. 264; *S. C.* 1 Salk. 13; Jones *v.* Festiniog R. C., L. R. 3 Q. B. 733. As to liability for fire caused by negligence, see further, Filliter *v.* Phippard, 11 Q. B. 347, per Tindal, C. J.; Ross *v.* Hill, 2 C. B. 899, and 3 C. B. 241; Smith *v.* Frampton, Ld. Raym. 62; Vise. Canterbury *v.* A. G. 1 Phill. 306; Smith *v.* London & South Western R. C., L. R. 5 C. P. 98.

[3] See Nicholson *v.* Lancashire & Yorkshire R. C. 3 H. & C. 534; Holmes *v.* North Eastern R. C., L. R. 4 Ex. 254; Lunt *v.* London & North Western R. C., L. R. 1 Q. B. 277, 286.

[4] Parnaby *v.* Lancaster Canal Co. 11 Ad. & El. 223, 243; Birkett *v.* Whitehaven Junction R. C., H. N. 730; Chapman *v.* Rothwell, E., B. & E. 168; Bayley *v.* Wolverhampton Works Co. 6 H. & N. 241; and cases cited, infra.

[5] Mersey Docks Trustees *v.* Gibbs; Same *v.* Penhallow, L. R. 1 H. L. 93.

tween his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no cause of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water that it should not impede him in its workings. The water was only left by the defendant to flow in its natural course.[1] On the other hand, if the owner of one mine introduces into it by *artificial means* water which floods an adjacent mine, this is an injury for which redress will be given.[2] Of this last case it is said by Lord Cairns that "the owner of the upper mine did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage thus occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. *The damage in the former case may be treated as having arisen from the act of God, in the latter from the act of the defendant.*"[3]

The point was afterwards further discussed in a celebrated case[4] where it appeared that A. was the lessee of certain mines, and B. was the owner of a mill standing on land adjoining that under which the mines were worked. B. desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to build it. A. had worked his mines up to a spot where there

[1] Smith *v.* Kenrick, 7 C. B. 564, as stated and approved by Lord Cranworth, in Rylands *v.* Fletcher, L. R. 3 H. of L. 341. See infra, § 934.

[2] Baird *v.* Williamson, 13 C. B. (N. S.) 376.

[3] Lord Cairns, in Rylands *v.* Fletcher, L. R. 3 H. L. 341.

[4] Rylands *v.* Fletcher, L. R. 3 H. of L. 330.

were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A.'s mine. It was held in the house of lords that A. was entitled to recover damages from B. in respect of this injury.[1]

[1] "The principles," said Lord Chancellor Cairns, "on which this case must be determined, appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or under ground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendant's, in order to have prevented that operation of the laws of nature. As an illustration of that principle, I may refer to a case which was cited in the argument before your lordships, the case of Smith *v.* Kenrick in the court of common pleas.[1] On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land, — and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if, in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequences of that, in my opinion, the defendants would be liable. As the case of Smith *v.* Kenrick is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, the case of Baird *v.* Williamson,[2] which was also cited in the argument at the bar. My lords, these simple principles, if they are well founded, as it appears to me they are,

[1] 7 C. B. 515. See infra, § 934.

[2] 15 C. B. N. S. 317.

Subsequently, however, it was held that this rule was not to be stretched so far as to impose liability for such floodings when the owner of the upper mine exercised ordinary proper and usual diligence in working the mine.[1] And in a case of much interest, decided by the judicial committee of the privy council in 1874,[2] it was determined that the principle that a man who accumulates anything on his land which, in escaping, may damage his neighbor, is liable for the damage, does not apply to water stored in the Indian tanks, in accordance with immemorial custom, and which are part of the tenure of land.

§ 788. *All concerned in the negligence jointly liable.* — If two or more persons are jointly concerned in a particular act they may be sued jointly.[3] So far has this been carried that it has been held

really dispose of this case. The same result is arrived at on the principles, referred to by Mr. Justice Blackburn, in his judgment in the court of exchequer chamber, where he states the opinion of that court as to the law in these words: 'We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his own peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the thing so brought be beast, or water, or filth, or stenches."

[1] Smith *v.* Fletcher, L. R. 9 Exch. 64, reversing same case in court of exchequer.

[2] Madras R. R. *v.* Zemindar, 30 L. T. N. S. 771; Alb. L. J. Sept. 5, 1874, 150.

[3] See Klander *v.* McGrath, 35 Penn. St. 128, and cases cited supra, § 395.

in Massachusetts that one who superintends, although gratuitously and not under any contract, work done on land of another, and through whose negligence, as well as that of such other, damage is done to a third person by the work, is liable therefor in an action by such third person against him and such other jointly.[1]

§ 789. *Negligence consists in omitting to control as well as in originating.* — The negligence is not simply in *originating* the mischief, for this may be a lawful act, but in not controlling it when put in operation.[2] Thus he who starts a fire lawfully on his own property is responsible for his negligence in not controlling it,[3] and he who leaves a dangerous pit on his land adjoining a highway is responsible for damages arising from his neglecting to fence such pit off from the highway.[4]

§ 790. *Special illustrations of doctrine.* — In subsequent chapters will be given certain leading groups of cases (*e. g.* collisions on roads, abuse of dangerous agencies, neglect in fencing, neglect in restraining mischievous animals) in which the doctrine before us finds its chief application. At this point will be noticed as illustrations a few cases not falling within the groups just mentioned.

§ 791. *Person overloading floor of upper room so as to injure tenant in lower room.* — If a person overloads the floor of an upper room so that the floor breaks and crushes the goods of another man in the floor beneath, the latter is entitled to redress. If the floor is weak the occupier must take good care that he does not put upon such weak floor more than it can well bear; and if it will not bear anything, he ought not to put anything upon it to the prejudice of another. Thus, where the defendant who was the lessee and occupier of a warehouse underlet a cellar beneath the warehouse to the plaintiff, and the defendant so overloaded the floor of the warehouse with merchandise that the floor gave way and crushed the plaintiff's wine in the cellar; it was held, that the defendant was responsible for the injury, and that it was no answer to the question to say that the floor was ruinous

[1] Hawkesworth *v.* Thompson, 98 Mass. 77. See Phelps *v.* Wait, 30 N. Y. 78; Michael *v.* Alestree, 2 Lev. 172; Pfau *v.* Williamson, 63 Ill. 16.

[2] See fully supra, § 79.

[3] See infra, § 866.

[4] Barnes *v.* Ward, 9 C. B. 392; 8 M. & W. 788; Hadley *v.* Taylor, L. R. 1 C. P. 53.

and that the defendant was not bound to repair it; "for he who takes a ruinous house ought to mind well what weight he puts into it, at his peril, that it be not so much that another shall take any damage by it. But if the floor had fallen of itself without any weight put upon it, or by the default only of the posts in the cellar which support it, with which the defendant had nothing to do, then the defendant shall be excused." [1]

§ 792. *Landlord neglecting to use proper skill in making repairs.* — So a landlord who neglects to use due skill in making repairs on the demised premises and thereby causes a personal injury to the tenant, is liable therefor, although his undertaking to make the repairs was gratuitous and by the tenant's solicitation.[2]

§ 793. *Cutting off water by which fire would otherwise be extin-*

[1] Edwards *v.* Halinder, Poph. 46. See supra, § 728.

[2] Gill *v.* Middleton, 105 Mass. 470. "It is argued," said Ames, J., "that upon a gratuitous undertaking of this nature, the defendant could only be held responsible for bad faith or for gross negligence, and that it was therefore an error to instruct the jury that he was liable for want of ordinary care and skill. But in assuming to make the repairs at the request of the tenant he must be considered as professing to have the requisite skill as a mechanic, and as undertaking to select and furnish the kind and quality of materials appropriate to the accomplishment of the desired object. It appears to us that this is one of the cases in which there is no practical difference between gross negligence and the want of ordinary care and skill; and that the omission of what Baron Rolfe calls a mere vituperative epithet is not a valid objection to the judge's charge. The true question for the jury was, whether the defendant had discharged the duty which he had assumed, with that due regard to the rights to the other party which might reasonably have been expected of him under all the circumstances. His undertaking required at least the skill of an ordinary mechanic, and his failure to furnish it, either because he did not possess or neglected to use it, would be gross negligence. Steamboat New World *v.* King, 16 How. 469. The law furnishes no definition of gross negligence as distinguished from want of reasonable and ordinary care, which can be of any practical utility. The question of reasonable care must always depend on the special circumstances of each case, and is almost of necessity a question of fact rather than of law. The degrees of negligence, so often spoken of in the text-books, do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate. Steamboat New World *v.* King, 16 How. 469; Chandler *v.* Worcester Insurance Co. 3 Cush. 228; Wilson *v.* Brett, 11 M. & W. 113; Grill *v.* General Iron Screw Collier Co., Law Rep. 1 C. P. 600." See however supra, § 728, as to the question of occult defects in leased premises.

guished. — Water is conducted to a house on fire in such a way that by the ordinary laws of nature the fire would be thereby extinguished. The hose by which the water is conducted is laid over a railroad track, and a train passing by, negligently cuts the hose. The train in so doing makes the company liable for the damages caused by the non-extinguishing of the fire.[1]

[1] Supra, 98 *a;* Metallic Comp. Cast. Co. *v.* Fitchburg R. R. 109 Mass. 277; 1 Am. Law T. (N. S.) 135.

In this case the evidence was that on the 24th of January, 1870, a little before midnight, the plaintiff's manufacturing establishment was discovered to be on fire. The buildings were situated in Somerville, about fifty feet south of the track of the Fitchburg Railroad. Two fire engines were brought upon the ground, belonging to the Somerville fire department, and one from Cambridge. Not being able to procure a supply of water otherwise, they laid the hose across the railroad track, under the direction of the chief engineer of the Cambridge fire department, and obtained a supply from a hydrant on the north side of the track. The water was, by means of the hose, applied to the fire and diminished it, and would probably have extinguished it in a short time but for the acts of the defendants. At that time a freight train came along from the west, and though its managers had sufficient notice and warning, and might have stopped and had no occasion for haste, they paid no attention to the hose, but carelessly passed over it with their train and thereby severed it and stopped the water. They injured the hose so much that it could not be seasonably repaired, and thereby the plaintiff's buildings were consumed. They did not delay to give time for uncoupling the hose, which would have delayed them but a few minutes. The railroad was crossed by another at a grade a few hundred feet before the place where the hose was severed; and the train was not stopped before the crossing, as required by the Gen. Stats. c. 63, § 93. The owners of he buildings brought suit to recover damages against the railroad corporation; and upon the foregoing facts the court held: (1) that the violation of the statute did not affect the defendants' liability; (2) that the firemen had a right at common law to lay the hose across the railroad; (3) that it was immaterial that they were volunteers from another town; (4) that it was immaterial that the plaintiff did not own the hose; (5) that the severing of the hose was the proximate cause of the destruction of the building; and (6) that the defendants were liable for the negligence of their servants in severing the hose.

In Mott *v.* Hudson Riv. R. R. 1 Robertson (N. Y.), 585, it was held that a railroad company was not liable for cutting the hose leading to a fire when there was no notice or warning to the train.

CHAPTER II.

COLLISION OF RAILWAY TRAINS WITH TRAVELLERS.

Railroad bound to provide adequate guards or flagmen at crossings, § 798.
Compliance with statutory requisitions not a defence if negligence be proved, § 799.
Omission to keep tracks in good order, § 800.
Erection by company of building in such a way as to prevent traveller from seeing train, § 801.
Omission to replace switch, § 802.
To slacken speed, § 803.
To give signals, § 804.
To place sign-boards, § 807.
To shut gate, § 808.
To have lights at crossings, § 808 *a*.
To have adequate brakes, § 809.
To have time-tables, § 810.
Moving cars irregularly, supra, § 390.
Negligence of persons carrying plaintiff, supra, § 395.
Giving negligent invitation to cross, supra, § 387.
Frightening horses by whistle, see infra, § 836.
Horse cars, distinctive law of, infra, § 820 *k*.
Shooting down car without brakeman, round a curve on a plot of ground belonging to company, but where persons were in the habit of meeting, § 811.

§ 798. *Railroad bound to establish at crossings guards or flagmen proportionate to the risks of such crossings.* — It is elsewhere shown that the diligence of a railroad company must be in proportion to its responsibilities and opportunities.[1] This doctrine is easily applied to the topic immediately before us. A railroad crossing a wilderness can go the whole distance, there being no intervening highway, at full speed without flagmen or guards. A railroad intersecting on level a populous thoroughfare should at the intersection establish not only such guards, consistent with the general duties of the company, as will prevent collision, but should take all other prudent steps to have watchful officers, and to have the train under their control.[2]

[1] Supra, § 47–8; infra, § 806.

[2] See supra, § 47, 48, and cases cited in following sections of this chapter. The following cases are now given as special illustrations: —

A railroad company in transferring two empty platform coal cars from the main to a side track, employed the mode known as the "running" or "flying switch," which is done by attaching the cars designed to be thrown upon the side track to the engine, when the train is put in motion running toward the switch, and before it is reached, and when sufficient momentum to answer the purpose has been acquired, the engine is detached and run ahead of the train, and after it passes, the switch is changed, and the cars thus detached, by the momen-

Flagmen. — It is said that there is no obligation at common

tum thus acquired, are carried along the side track to the point intended: it was held, in thus switching their cars in a populous part of a city of ten or twelve thousand inhabitants, crossing a travelled street and along an alley used by the public, the cars thrown upon the side track having a momentum which carried them at the rate of five miles an hour, the company were guilty of a high degree of negligence, and of which the fact that signals of alarm were given from the engine employed in the switching, intended for a person crossing the side track, who was injured by the cars, would not excuse them. It was held to be gross negligence on the part of the brakeman not to be at the brakes to respond to the signal of "down brakes," given by the engineer, or being there, in failing to put on the brakes. As the company had adopted such dangerous mode of switching, it was imperative that the brakeman should have been so situated as to see in front of his train, and to have had full command of it, so as to have guarded, as far as possible, against inflicting injury. Ill. Cent. R. R. *v.* Baches, 56 Ill. 379.

A train consisting of thirteen empty freight cars was being pushed by an engine along the track on one of the streets in the city of Chicago, at the rate of about four miles an hour; there was a man stationed on the head car for the purpose of watching ahead, and another on the rear car to repeat signals from the former to the engineer, and while the men were attending to their duty in those respects, the train being in motion, a boy about seven years of age undertook to climb up on one of the cars, and, losing his hold, fell under the cars and was seriously hurt. In an action against the company, it was held, there was no negligence on their part in the management of the train; it was not incumbent on the company, under such circumstances, to place a guard on every car, to keep persons off. It was further held, that while a railroad company is held to a very high degree of care and diligence in operating its road through the public streets of a city, yet the care and caution in this respect are required to be exercised in reference to the proper uses of the streets as a thoroughfare for travel, rather than to safety of persons in wrongfully getting on their cars when running. The duty imposed upon the company does not require them to use every absolutely necessary precaution to avoid injury to individuals, or to have employed any particular means which it may appear, after an accident has occurred, would have avoided it; but they are only required to use every reasonable precaution, such as would have been adopted by a very prudent person, prior to the accident. Chic., Bur. & Q. R. R. *v.* Stumps, 55 Ill. 367.

While a street railroad company has a right to run its cars on a public street, yet the public have also a right to travel on the street, and the railroad company must exercise such care and precaution for the purpose of avoiding accidents, as a reasonable prudence would suggest. It is further held that a street railroad company has only an equal right with the travelling public to the use of the street where its track is laid, with a few exceptions, — such as, that the cars run on a track, and when a vehicle meets a car it must give way. So it must be held that a person is entitled to walk on a street railroad track in a public street, using reasonable care and prudence to

law to have a flagman at a crossing, unless such an obligation has

avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part. Shea *v.* Potrero & Bay View R. R. Co. 44 Cal. 414. See, as to horse-cars, infra, § 820 *l*.

Repairs of a railroad track were attempted to be made without interfering with the passage of the trains. The times of the passage of such trains were well understood, and to insure safety it was only necessary that the employees of the company should have an accurate time-piece, to enable them so to conduct the work that the track should be in order, on the arrival of the next train. Held, that it was the duty of the company to see that the men employed in labor of that kind were furnished with a proper time-piece. And it appearing, from the evidence, that the officers of the company paid no attention to that subject, but left the foreman to procure, and attend to the regulation of their own watches; it was held, that on this evidence the jury had the right to pass, and say whether it was or was not negligence in the company thus to conduct itself. Matteson *v.* N. Y. C. R. R. Co. 62 Barb. 364.

When there was evidence that a crossing was of a dangerous character, and there was evidence sufficient for the jury to find that the servants of the company having the control of the particular train which did the injury, were well aware of that fact, it was held, if this were so, and there was evidence tending to show that they ran the train without the use of steam, upon a down grade, in a comparatively noiseless manner, and at a rapid rate of speed, without sounding the whistle or ringing the bell after they passed the whistle post, eighty rods from the crossing, when they had every reason to suppose that persons would be passing over the track on the highway, without opportunity of seeing the approaching train; then these facts were sufficient to warrant the jury in inferring recklessness of life and limb on the part of such servants, and that they were actuated by general malice and criminal misconduct, or very gross negligence. C. B. & Q. R. R. Co. *v.* Payne, 59 Ill. 534. See infra, § 804.

Where a train, in passing through a populous village, was cut in two, and the ten rear cars being separated from the ten front cars and engine by a distance of fifteen or twenty rods, while running across a public street, struck and killed plaintiff's intestate, there being no person on the front car of said rear section on the lookout for and ready to warn persons approaching, and no flagman at the crossing: Held, that these facts were evidence of gross negligence on the part of the company. Rothe *v.* R. R. Co. 21 Wisc. 256.

In Bilbee *v.* The London, Brighton & South Coast Railway Co. (18 Com. B. N. S. 584; 34 L. J. C. P. 182), it appeared that the defendants railway crossed a carriage-road on a level; there were locked carriage-gates and swing-gates for foot-passengers, the trains were frequent, the crossing was on a level, and a bridge near it over the line obstructed the view in that direction. Two trains passed about the same time, and whilst the plaintiff's attention was directed to one, the other knocked him down.

been assumed by a company for itself by custom or by-law.[1] But in a New Jersey case,[2] it was ruled that the passage of two trains in opposite directions, along contiguous tracks, in a populous city, so as to meet at or near a crossing properly used by foot-passengers, without the presence of a flagman, and without lessening their speed, will justify a jury in determining that the railway company was guilty of culpable negligence, although flagmen were kept at the places designated in a city ordinance, and the speed did not exceed what was authorized for one train by the ordinance. And the better opinion is, that it is a duty for the road to place a flagman at all crossings where there is a flow of travellers and a frequent passage of trains.[3] In Massachusetts, however, an omission to provide safeguards of this class cannot be treated as negligence when the evidence is that daily twenty trains on a railroad, and about as many vehicles on a highway, passed over a place where the railroad crossed the highway at a grade, but was in full view from the highway at any point within a hundred and fifty feet of the crossing; it appearing the public authorities never required the establishment of

A verdict having been returned for the plaintiff and a rule *nisi* obtained to set it aside, Erle, C. J., in discharging it, said: "The ground of my decision is, the great degree of risk in this place; there were many trains, it was on a curve and near a bridge. The noises of the different trains would interfere with each other, and the bridge would obstruct the sight, and I am therefore unable to say that the judge was bound to nonsuit."

In Chicago & Alton Railroad Co. *v.* Garvy, 58 Ill. 83, which was an action under the statute for a wrongful killing, it appeared from the evidence that the deceased was killed on a dark night, at the crossing of a public street in frequent use, while attempting to cross a railroad track, by a train of freight cars, which had been detached from the engine, and was running along the track under the control of no person, without any light or signal being given of its approach: Held, that these facts constituted great negligence on the part of the railroad company, for which it must be held responsible for the damages sustained. See infra, § 808 *a*.

[1] McGrath *v.* N. Y. C. & H. R. R. 1 N. Y. Supr. Ct. 213; Ernst *v.* H. R. R. R. 39 N. Y. 69; Warner *v.* R. R. 45 Barb. 239; McGrath *v.* R. R. 3 N. Y. Supr. Ct. 776. See R. *v.* Smith, 11 Cox C. C. 191. See as to switchman infra, § 802; Piper *v.* N. Y. C. & H. R. R. 39 N. Y. Supr. Ct. 290; B. & O. *v.* Worthington, 21 Md. 275.

[2] New Jersey Railroad & Transportation Company *v.* West, 3 Vroom, 91.

[3] Bilbee *v.* London, Brighton & South Coast Railway Co. 18 C. B. (N. S.) 584; Stubley *v.* London & North Western Railway Co., Law Rep. 1 Ex. 13; Rothe *v.* R. R. 21 Wisc. 256; Cliff *v.* R. R., L. R. 5 Q. B. 258; Richardson *v.* R. R. 45 N. Y. 846; Penn. R. R. *v.* Matthews, 36 N. J. 531.

a gate, station agent, or flagman, although the crossing had existed for many years.[1] At the same time, it has been ruled in the same state that the company, in a case where a flagman is required, cannot set up the custom of other roads as an excuse. Thus, in an action against a railroad corporation for running a train over the plaintiff at a crossing where there was a single track and no flagman, a witness, called as an expert by the defendants, cannot be asked what is the custom of railroads in maintaining a flagman at crossings similar to the one in question, or at crossings where there is one track.[2]

[1] Com. *v.* Boston & W. R. R. 101 Mass. 201. Gray, J.: "This indictment is founded on that section of the railroad act which provides that 'if, by reason of the negligence or carelessness of a corporation, the life of any person, being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost, the corporation shall be punished by a fine to be recovered by indictment.' Gen. Sts. c. 63, § 98.

"The negligence or carelessness which is thus made criminal is not confined to the omission to comply with specific requirements of the statutes of the commonwealth, but extends to any want of reasonable care which would give the party injured, if not immediately killed, a right of action against the corporation. And it has been adjudged that compliance with all statute requirements does not exempt a railroad corporation from liability to an action by a party injured by its omission to take all other reasonable precautions. Bradley *v.* Boston & Maine Railroad, 2 Cush. 539; Linfield *v.* Old Colony Railroad Co. 10 Cush. 569; Shaw *v.* Boston & Worcester Railroad Co. 8 Gray, 73. The question whether the defendants had omitted any such precautions was therefore a question for the jury.

"But the commonwealth, in order to support this indictment, must prove that the corporation was negligent, that the deceased used due diligence, and that the negligence of the corporation caused his death. Proof of his death and his diligence does not dispense with the necessity of proving the negligence of the corporation. The negligence alleged in the indictment consisted in leaving the crossing in question wholly unprovided with any suitable gate, or station agent, or flagman. A railroad corporation is not obliged to have a gate, station agent, or flagman at every crossing of a highway, but only at such places and under such circumstances as may reasonably be required for the protection of the public travel in the highways."

[2] Bailey *v.* N. H. & N. R. R. Co. 107 Mass. 496. In deciding this point, Chapman, C. J. said: —

"The thing sought to be proved by these witnesses called experts was not properly a custom by which parties dealing together are bound, and which, when proved, tends to establish their rights as against each other. It was rather a practice of railroad companies as to using or omitting a certain precautionary measure at certain crossings. But the need of a flagman depends much upon the situation and circumstances of each particular crossing, and these must be known in order

§ 799. *Compliance with statutory requisitions not in itself a defence if negligence be proved.* — The fact that a railroad complies with certain statutory prescriptions intended to prevent collisions, does not relieve it from the necessity of adopting other precautions which ordinary prudence would suggest.[1]

§ 800. *Omission to keep track in good order.* — A railroad company is liable for damages resulting from its neglect to keep in order its track laid through a public street or road.[2] Nor is notice necessary. "The presumption of knowledge arises from the existence of the defects themselves."[3] And this duty applies to a road over which the company has a right of way. "A railroad company, when using the track and easement of another similar corporation for the purpose of running their own engine and cars, with their own employees, must be held to observe such precautions for the safety of the public at a crossing as shall be fully equivalent to those which are required in the exercise of reasonable care and prudence at the hands of the corporation whose road they are using."[4]

§ 801. *Erection by company of building in such a way as to prevent traveller from seeing train.* — Where a railroad is arbitrarily and unnecessarily laid across a public highway in such manner

to determine intelligently whether or not there ought to be a flagman there. The practice at each crossing would, therefore, raise a separate collateral issue; and if it were settled, it would not aid us in determining the issue before us.

"In this case, evidence was given in respect to the track, the motion of the train, and other particulars, which was pertinent to the issue, and tends to show how much the necessity of maintaining a flagman must depend upon the particular circumstances of each crossing, and also the circumstances of each occasion of crossing, and how valueless the evidence would be if it took no account of these particulars. It also tends to show that evidence which should undertake to go into these particulars would present cases so unlike, that they would not be pertinent to the issue in this case. We think the evidence was properly excluded."

[1] See supra, § 384–8; Webb *v.* R. R. 57 Me. 117; Bradley *v.* R. R. 2 Cush. 539; Richardson *v.* N. Y. C. R. R. 50 N. Y. 846; Ill. Cent. R. R. *v.* Baches, 56 Ill. 379.

[2] Worster *v.* Forty-second St. &c. R. R. 50 N. Y. 203; Fash *v.* Third Av. R. R. 1 Daly, 148; Cumberland R. R. *v.* Hughes, 11 Penn. St. 141; Mazetti *v.* Harlem R. R. 3 E. D. Smith, 98; G. West. R. R. *v.* Brand, 1 Moore P. C. (N. S.) 101; Virginia Cent. R. R. *v.* Sanger, 15 Gratt. 230.

[3] Church, C. J., in Worster *v.* Forty-second St. R. R. 50 N. Y. 203; Grote *v.* Chester R. R. 2 Exch. 251; Barton *v.* City of Syracuse, 36 N. Y. 54; Griffin *v.* Mayor, 9 N. Y. 456.

[4] Barrows J. — Webb *v.* R. R. 59 Me. 136.

and place that those travelling the highway can neither see nor distinctly hear approaching trains until too late to avoid collision with them, or when a building is erected by the company so as to shut off the view, the company is liable for the collision in the absence of negligence of those injured.[1]

§ 802. *Omission to replace switch.* — The omission to replace switch is *per se* negligence.[2]

§ 803. *Omission to slacken speed.* — This, on approaching a village or crossing where persons are constantly passing, is the duty of those running a train.[3] So, as has been already said, if the engineer sees a person apparently helpless before him, it is his duty to slacken speed,[4] but otherwise when he sees a person apparently intelligent and capable of moving off the track.[5]

[1] Supra, § 386; Mackay *v.* N. Y. Cent. R. R. 35 N. Y. 75; Richardson *v.* N. Y. C. R. R. 50 N. Y. 846.

In the last case, Peckham, J., said: . . . . "A building thus erected by a railroad, which prevented the public from seeing a train until too near for safety, has been held by this court a good ground for recovery. Mackay *v.* N. Y. Cen. R. R. Co. 35 N. Y. 75. It is so in this case.

"Grover, J., was for affirmance, on the ground that the rate of speed of the cars was improper, at that point.

"Folger and Andrews, JJ., concur, on the ground that the defendant, by erecting the watch-house, had obstructed the view."

[2] Caswell *v.* Boston & W. R. R. 98 Mass. 194; State *v.* O'Brien, 3 Vroom, 169; R. *v.* Pargeter, 3 Cox C. C. 191; B. & O. R. R. *v.* Worthington, 21 Md. 275.

[3] Lafayette R. R. *v.* Adams, 26 Ind. 76; Wilds *v.* R. R. 29 N. Y. 315; Black *v.* R. R. West. Jurist, Aug. 7, 1874, 485.

[4] Supra, § 389 *a*. In East Tenn. R. R. *v.* St. John, 5 Sneed, 524, it was held negligence to run over a sleeping boy.

[5] Supra, § 389, and cases there cited; and see also Telfer *v.* R. R. 30 N. J. 188; Lake Shore R. R. *v.* Miller, 25 Mich. 277, cited supra, § 389 *a*.

In Jones *v.* N. C. R. R. Co. 67 N. C. 125, Rodman, J., said: . . . . "In Herring *v.* W. & W. R. R. Co. 10 Ire. 402, it was held, that it was not the duty of the engineer to stop or slacken his train, when he saw a human being on the track ahead of him, unless he knew that the man was drunk or asleep, or otherwise put out of the general rule. As men in general have the instinct of self-preservation, and the power of locomotion, the engineer might reasonably suppose that he would take notice of the danger and get off the track. Under a contrary doctrine, individuals might so embarrass railroads as to make the running of trains practically impossible. The same reasoning will apply, though with somewhat less force, to horses and other animals; they also have the instinct of self-preservation, though combined with less intelligence, and the power of locomotion. It would seem not to be a duty of the engineer to stop or slacken his train whenever he sees an animal on the track. To do so would greatly impair the usefulness of the road, without a corresponding advantage to any one. But it is ad-

§ 804. *Omission to give signals.* — Omission to give signals by sounding a bell or whistle has been held not necessarily negligence,[1] and it is easy to conceive of a case in which such an omission would not amount to negligence. The engine may be passing an open country, in which it is plain no one approaching can avoid seeing the train.

Even where a statute is in force requiring the use of a bell or steam-whistle or other signal at a crossing, while the omission to comply creates a *primâ facia* case against the company, it is a good defence that the plaintiff saw the train, and recklessly exposed himself to the collision. When, however, the injury results from the omission of the signal, then the railroad is liable.[2] But

mitted to be clearly his duty to blow the whistle, for the purpose of frightening the animal. This precaution is usual, requires no sacrifice, and is generally successful. If it appeared that it was omitted on this occasion, it would clearly be evidence of negligence. But it does not so appear. That the whistle may have been blown, is entirely consistent with all the facts proved. So that the question at last resolves itself into this: Was the burden on the plaintiff to prove that the whistle was not blown, or on the defendant to prove that it was? But it is conceded that the burden of proving negligence is on the plaintiff, and this answers the question. Until he proves that the whistle was omitted to be blown (or some similar act), he has not given in evidence any act of negligence."

[1] Supra, § 384; R. *v.* Pargeter, 3 Cox C. C. 191; R. *v.* Gray, 4 F. & F. 1098; Galena & Chic. R. R. *v.* Dill, 22 Ill. 265; Ill. Cent. R. R. *v.* Phelps, 29 Ill. 447; Cook *v.* N. Y. Cent. R. R. 5 Lansing, 401; Havens *v.* Erie R. R. 41 N. Y. 296. See Schwartz *v.* R. R. 4 Robertson, 347; Leav. R. R. *v.* Rice, 10 Kans. 426; Bradley *v.* R. R. 3 N. Y. Supr. Ct. 288; and cases cited supra, § 384.

[2] See supra, § 130, 384; Wakefield *v.* R. R. 37 Vt. 330; Steves *v.* O. & S. R. R. 18 N. Y. 422; Ernst *v.* R. R. 35 N. Y. 9; Renwick *v.* R. R. 36 N. Y. 132; Havens *v.* Erie R. R. 41 N. Y. 296; Wilcox *v.* Rome, W. & O. R. R. 39 N. Y. 358; Eaton *v.* R. R. 51 N. Y. 544; Galena R. R. *v.* Loomis, 13 Ill. 548; St. Louis R. R. *v.* Manly, 58 Ill. 97; Reynolds *v.* Hindman, 32 Iowa, 146; Artz *v.* Chicago, R. I. & P. R. R. Co. 34 Iowa, 153; Spencer *v.* Ill. Cent. R. R. 29 Iowa, 55; Ohio R. R. *v.* Eaves, 42 Mo. 288. Though see St. Louis, J. & C. *v.* Terhune, 50 Ill. 151; Chicago & Alton R. R. *v.* Adler, 56 Ill. 344.

Steam-whistles as signals. — The following report of the Massachusetts Railroad Commissioners appears in the Boston Daily Advertiser of July 24, 1874: —

"The whistle is now commonly used for four purposes:

"1st. As a precautionary warning against a possible danger.

"2d. To notify employees at stations or crossings of the approach of a train.

"3d. As a direction of train movements.

"4th. As a strict danger signal.

"The first use, that of a precautionary warning against a possible danger, would seem to be wholly un-

when crossing a thoroughfare, where its approach is in any way hid, or when passing close to houses in a village or city, there

necessary. Loud and long blasts are, by standing order, habitually given at certain points where the track is hidden or much frequented, to warn possible trespassers of the approach of a train. This is a simple abuse of the signal. The whole community peaceably and legally in their dwelling-places are disturbed that possible trespassers may be saved from the consequences of their own reckless and illegal acts; even so far as these last are concerned, the constant use of the danger signal destroys its value where really needed. There is no good reason for a continuance of this practice.

"The second use — that to notify employees of the approach of trains — is equally unnecessary. At crossings the law prescribes the use of the whistle *or* the bell. Certain of the corporations claim that as the whistle is more effective than the bell, they are forced to use it in self-protection; as in case of accident they are almost uniformly cast in heavy damages unless they can show that they gave the utmost notice which it was in their power to give. This argument is entitled to some weight. Juries are unquestionably very severe on railroad corporations in cases of accidents at crossings, and in the present case it is only just that, in discontinuing the practice of whistling at these points and confining themselves to the use of the bell, the corporations should be able to show, in any future exigency, that they did so with reluctance, and only in obedience to a strongly expressed public opinion and the direct recommendation of this board. At the same time, crossings in all crowded neighborhoods are, or should be, protected by gates or flagmen, and to those not so protected this recommendation does not apply. This covers the case of the outside public at crossings. So far as notice to employees of the approach of trains is concerned, the use of the whistle in crowded neighborhoods is a single relic of the crude expedients made use of in the past. Either employees should see or hear the approaching train to prepare for it, or they should be notified by electric signals. The latter system is the most effective, and will, without question, ultimately grow into general use. It is generally employed elsewhere, especially in Europe, and gives the only reliable notice to employees and the public. It is, however, wholly out of the question that the corporations should, until they are ready to adopt this system, habitually disturb whole communities in order to attract the attention of their own servants. There is no pretence that in this case the use of the whistle is compelled by law. It is a mere matter of convenience to the corporations, which is insisted upon only in utter disregard of the comfort and rights of the public.

"As a train signal, the use of the whistle continually degenerates into abuse. The introduction of the train brake has obviated the necessity of it on passenger trains, except as a danger signal. On freight trains its use is still necessary in a limited degree.

"Finally, as a danger signal, when properly used, the whistle is and will always remain a most important adjunct in the operation of railroads. Its value in this respect is now greatly impaired by its promiscuous use on all occasions; but if it were rigidly reserved as a special signal, no cause of complaint could exist. At present it may well be questioned whether, in its

not only should its speed be slackened, but notice be given by bell in the more crowded neighborhoods, by steam-whistle in the country.[1] So, if the obstructions at the crossing were such as to make it impossible for a person approaching it to see the train, and impossible or very difficult to hear it, in such and similar cases (apart from statutes), "it would be the clear duty of a railroad company to ring the bell or sound the whistle so as to warn persons of the approach of the train, and an omission so to do, even in the absence of any statute requiring it, would be negligence, if so found by the jury, rendering the company liable for any injury resulting therefrom." [2]

effect on invalids and horses, the whistle as now used does not occasion a greater loss even of human life than would ensue from its total suppression on all locomotive engines.

"In accordance, therefore, with the present petition and the evidence adduced in support of it, this board recommends to the railroad corporations the disuse of the whistle within the limits of city of Boston, and other crowded neighborhoods on their lines of road, except in the strictly necessary management of freight trains and as a signal of danger. If the corporations find that they cannot rely upon sight or hearing, but must in some way notify employees at crossings and stations of the approach of trains, the board would then suggest the adoption of a system of automatic signals for that purpose. Recent improvements have made these as effective and reliable in winter as in summer, and their general adoption is a mere question of time. The board has less hesitation in arriving at these conclusions and making the foregoing recommendations in view of the fact that they suggest no novel experiment."

In Indiana, the failure of a railroad train, about to cross a public road, to give notice by bell or whistle, is not of itself negligence, unless peculiar circumstances, such as the concealment of the train, make such notice proper. Bellefontaine R. R. Co. *v.* Hunter, 33 Ind. 335.

[1] See cases cited supra, § 386; and Artz *v.* R. R. 34 Iowa, 160; Maginnis *v.* N. Y. C. & H. R. R. 52 N. Y. 215; Phil. R. R. *v.* Hagan, 47 Penn. St. 244; C., B. & Q. R. R. *v.* Payne, cited supra, § 798.

[2] Cole, J., in Artz *v.* Chicago, R. I. & O. R. R. 34 Iowa, 158; citing Brown *v.* N. Y. C. R. R. 32 N. Y. 597; Beisiegel *v.* N. Y. C. R. R. 34 N. Y. 622; Ernst *v.* H. R. R. R. 35 N. Y. 9; supra, § 386.

In Penn. R. R. *v.* Ackermann, reported in Phil. Legal Gazette for September 7, 1873, Sharswood, J., said: —

"There is no subject which, in my judgment, more loudly calls for legislative regulation, than that of railroad crossings at grade. We are far behind Great Britain, and the countries on the Continent of Europe, in the precautions required to prevent those fearful accidents to passenger trains from collisions which have produced the loss of so many valuable lives, accompanied with the horrible suffering from mangled limbs and bodies. The judicial decisions of the courts, and of this court in particular, have gone as far as they could in requiring the utmost care on the part of the servants of the railroad companies to give

Head lights must be used, when necessary to safety of train and of travellers, however much they may endanger cattle.[1]

§ 805. *So giving signals is not sufficient notice if such signals do not indicate the particular danger.* — It is not enough to ring bell or sound whistle if these do not indicate the danger. Thus in a New York case,[2] it was held that the ringing a bell or the sounding a whistle upon a locomotive attached to a long freight train, which is standing with its rear end partially across a street in a city, is not such notice to passengers upon the street of an intended backward movement of the train as will absolve the railroad company from the charge of negligence.[3]

notice of the approach of trains, and the like care and caution to travellers in attempting to cross. More particularly is this true either in approaching or passing through populous towns or cities.

"If the evidence given by the plaintiff below was to be believed, the railroad company in the case before us was guilty of very gross negligence. It was a dark, foggy morning — snow on the track which deadened the usual rumbling sound of a moving train. They were going, even according to their own account, at a much greater speed than was allowed by the ordinance of the city of Alleghany, through whose streets they were passing. They sounded no whistle, and if they were ringing a bell, it could only have been at intervals, not continuously. Too many entirely indifferent witnesses testified that they did not hear a bell, to lead the mind to any other conclusion. This particular crossing was at the time so obstructed by cars on a siding, that the view of the track could not be had until the traveller was directly upon it. One witness testified that a person could not see up the track without getting out on the middle of it. This resulted, as he said, from a tannery which stood out in the way, and from the manner in which cars stood on the siding, one car standing out partly on the street."

[1] Bellefontaine R. R. *v.* Schruyhart, 10 Ohio St. 116. See Johnson *v.* R. R. 20 N. Y. 65.

[2] Eaton *v.* Erie Railway Co. 51 N. Y. 544.

[3] In this case it was further declared that while a train was thus standing upon defendant's track, plaintiff, desirous of passing upon the street with his horse and wagon, asked a young man who had got off the train, but who it did not appear was in defendant's employ, if he could pass. He was advised not to do so, as the train might back at any time. Plaintiff waited a few minutes, and then attempted to lead his horse across the track in the rear of the train, when the train moved backward, struck and injured the horse and wagon. It was held, that this was not such evidence as constituted contributory negligence as matter of law, but the question was one of fact for the jury.

The running of a train of cars backward through a public street of a city in the night-time, without a light, signal, or warning at the rear end of the train, is sufficient negligence to render the railroad company liable for an injury to one crossing the street; and where a train, which has been thus moving, has so nearly stopped as

§ 806. *Positive proof of signal being given to outweigh negative.* — On an issue as to the ringing the bell on the engine, positive evidence as to that fact is entitled to more weight than negative evidence in relation to it.[1]

§ 807. *Omission to place sign-boards.* — The omission of a railroad company to have a sign-board at a highway crossing to warn persons approaching, as provided by the Iowa statute, does not render the company absolutely liable for injuries to persons or property while attempting to cross the track at such point. Evidence of such omission merely establishes the negligence of the company, and, if it appears that the plaintiff's negligence contributed to the injury he cannot recover.[2]

§ 808. *Omission to keep gates closed.* — The 8 & 9 Vict. c. 20 (the Railway Clauses Consolidation Act, 1845), s. 47, enacts that, "If the railway cross any turnpike road or public carriage-road, on a level, the company shall erect, and at all times maintain, good and sufficient gates across such road on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway; and the person intrusted with the care of such gates shall cause the same to be closed as soon as such cattle, horses, carts, or carriages shall have passed through the same, under a penalty of forty shillings for every default therein."

The construction put upon this section is to make the road a highway only when the gates are opened by one of the company's

to appear to be standing still, it is not negligence *per se* for a passenger upon the street to attempt to cross in the rear of the train.

The court charged that if they (defendant's employees) gave the train a sudden and undue impetus, it was evidence of negligence. Held, that the fair import of the charge was, that if the impetus given was, under the circumstances of want of light, signal, or warning, improper, it was evidence of negligence, and, as thus construed, the charge was correct. Maginnis *v.* N. Y. C. & H. R. R. Co. 52 N. Y. 215.

[1] Chic., Bur. & Q. R. R. *v.* Stumps, 55 Ill. 367.

[2] Dodge *v.* Burlington, C. R. & M. R. R. Co. 34 Iowa, 370.

servants; and if, there being no servant there, though after waiting a reasonable time, a passenger opens the gates and attempts to pass through with his horse and carriage and damage ensue to him, the company will not be liable.[1] And as the company, by shutting the gate, can entirely preclude a collision, it is properly held (separating in this case from the rulings as to merely cautionary signals), that the leaving a gate open, when an act of the legislature requires it to be closed on the approach of a train, is such negligence as makes the company responsible for damages.[2]

§ 808 *a*. *Lights at crossings.* — Where there is an established level crossing, it is the duty of the company to place lights at night at such crossing;[3] but this does not apply where there is no foot-path.[4]

§ 809. *Omission to have adequate brakes.* — Railroad companies are bound to supply their trains with brakes, and if a person is injured on or crossing a track, and the injury could have been avoided by the use of brakes, the omission to have them, or to use them, would be such negligence as would render them liable to the person injured. If they are obliged to have some brake, the public safety requires that it should be the best in use. They

[1] See Wyatt *v.* The Great Western Railway Co. 6 Best & S. 709; 34 L. J. Q. B. 204.

[2] Stapley *v.* London & Brighton Ry. Co., Law Rep. 1 Exch. 21; Wanless *v.* N. E. Ry. Co., Law Rep. 6 Q. B. 480.

In Wanless *v.* N. E. R. R. Co. the defendants' railway crossed on a level a public carriage-way and footway. There were gates across the carriage-way and a swing gate for the use of foot-passengers. The gates on the down side of the line being open, the plaintiff entered on the railway at a time when a train on the up side was passing, intending to cross as soon as that train had passed. While he was on the railway, another train, on the down side, which he could have seen if he had looked, knocked him down and injured him. In an action against the defendants for negligence, the jury found for the plaintiff, and leave was reserved to enter a nonsuit if the court should be of opinion that there was no evidence of negligence on the part of the defendants.

Held (Bramwell, B., dissenting), that there was some evidence of negligence on the part of the defendants to go to a jury, inasmuch as it was the duty of the defendants under 8 Vict. c. 20, § 47, to keep the gates closed when trains were approaching, and the fact of the gates on the down side being open was an intimation to the plaintiff that the down line was safe. Stapley *v.* London & Brighton Ry. Co., Law Rep. 1 Ex. 21, affirmed.

[3] Nicholson *v.* R. R. 3 H. & C. 534; Chic. & A. R. R. *v.* Garvey, 58 Ill. 83.

[4] Paddock *v.* R. R. 16 Law Times N. S. 639.

cannot use an old brake which will stop a train in less than 1,000 feet, when running ten miles per hour, when other companies use brakes that will stop a train in 500 feet, running at the same rate of speed.[1] So the faithful use of the brakes is required.[2]

§ 810. *Omission to have time-tables.* — So far as concerns operatives on the road this may be negligence.[3] But the omission to provide regulations for the movement of trains engaged in and about the freight and engine-houses and depots of the company is not negligence, such a mode of regulation being impracticable ;[4] at the same time it is practicable to prescribe in what manner engineers and conductors shall give notice of the approach of an engine, with or without cars, when trains are being made up, or moving about freight-houses, depots, or engine-houses. And if proper precautions are not taken for the protection of life and limb from injury by such engines and trains, a person injured, who is not an employee of the company, has just cause of complaint, and is entitled to recover damages for any injury sustained by reason of the omission of the company to adopt all reasonable guards against liability to injury.[5]

§ 811. *Shooting car, without brakeman, round a curve on a plot of ground belonging to the company, but where persons were accustomed to congregate.* — If a dangerous agency is let loose in a place where persons are likely to be, it is no defence, as has been already seen, that they are trespassers.[6] Hence it has been correctly held, in Pennsylvania, where the agents of a railroad company detached a car and permitted it to run loose, without a brakeman, round a curve on a piece of ground belonging to the company, to a place where persons were accustomed to congregate, whereby a boy standing on the track was injured, that the company were liable for the injury.[7]

[1] Costello *v.* The Syracuse, B. & N. Y. R. R. Co. 65 Barb. 92.

[2] Ill. Cent. R. R. *v.* Baches, 56 Ill. 379.

[3] Matteson *v.* R. R. 62 Barb. 364, cited supra, § 798.

[4] See Phil. & R. R. R. *v.* Spearen, 47 Penn. St. 300.

[5] Haskins *v.* N. Y. Cent. R. R. 55 Barb. 129.

[6] Supra, § 344, 345, 364.

[7] Kay *v.* Penn. R. R. Co. 65 Pa. State, 269. Agnew, J.: "But the learned judge in the court below rested his conclusions as to negligence chiefly on the decisions in Phila. & Read. Railroad Co. *v.* Hummel, 8 Wright, 375, and Gillis *v.* Penna. Railroad Co. 9 P. F. Smith, 129. . . . . Nor is Gillis *v.* Railroad Co. 9 P. F. Smith (5 Penn. St.), any more applicable. That case was well decided on its cir-

cumstances, but its principle does not touch this case. The precise ground on which the decision is rested, is that the railroad company had done nothing to invite the public upon the platform that gave way, and therefore no duty lay on them to maintain such a structure as would support the dense crowd, that out of curiosity perilled their persons upon it. The platform was in no sense a public way, but was erected for the accommodation of passengers arriving and departing in the train. Though it was open, and a general permission to pass over, yet the plaintiff had no legal right there, and his presence was in nowise connected with the purposes for which the platform was erected. He was there merely to enjoy himself and gratify his own feelings, and by no act of the company." But Sharswood, J., proceeds to say: "Had it been the time for the arrival or departure of the train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stand in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand upon it. As to all others, they were liable only for wanton or intentional injury." Thus in Gillis *v.* Railroad Co., it will be seen that the negligence alleged was purely of a negative character, in omitting to keep up a structure sufficient to bear the weight of a crowd unexpectedly and exceptionally gathered upon it, for their own curiosity, and for no purpose connected with the use of the railroad. But in the present case the negligence charged consisted of a positive act of carelessness, in sending a car around a curve out of sight, on a descending grade, at a place where persons might be expected to be, from the permissive use suffered by the company. It was the duty of the court therefore to have submitted the facts to the jury for their determination, whether there was negligence or not."

CHAPTER III.

INJURIES CAUSED TO TRAVELLERS AND VISITORS BY OWNERS OF LAND OR HOUSES.

I. Obstructions and defects in highways, § 815.
Persons placing defect on highway liable, § 815.
Making excavation on and under highway, § 816.
Necessary obstruction of highway in building, loading, &c., § 816 *a*.
Owner out of possession not liable for tenant's negligence, § 817.
No defence that negligence was by contractor, § 818.
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Care to be such as careful drivers are accustomed to use, § 820 *a*.
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So of driving rapidly in a crowd, § 820 *d*.
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And for defective carriage, § 820 *g*.
And for driving on wrong side of road, § 820 *h*.
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II. Obstructions and defects in platforms and approaches of railway companies, § 821.
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VIII. Nuisances on watercourses, § 846.
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Degree of care to be exercised in constructing dams, § 847.
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IX. Negligent interference with riparian owner, § 849.

I. OBSTRUCTIONS AND DEFECTS ON HIGHWAYS.

§ 815. *Person placing obstruction on highway liable.* — The duty of the public authorities in making and repairing public roads will be hereafter independently considered. Under the present head we will be limited to the consideration of the obstruction or endangering through the negligence of individuals.[1] And it is a general axiom that an individual who negligently causes a defect on a highway by which travellers are injured is liable for the injury.[2]

[1] Com. *v.* King, 13 Metc. 115; Congreve *v.* Smith, 18 N. Y. 79; Hart *v.* Albany, 9 Wend. 607; Heacock *v.* Sherman, 14 Wend. 58; Balt. *v.* Marriott, 9 Md. 160; Linsley *v.* Bushnell, 15 Conn. 225; Barnes *v.* Ward, 9 C. B. 392; Bush *v.* Steinman, 1 B. & P. 404; Robbins *v.* Jones, 15 C. B. (N. S.) 221. See this topic fully examined in Whart. Crim. Law, 7th ed. § 2414 *et seq.*

[2] No person, whether he be owner or not, has the right to obstruct a highway, either by placing obstructions or making excavations therein. Such obstructions are public nuisances, and may be abated by any person injured thereby. And the person making such obstruction is liable to the injured party for such damages as may be sustained by reason thereof. So, also, digging post-holes in a street is a public nuisance, although it be done in a part of the street not used, nor susceptible of use, by the public, by reason of natural obstructions therein.[1] When the act done is a nuisance, the liability of the party causing it, for the consequences, follows as a matter of course, provided the person injured by such act is himself free from negligence. Wright *v.* Saunders, 65 Barb. 214.

Persons putting obstructions on a public road are not discharged from liability by the fact that the municipal or state authorities are also liable for damage from such nuisance.[2] Nor is it necessary that such obstructions or nuisances should be directly on the road. It is enough if they are so close to it as to make travelling dangerous. Thus in an English case the evidence was that the plaintiff, in passing along a highway at night, fell into a "hoist-hole," which was within fourteen inches of the public way, and unfenced. The hole formed part of an unfinished warehouse, one floor of which the defendants were permitted to occupy whilst a lease was in course of preparation, and the aperture was used by the defendants in raising goods from the basement to an upper floor. It was held, that the defendants had a sufficient occupation of the premises to cast upon them the duty of protecting the hoist-hole; and that the hole was

[1] See infra, § 885.

[2] Tobin *v.* P., S. & P. R. R. 59 Me. 183.

§ 816. *Person making excavation by or under highway is bound to the diligence of a good business man.*[1] — It has undoubtedly been held that a person excavating, though with legal title, under a highway is bound, no matter what may be his care, for the injuries thereby caused to a traveller on the highway.[2] But this is at variance with the principle that no one in exercising a lawful calling is liable for anything more than the diligence of a good business man in such calling;[3] and is inconsistent with more recent and better considered cases, which hold that if such work is done with the care good business men are accustomed to

near enough to the highway to constitute a nuisance.[1]

Even where a bridge is placed by a private person over a highway, with the consent of the road-builders, the person erecting the bridge is liable for injuries sustained by a traveller from defects caused by its decay. Thus, where the defendant, with the consent of a turnpike company, crossed their road with a railroad for his individual use, and raised the bed of the turnpike, passing over it with a bridge, it being his duty to keep the bridge in repair; and the original railing of the bridge having decayed, the plaintiff fell over it on a dark night, and was hurt, it was held that the defendant was liable.[2]

See also Phoenix *v.* Phoenixville Iron Co. 9 Wright, Penn. 135; Perley *v.* Chandler, 6 Mass. 454; Dygert *v.* Schenck, 23 Wend. 446.

Cellar doors and flap doors are often lawfully connected with a public street; and in this case the duty of the owner is limited to covering and guarding the entrances in such a way as good mechanics are accustomed to adopt for such purposes. Fisher *v.* Thirkell, infra; Daniels *v.* Potter, 4 C. & P. 262; Proctor *v.* Harris, 4 C. & P. 337.

Proof of the fact that the defendant dug a ditch across a public sidewalk, and allowed it to remain open in the night-time, with no provision for warning or protecting travellers, establishes negligence, as matter of law, and a refusal to submit this question to the jury is no error. Evidence of permission from the proper city authorities to open such ditch furnishes no defence, where the action is based upon negligence instead of a trespass. Sexton *v.* Lett, 44 N. Y. 430. In this case it was said by Earl, C.: . . . . "It is a well settled rule that a person who interferes with a sidewalk in a city, and leaves it in a dangerous condition, is liable for injuries caused thereby, whether he knew it to be dangerous or not, and irrespective of any permission from the public authorities to do the work from which the injury arises. Creed *v.* Hartmann, 29 N. Y. 591; Congreve *v.* Smith, 18 N. Y. 79; Congreve *v.* Morgan, 18 N. Y. 84."

[1] See infra, § 885.

[2] Congreve *v.* Morgan, 5 Duer, 495; *S. C.* 18 N. Y. 79; Irvin *v.* Fowler, 5 Robertson, 482; Horman *v.* Stanley, 66 Pa. St. 464; Atlanta R. R. *v.* Wood, 48 Ga. 565.

[3] Supra, § 30–54.

[1] Hadley *v.* Taylor, Law Rep. 1 C. P. 53.

[2] Hays *v.* Gallagher, 72 Penn. (22 P. F. Smith) 136.

exercise in such kind of work this is an exoneration.[1] But clearly when the hole is illegal, those concerned in making and contin-

[1] Clark *v.* Fry, 8 Oh. St. 358; Fisher *v.* Thirkell, 21 Mich. 1. In this case Christiancy, J., said: —

. . . . "We think the court erred both in charging as requested by the plaintiff below, and in refusing to charge as requested by the defendants.

"There are some cases in the State of New York which apparently sanction this ruling of the court; and would hold the owners, who made the excavation and the scuttle, responsible for all injuries resulting from the want of its entire safety, though the owner was guilty of no negligence in the manner of its construction; thus making the owner an absolute insurer against all injuries which may arise from it, without reference to his negligence or vigilance; Congreve *v.* Morgan et al. 5 Duer, 495; and the same case on appeal, 18 N. Y. 79; and this though the work was well and safely constructed, and was afterwards destroyed or injured by the act of a wrong-doer. Congreve *v.* Morgan et al. 18 N. Y. 84. And see Davenport *v.* Ruckman, 10 Bosw. 20; and Irvin *v.* Fowler, 5 Robertson R. 482.

"But these cases go upon the avowed principle that such excavations in the public street are unlawful in themselves *ab initio;* and that no person is authorized to make them without affirmative legislative authority (which however I infer might be by resolution or ordinance of the common council. Milhan *v.* Sharp, 17 Barb. 435). And if it be conceded that the construction itself was a wrongful act, and in violation of law, then the consequences which the New York courts have drawn from this fact would seem naturally enough to follow upon common law principles. This is well illustrated by the case of Ellis *v.* Sheffield Gas Co. 2 Ellis & Blackburn, 767, which turns upon this distinction. And if there had been an ordinance of the city of Detroit against making such constructions without special permission of the council, which had not been obtained, or forbidding their construction except in a certain manner, and such ordinance had been violated in constructing this excavation or the scuttle, perhaps the rule of responsibility adopted by the courts of New York might be applicable to the present case. But it is conceded there was no such ordinance of the city of Detroit applicable to the construction of this work (and that no license or permission was obtained from the common council for its construction), and we are satisfied that, at common law, the making of such excavations under sidewalks in cities, and the scuttles therein, for such purposes as this was made and used for, were not treated as nuisances in themselves, or in any respect illegal, unless the sidewalk was allowed to remain broken up for an unreasonable length of time, or the work was improperly or unsafely constructed; though it would afterwards become a nuisance if not kept in repair.

"Judging from the reported cases, the usage or custom of constructing such works in cities seems to have been, in England for a long period, as general as we know it has been in this country. And though we find many decided cases in the English books, for private injuries caused by these structures being out of repair, and indictments for obstructing highways and streets in a great variety of ways, we have been cited to no Eng-

uing the nuisance as well as the owner himself, are liable for injuries thereby produced, irrespective of negligence.[1] When, however, there is a license to excavate (as in laying gas-pipes or sewers), the party so excavating is bound to exercise the diligence of competent mechanics in replacing the road in a state safe for travel.[2]

§ 816 *a*. *Necessary obstruction of highway in building, loading, &c.* — Circumstances may exist when in building, unloading, and other operations essential to business in a city, obstructions are temporarily placed on a highway. The mere fact of such obstructions being so temporarily placed is not of itself negli-

lish cases, and have discovered none in which such works have been held illegal in themselves, when properly and safely made, without any legislative permission, or that of the municipal authorities. Their legality seems, in all cases, to have been assumed by the courts, without any showing of such special authority or any authority. They have been treated as nuisances when allowed to be out of repair, and private actions have frequently been sustained for injuries received in consequence; but we find no intimation of their original illegality, when safely and properly constructed. This will appear from the cases cited below upon the question, whether the landlord or tenant is bound to keep them in repair. And the same view seems to have been quite generally taken in this country, outside of the State of New York.

"The principles of the common law applicable to this question are, we think, clearly stated in Clark *v.* Fry, 8 Ohio State R. 358, which was an action for damages caused by the plaintiff's falling into an excavation made in the sidewalk (or part of the street) in front of the defendant's lot, in the city of Toledo, communicating with the cellar; and the supreme court of Ohio held that the right of transit in the use of the public highways is subject to such incidental, temporary, or partial obstructions as manifest necessity requires; and that among these are the temporary impediments necessarily occasioned in the building and repairing of houses and lots fronting on the streets of a city, and in the construction of sewers and cellars, &c.; that these are not invasions but qualifications of the right of transit on the public highway; and the limitation on them is, that they must not unnecessarily be interposed or prolonged; that such temporary obstructions upon the highway, when guarded with due care to prevent danger to the public, and not unnecessarily extended or continued, are not nuisances, and do not require a license from the municipal authority to legalize them, although suitable regulations by city authorities requiring such obstructions to be properly guarded, and to prevent them from being made in an improper manner or continued unnecessarily, are usual and highly proper."

[1] Congreve *v.* Morgan, 18 N. Y. 84; Congreve *v.* Smith, 18 N. Y. 79.

[2] Drew *v.* New River Co. 6 C. & P. 754; Jones *v.* Bird, 5 B. & A. 837; McCamus *v.* C. G. Co. 40 Barb. 380; Hayes *v.* Gallagher, 72 Penn. St. 136.

gence, unless a statute or municipal ordinance be thereby violated, or unless the obstruction be unnecessarily prolonged, or inadequately guarded.[1]

§ 817. *Owner out of possession not liable for tenant's negligence.* — An owner being out of possession and not bound to repair, is not liable in this action for injuries received in consequence of his neglect to repair.[2] But where the nuisance existed when the property was leased to the tenant, the landlord may be held liable.[3] So the tenant is liable for the nuisance thus retained by him, even though the nuisance was on the premises when leased to him.[4] And both landlord and tenant under the circumstances are jointly and severally liable for the continuation of the nuisance, supposing the nuisance to be on the property when leased, or to be put there with the landlord's connivance.[5]

§ 818. *No defence that work was done by a contractor when the natural effect is a nuisance.* — The rule is now firmly established,

[1] Haight *v.* Keokuk, 4 Iowa, 199; Vanderpool *v.* Husson, 28 Barb. 186; Jackson *v.* Schmidt, 14 La. An. 806. See R. *v.* Russell, 6 East, 427; Passmore's case, 1 S. & R. 217.

[2] Payne *v.* Rogers, 2 H. Bl. 350; Lowell *v.* Spaulding, 4 Cush. 277; Chauntler *v.* Robinson, 4 Excheq. 163; Rich *v.* Basterfield, 4 M., G. & S. 783; Russell *v.* Shenton, 3 Ad. & E. (N. S.) 449; Bishop *v.* Bedford Charity, 1 Ellis & Ellis, 697, which was a case of injury from falling through grating.

. . . . "In Rich *v.* Basterfield, 4 C. B. 783, the owner of premises built a chimney upon it and leased the premises. The tenant, after he entered, lighted a fire, from the smoke of which the plaintiff was injured in his occupation of adjoining premises, and sued the owner to recover damages, on the ground that having erected the chimney and let the premises with the chimney so erected, he had implicitly authorized the lighting of a fire therein. It was held that the injury resulted from the act of the tenant, and the action would not lie, although, as was said by Cresswell, J., the defendant 'enabled the tenant to make fires if he pleased.'

"Where the lease is silent as to who should make repairs, it is the duty of the lessees to keep the premises in repair. Gott *v.* Gandy, 22 Eng. L. & Eq. 173; Leavitt *v.* Fletcher, 10 Allen, 121; Elliott *v.* Aiken, 45 N. H. 36; Estep *v.* Estep, 23 Ind. 114; City of Lowell *v.* Spaulding, 4 Cush. 277; Fisher *v.* Thirkell, 21 Mich. 1."

[3] Rich *v.* Basterfield, above cited; Todd *v.* Flight, 9 C. B. (N. S.) 377; Anderson *v.* Dickie, 26 How. Pr. 105; Davenport *v.* Ruckman, 37 N. Y. 568; R. *v.* Pedley, 1 A. & E. 826.

[4] Coupland *v.* Hardingham, 3 Camp. 398. See Davenport *v.* Ruckman, 37 N. Y. 568.

[5] R. *v.* Stoughton, 2 Saund. 158, note; R. *v.* Kenison, 3 M. & S. 526; R. *v.* Pedley, 1 A. & E. 826; Stapple *v.* Spring, 10 Mass. 74; Vedder *v.* Vedder, 1 Den. 257; Waggoner *v.* Jermaine, 3 Denio, 306; Brown *v.* C. & S. R. R. 12 N. Y. 486.

that where the owner of lands undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injuries which may result from it to third persons, though the work is done by a contractor exercising an independent employment and employing his own servants. But when the work is not in itself a nuisance, and the injury results from the negligence of such contractor, or his servants in the execution of it, the contractor alone is liable, unless the owner is in default in employing an unskilful or improper person as the contractor.[1]

[1] Depue, J., in Cuff *v.* Newark & N. Y. R. R. 35 N. J. 17, citing Elvin *v.* Sheffield Gas Consumers' Co. 2 E. & B. 767; Peachy *v.* Rowland, 13 C. B. 182; Toole *v.* S. & S. Railway Co. 6 H. & N. 488; Steel *v.* The S. E. Railway Co. 16 C. B. 550; Rapson *v.* Cubit, 9 M. & W. 710; Reedie *v.* London & N. W. R. R. Co. 4 Exch. 244; Knight *v.* Fox, 5 Exch. 721; Milligan *v.* Wedge, 12 A. & E. 737; Overton *v.* Freeman, 11 C. B. 867; Packard *v.* Smith, 10 C. B. N. S. 470–480; Butler *v.* Hunter, 7 H. & N. 826; Allen *v.* Hayward, 7 Q. B. 960; Chicago City *v.* Robbins, 2 Black. 418; Storrs *v.* Utica, 17 N. Y. 104; Scammon *v.* Chicago, 25 Ill. 424; McGuire *v.* Grant, 1 Dutcher, 356. See supra, § 186, 440, 535.

"In Bush *v.* Steinman, 1 B. & P. 404, it was held that the owner of lands was liable for all injuries resulting from the negligence of employees engaged in executing work upon the land, though the work was done by a contractor who had contracted to do the work, and who employed the servant through whose negligence the injury happened. In that case, the action was against the owner of lands for causing a quantity of lime to be placed on the highway, by means of which the plaintiff and his wife, in driving along the highway, were overturned and much injured. The defendant, having purchased a house by the roadside, contracted with a surveyor to put it in repair for a stipulated sum. A carpenter, having a contract under the surveyor to do the whole business, employed a bricklayer under him, and he again contracted for a quantity of lime with a limeburner, by whose servant the lime in question was laid in the road. The defendant was held liable. After a recognition as authority, Bush *v.* Steinman was overruled. At first its authority was restricted to liability for negligence in relation to real estate, making a distinction in this respect between the owners of real and personal property; finally, this distinction was abandoned, and the authority of Bush *v.* Steinman was completely denied, and no case which was once esteemed as authority has been more completely overthrown. Quarman *v.* Burnett, 6 M. & W. 499; Hobbit *v.* The London & N. W. R. R. Co. 4 Exch. 254; Painter *v.* Pittsburg, 46 Penn. 213; Blake *v.* Ferris, 5 N. Y. 48; Pack *v.* The City of New York, 8 N. Y. 222; Hilliard *v.* Richardson, 3 Gray, 349. The cases on this subject are collected in the American note to Holliday *v.* St. Leonards, 11 C. B. N. S. 209; and in a note to the case of Painter *v.* Pittsburg, in 3 Am. Law Reg. N. S. 358; 1 Redfield on Railways, § 129; Shearman & Redfield on Negligence, § 79." Depue, J. — Cuff *v.* Newark, *ut supra*.

An owner who excavates a cellar and carries the excavation to the

§ 819. *When a statute permits a railroad to change the course of a highway, this must be done in such a way as not to endanger travellers, and the railroad is liable for injuries caused by its negligence in this respect.* — Where a railroad company is authorized by its charter to divert the location of a highway when this is necessary in the construction of its road, the right must be exercised with due regard to the public safety; and the company will be liable for injuries sustained by travellers on the highway, by reason of its negligence in not erecting proper barriers to guard them from driving into cuts or excavations made in the highway by the company, where such travellers are not in fault themselves.[1] And the same liability attaches where a railroad is licensed to lay its track along, over, or under a public road.[2]

§ 820. *Negligent driving on public road.* — On this point it is only practicable at present briefly to state the following conclusions.

§ 820 *a*. *Care to be exercised is that which careful drivers are accustomed to use.*[3] — Hence a driver who fails to exercise such care and thereby injures another is liable.[4]

§ 820 *b*. *Speed is to be proportioned to danger.*[5] — To drive rapidly on an open country highway, where the danger of collision is slight, is not negligence. On the other hand, rapid driving in a thronged street invokes a peculiar degree of caution,[6] and *a fortiori*, proof of driving in a public street in a city, at the rate of a mile in three minutes and ten seconds, when the law limits

curbstone for the purpose of constructing a vault under it, is bound to have it securely fenced. An owner about to build, contracted with one to dig the cellar, who employed his own assistants, horses, and carts; with another to do the masonry, the owner finding the stone, lime, &c.; with a third to put up the superstructure. The excavation not being sufficiently guarded, the plaintiff fell in and was injured. Held, that the owner and not the contractor was liable. Homan *v*. Stanley, 66 Pa. St. 464.

[1] Potter *v*. Bunnell, 20 Ohio St. 150; Atlanta R. R. *v*. Wood, 48 Ga. 565.

[2] R. *v*. U. K. Elec. Tel. Co. 9 Cox C. C. 174; Veazie *v*. P. R. R. 49 Me. 119; Hughes *v*. Bost. & Prov. R. R. 2 R. I. 493; Com. *v*. R. R. 2 Gray, 54; Com. *v*. R. R. 101 Mass. 201; Gahagan *v*. R. R. 1 Allen, 187; State *v*. R. R. 1 Dutch. 437; Com. *v*. R. R. 27 Penn. St. 339.

[3] Supra, § 31–46.

[4] See Pitts *v*. Gaince, 1 Str. 635; 2 Ld. Ray. 1402; Hall *v*. Pickard, 3 Camp. 184; Barnes *v*. Hurd, 11 Mass. 57.

[5] Supra, § 48; Davies *v*. Mann, 10 M. & W. 546.

[6] Williams *v*. Richards, 3 C. & K. 81; Garmon *v*. Bangor, 38 Maine, 443.

driving to a mile in eleven minutes, is amply sufficient to charge the driver with the consequences that follow from such driving.[1] So, also, it is the duty of persons who are driving over a crossing for foot-passengers to drive slowly, cautiously, and carefully.[2]

§ 820 *c*. *Suddenly whipping or spurring horse close to traveller.*[3] — So, also, as to suddenly whipping a restive horse close to a traveller.[4]

§ 820 *d*. *Driving rapidly into a crowd* is negligence in proportion to the apparent incapacity of the persons so driven in order to avoid the collision.[5]

§ 820 *e*. *Leaving horse unattended.* — This necessarily exposes the person so negligent to the natural consequences of an unattended horse, moving inadvertently, being meddled with, or taking fright.[6]

§ 820 *f*. *Driver not liable for latent viciousness or defects of horse which he did not know, and which it was not his duty to be acquainted with.* — This results from principles which are hereafter more fully noticed.[7] To those driving horses the doctrine has been more than once applied.[8]

§ 820 *g*. *So as to defective carriage.* — If a collision is caused by a defective carriage, this is negligence in the owner, when the defect was known or ought to have been known by him: otherwise not.[9]

[1] Moody *v*. Osgood, 60 Barb. 644. See Jetter *v*. N. Y. & H. R. R. 2 Keyes, 154.

[2] Williams *v*. Richards, 3 Car. & Kir. 82; Cotton *v*. Wood, 8 Com. B. N. S. 571; Garmon *v*. Bangor, 38 Me. 443.

[3] Where the plaintiff was driving a wagon and three horses along a highway, walking in the usual way at the head of the leading horse on his proper side of the road, and the defendant and his groom were riding at a foot pace (meeting the wagon on the wrong side), when, just as he passed the plaintiff, the groom touched his horse with a spur, whereupon it kicked out and struck the plaintiff, — it was held, that the act of using the spur, when so near the plaintiff, justified the jury in finding negligence.[1]

[4] Center *v*. Finney, 17 Barb. 94; 2 Seld. Notes, 45.

[5] See supra, § 310, 389 *a*; Edsall *v*. Vandemark, 39 Barb. 589.

[6] See supra, § 100, 102–7, 108; infra, § 838; Welling *v*. Judge, 40 Barb. 193; Park *v*. O'Brien, 23 Conn. 339.

[7] See infra, § 920–3.

[8] Hammack *v*. White, 11 C. B. (N. S.) 588; Sullivan *v*. Scripture, 3 Allen, 564.

[9] Welch *v*. Lawrence, 2 Chit. 262. See supra, § 628, 809.

[1] North *v*. Smith, 10 Com. B. N. S. 572.

§ 820 *h*. *Driving on wrong side of road negligence when productive of collision.* — Of course when a road is free from other travellers, a driver may take his own course.[1] He is not, according to the English rule, bound to keep on the regular side of the road; but if he does not do so, he should use more care and keep a better lookout to avoid concussion than would be necessary if he were on the proper side.[2] In this country statutes exist in several states requiring travellers to take the right of the centre of the road where passing others; and even when there are no such statutes, the custom to this effect is so universal that a collision produced by violating it is regarded as negligent.[3] Yet the fact that a driver is on the wrong side of the road will not excuse another for negligently driving into him.[4] And while the rule is strictly applied to persons driving in the dark,[5] it is relaxed in favor of a heavy wagon when meeting one much lighter and more capable of moving on one side;[6] in favor of a person turning into the road from a cross road,[7] and *a fortiori* in favor of a horse-car, which cannot move at all off its track.[8] Nor does it apply to one driver seeking to pass another on the same road. The former, being behind, must pick out the safest way of passing, which he takes at his peril.[9]

§ 820 *i*. *Noise and violence in driving, causing another horse to take fright.*—As will be hereafter seen this is on general principles negligence.[10] Hence a noisy and violent driver, causing another's horse to take fright, is liable for the consequences.[11]

[1] Aston *v*. Heaven, 2 Espinasse, 533; Foster *v*. Goddard, 40 Maine, 64.

[2] Plucknall *v*. Wilson, 5 C. & P. 375; Boss *v*. Litton, Ibid. 407. See Turley *v*. Thomas, 8 C. & P. 103; Wayde *v*. Carr, 2 D. & R. 255.

[3] Kennard *v*. Burton, 25 Maine, 39; Brooks *v*. Hart, 14 New Hampshire, 307; Earing *v*. Lansing, 7 Wendell, 185; Kennedy *v*. Way, Bright. R. 186.

[4] See supra, § 345, 388, 400; Davies *v*. Mann, 10 M. & W. 546; Spofford *v*. Harlow, 3 Allen, 176.

[5] Cruden *v*. Fentham, 2 Espinasse, 685.

[6] See Grier *v*. Sampson, 27 Penn. St. 183.

[7] Lovejoy *v*. Dolan, 10 Cushing, 495.

[8] Hegan *v*. Eighth Av. R. R. 15 N. Y. 380. See Suydam *v*. Grand St. R. R. 41 Barb. 375; Wilbrand *v*. Eighth Avenue R. R. 3 Bosw. 314.

[9] Avegno *v*. Hart, 25 La. An. 235; Bolton *v*. Colder, 1 Watts, 360.

[10] See infra, § 835 *b*.

[11] Burnham *v*. Butler, 31 N. Y. 480; Rowe *v*. Young, 16 Indiana, 312; Welch *v*. Lawrence, 2 Chit. 262.

§ 820 *k*. *Passing another on road.* — This, as has just been seen, involves liability for any consequent damage.[1]

§ 820 *l*. *Railroad cars and sleighs.* — The rule as to steam-cars has been already noticed.[2] Horse-cars are less likely to inflict damage, but even as to these, from their noiselessness and their heavy momentum, the rule applies that bells should be used (except when forbidden on Sundays by local ordinance), and that at night they should display lights.[3] Care is exacted from the driver of such car in proportion to the danger with which the travel is attended.[4] Horse-railroads, like all other railroads, are liable for non-repair of track.[5]

For *sleighs* the usage is to require bells, but the mere want of bells by a colliding sleigh is not negligence, without proof that the collision was thereby caused.[6]

§ 820 *m*. *Drunken driver.* — For a master to employ a drunken driver is negligence in the master whenever the knowledge of the driver's habits is imputable to him.[7]

§ 820 *n*. *Contributory negligence.* — This topic has been already specially discussed.[8]

II. OBSTRUCTIONS AND DEFECTS ON PLATFORMS AND APPROACHES OF RAILROAD COMPANIES.

§ 821. *Railroad company must keep its platform and approaches in safe condition.* — So far as concerns the relations of railroads to passengers, this topic has been already discussed.[9] A railroad company, however, it must be remembered, being a common carrier on a large scale (offering to carry all who apply), makes its approaches thoroughfares. Those approaches, therefore, it must keep in safe condition for the public as well as for its particular customers.[10] "They" (railroad corporations) "are

[1] Avegno *v*. Hart, 25 La. An. 235; Burnham *v*. Butler, 31 N. Y. 480.

[2] Supra, § 798 *et seq*.

[3] Johnson *v*. Hudson Riv. R. R. 29 N. Y. 65; Shea *v*. R. R. 44 Cal. 414.

[4] Supra, § 48; Com. *v* Met. R. R. 107 Mass. 236; Mangam *v*. Brooklyn City R. R. 38 N. Y. 455.

[5] Worster *v*. R. R. 50 N. Y. 203.

[6] Parker *v*. Adams, 12 Mete. 415. See Kennard *v*. Burton, 25 Me. 39; Burnham *v*. Butler, 31 N. Y. 480.

[7] Sawyer *v*. Sauer, 10 Kans. 466; Frink *v*. Coe, 4 Greene, 555.

[8] See supra, § 300–400; and see also Park *v*. O'Brien, 23 Conn. 339; Welling *v*. Judge, 40 Barb. 193.

[9] See supra, § 652.

[10] Cases cited supra, § 652; Cormman *v*. R. R. Co. 4 H. & N. 781; Martin *v*. Great N. R. R. 16 C. B. 179 (a case of bad lighting); Longmore *v*. R. R. Co. 19 C. B. N. S. 183; Davis *v*. L., B. & C. R. R. 2 F. & F.

bound to keep in a safe condition all portions of their platforms and approaches thereto, to which the public do or would naturally resort, and all portions of their station grounds reasonably near the platform, where passengers, or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go." [1]

§ 822. But what is required from the company is not a war-

588; Sawyer *v.* R. R. Co. 27 Vt. 277; Murch *v.* R. R. Co. 9 Foster, 9; Frost *v.* R. R. Co. 10 Allen, 387; McDonald *v.* Chicago & N. W. R. R. 26 Iowa, 124; Knight *v.* P., S. & P. R. R. 56 Me. 505; Tobin *v.* P., S. & P. R. R. 59 Me. 183; Liscomb *v.* N. J. R. R. 6 Lansing, 75; Memphis & C. R. R. *v.* Whitfield, 44 Miss. 406.

[1] Dillon, C. J., in McDonald *v.* Chic. & N. W. R. R. 26 Iowa, 124; approved in *S. C.* 29 Iowa, 170; and Jeffersonville, &c. R. R. *v.* Riley, 39 Ind. 586.

Refreshment rooms and a coal cellar at a railway station were let by the company to one S., the opening for putting coals into the cellar being on the arrival platform. A train coming in whilst the servants of the coal merchant were shooting coals into the cellar for S., the plaintiff, a passenger, whilst passing in the usual way out of the station, without any fault of his own, fell into the cellar opening which the coal merchant's servants had negligently left insufficiently guarded: it was upon this held that S., the occupier of the refreshment rooms and cellar, was responsible for this negligence. Pickard *v.* Smith, 10 Com. B. N. S. 470.

In Holmes *v.* The North Eastern Railway Co., L. R. 4 Ex. 254; 38 L. T. Ex. 161, it appeared that a coal depot of a railway company had a railway siding, under which were cells, into which the coals were tipped from the trucks, so as to fall into the carts of the consignees, which were backed into the cells from the roadway, which was at a lower level than the railway. It was the practice of the persons coming to receive the coals to assist the defendants' servants in tipping their coals, and for that purpose they passed along a flagged pathway, on the siding, running by the side of the trucks. Some coals arrived consigned to the plaintiff, who went to receive delivery, but found that his truck could not be tipped as the cells were all full. With the permission of the station-master, he passed along the flagged pathway till he came to his coals, stepped on to the buffer of the truck, and threw down some pieces of coal to the roadway, where his servant was with a cart. He stepped back on to the flagged way, and one of the flags, which was in an insecure state, gave way and he fell into one of the cells, and was injured. Upon these facts it was held, that although the plaintiff in getting his coals was not doing so in the ordinary mode, yet the defendants were under the same obligation to provide for his safety, as if he had been pursuing the ordinary mode, and that he was not a mere licensee, but engaged with the consent of the defendants in doing something incidental to the completion of the contract between himself and the defendants, in which both he and the defendants had an interest, and, therefore, the defendants were bound to take due and reasonable care for his security upon their premises.

ranty of the safety of everybody from everything, but such diligence as a good business man is in such matters accustomed to use.[1] That this is the limit of the company's liability is illustrated by a curious English case,[2] where it appeared that the plaintiff was bitten by a stray dog at a railway station, while waiting for a train. It was proved that at 9 P. M. the dog flew at and tore the dress of another person on the platform; that at 10.30 he attacked a cat in the signal box near the station, when the porter there kicked him out, and saw no more of him; and that he made his appearance again at 10.40 on the platform, where he bit the plaintiff. It was held by the common pleas that there was no evidence to warrant a jury in finding that the company had been guilty of any negligence in keeping the station reasonably safe for passengers.

III. OBSTRUCTIONS AND DEFECTS ON APPROACHES TO SHIPS.

§ 823. *So as to shipping companies and dock companies to give safe access to ships.* — The same duty, it has been seen,[3] applies to the giving safe access to ships. The principle has been applied to dock companies in a case[4] where the evidence was that the defendants, a dock company, provided gangways from the shore to the ships lying in their dock, the gangways being made of materials belonging to the defendants and managed by their servants. The plaintiff went on board a ship in the dock at the invitation of one of the ship's officers, and, while he was on board, the defendants' servants, for the purposes of the business of the dock, moved the gangway, so that it was, to their knowledge, insecure. The plaintiff, in ignorance of its insecurity, returned along it to the shore, the gangway gave way, and he was injured. It was ruled that there was a duty on the defendants toward the plaintiff to keep the gangway reasonably safe, and that he was entitled to recover damages from them for the injuries he received.[5]

[1] Sweeny *v.* O. C. R. R. 10 Allen, 385; Toomey *v.* L., B. & C. R. R. 3 C. B. (N. S.) 146; Foy *v.* L., B. & C. R. R. 18 C. B. (N. S.) 225; Crafter *v.* Met. R. R., L. R. 1 C. P. 300; Corrman *v.* E. R. R. 4 H. & N. 781. See supra, § 634–5.

[2] Smith *v.* Great E. R. R., L. R. 2 C. P. 4.

[3] Supra, § 655–7.

[4] Smith *v.* London & Saint Katharine Docks Company, L. R. 3 C. P. 326.

[5] Defendants leased a pier to another party, the lessee agreeing to

IV. OBSTRUCTIONS AND DEFECTS IN INCLOSURES BELONGING TO A PRIVATE PERSON.

§ 824. *Wanton negligence to trespassers creates liability.* — The law in this respect has been already noticed. As against ordinary trespassers who pass over land the erection of spring-guns makes the owner liable for any damage thereby produced;[1] and so as to the erection by him of any dangerous engine which in the natural order of things would be meddled with by loiterers in the neighborhood.[2]

§ 824 *a*. *No liability for the ordinary imperfection of private grounds.* — But for the ordinary imperfections of his private grounds, the owner of the land is not liable.[3] At the same time it must be kept in mind that he is bound to keep his premises in such order that visitors, and persons on business when acting prudently, will not be injured; and if dangerous places exist by which they, exercising such prudence, might be hurt, his duty is to give notice of the danger.[4]

keep the same in repair. At the time of leasing there was a defect in the pier, in consequence of which plaintiff's intestate received the injury whereof he died. The accident happened after the lessees had taken possession. Held, that defendants were liable for such injury. Fish *v.* Dodge, 4 Denio, 311; Moody *v.* Mayor of New York, 43 Barb. 282; Davenport *v.* Ruckman, 37 N. Y. 568; Swords *v.* Edgar, 1 N. Y. Supr. Ct. add. 23.

[1] Supra, § 345–7.

[2] Supra, § 350; infra, § 860; Railroad *v.* Stout, 17 Wall. 659.

[3] Gautret *v.* Egerton, Law R. 2 C. P. 371; supra, § 351.

[4] Infra, § 885; Holmes *v.* N. E. R. Co., L. R. 4 Exch. 254, and cases cited supra, § 821; Chapman *v.* Franco. Iron Works, 99 Mass. 216; Sweeny *v.* O. C. R. R. 10 Allen, 368. Though see Southcote *v.* Stanley, 1 H. & N. 143, and cases commented on, supra, § 349.

Where A., who was the owner of a storehouse and lot in the city of Rome, left at the rear of such storehouse an excavation walled up for the purpose of giving light to the cellar of such storehouse, and B., who, on an alarm of fire, went down to the storehouse adjoining the house in which the fire was, and entering at the front door went through the store, and going through the back door turned off the gangway, across the opening, and fell in and was injured. Held, that the digging of an open space in the rear of the storehouse by A. upon his own ground was a lawful act by him, and he had the right to keep it there as an appurtenant right for the use of his property, and B. falling in by accident, the same not being near to a public street or crossing, gave no right to recover damages from A. as a wrong-doer in the premises, and B. going there on account of the fire did not change the rule. Kohn *v.* Lovett, 44 Ga. 251.

In Morgan *v.* City of Hallowell, 57 Me. 377, Barrows, J., said: "In the

V. OBSTRUCTIONS AND DEFECTS IN PRIVATE HOUSES.

§ 825. *Defects ordinarily incident to houses.* — Defects in a house, such as are incident to the ordinary wear of housekeeping,

ancient case of Blyth *v.* Topham, Cro. Jac. 158, 159, cited in Comyns's Digest, Action upon the Case for a Nuisance, C, it was held that 'the action does not lie, if a man makes a ditch in his waste, which lies near the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste.' Modern legal learning has never improved upon nor controverted the terse statement of rights, faults, and liabilities here made. It recognizes fully the right of him who, having the dominion of the soil, without malice does a lawful act on his own premises, and leaves the consequences of an accident thereby happening where they belong, upon him who has wandered out of the way, though he may have been guilty of no negligence in the ordinary acceptation of the term. It is purely *damnum absque injuria*." . . .

Every person who occupies land, who allows wells or mining shafts to remain on his land unguarded and unprotected, is responsible in damages to all persons who sustain injury from falling into them, provided they were lawfully traversing the land on which the shaft or well existed, and fell into it without any negligence or misconduct on their part; but if, however, they were at the time trespassers on the land, they would not be entitled to maintain the action. Hardcastle *v.* The South Yorkshire Railway Co. 4 Hur. & N. 67; 28 L. J. Ex. 139. See infra, § 885. In this case, Martin, B., thus states the law: "When an excavation is made adjoining to a public way, so that a person walking on it might by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage, who might by the sudden starting of a horse be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different. We do not see where the liability is to stop.

"A man going off a road in a dark night and losing his way may wander to any extent, and if the question be for the jury, no one can tell whether he was liable for the consequences of his acts upon his own land or not. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way? And it would be very dangerous if it were otherwise; and if in every case it was to be left as a fact to the jury, whether the excavation was sufficiently near to the highway to be dangerous. When a man dedicates a way to the public, there does not seem any just ground in reason and good sense that he should restrict himself in the use of his land adjoining to any further extent than that he should not make the use of the way dangerous to the persons who are upon it and using it." See Blyth *v.* Topham, Cro. Jac. 158.

So, where the defendants were owners of waste land, which was bounded by two highways, and they worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark, and

but which are the cause of injury to a lawful visitor, attach no liability to the owner or occupier of the house. For the question

fell into the quarry and broke his leg, and then brought an action for the injury; it was held, that the action could not be maintained, as there was no legal obligation in the defendants to fence the quarry for the benefit of the plaintiff who was a mere trespasser upon the land. Hounsell *v.* Smith & others, 7 Com. B. N. S. 731; 29 L. J. C. P. 203. See also Gautret *v.* Egerton, L. R. 2 C. P. 371; 36 L. J. C. P. 191.

Where the appellants were in occupation of the minerals under a field which was in the occupation of the respondent, and they had sunk a shaft in the field for the purpose of getting the minerals beneath it; it appeared that when they had ceased to work the shaft they covered it over in such a manner as not to afford a proper and effectual protection for horses in the field. The respondent turned out a mare to feed in the field, and she fell down the shaft and wa killed, without any negligence on the part of the respondent; and it was held, that the appellants were responsible to the respondent for the injury. Cockburn, C. J., in giving his judgment, said: "The question before us is a nice one; it appears to be novel, and upon which no direct and positive authority can be found.

"The facts lie within a small compass, but there is some difficulty in deciding upon them. The question is this: whether when the minerals below the surface of the ground have been separated from the ownership and occupation of the surface, with a license from the owner to the person to whom the minerals are let to sink a shaft through the surface, it is incumbent upon the last mentioned person to fence off the shaft so as to protect the owner of the surface from injury? There being no statutory enactment upon the subject, no stipulation between the parties, and no evidence of any mining custom, we have to see whether there is any implied contract that it should be done by the occupier of the minerals. . . . . What is the law of reason upon the matter? I think that it is more reasonable that he who does the work which is the cause of danger should avert that danger by all that is reasonably necessary. The owner of the soil does not know when or in what way or to what extent the shaft will be sunk and kept open, and I am disposed to think, and I am ready to act upon my opinion in holding, that the person who sinks the shaft should do what is necessary to render it harmless to the horses and cattle which are likely to feed upon the surface of the ground, and that an obligation arises to that extent." Blackburn, J., also said: "This is not a case in which the respondent is a stranger or a person whose horse had no right to be in the field; if it were so, it is clear that there would be no obligation on the appellants to prevent wrong happening by means of the shaft being left open. In Blyth *v.* Topham (Cro. Jac. 158), it was argued 'that when the mare was straying,' and the plaintiff 'shows not any right why his mare should be in the said common, the digging of the pit is lawful as against him, and although his mare fell therein, he hath not any remedy, for it is *damnum absque injuriâ*. Wherefore an action lies not, and of that opinion were the whole court.'

. . . . "The general rule of law is, that he who has property should so use it as not to injure the property of his neighbor; and it seems to me that

when such liability is mooted in reference to such a visitor is, whether the proprietor exercised in his house the care which good housekeepers are accustomed to exercise.[1] What is such care? Certainly, when we recollect the great varieties of habit and taste in this respect, all that we can ask is that the house, to those visiting it, should be free from those obvious defects of which an occupant not an expert in mechanics would be cognizant. Those latent defects which are either concealed in defective workmanship, or are incident to the ordinary wear and tear of houses, are among those casualties which no man can avoid without the exercise of that extraordinary care and vigilance which the law does not impose.[2] On this principle we can sustain a leading English case,[3] where the declaration alleged that the plaintiff was lawfully in the defendant's house as a visitor by his invitation, and that for the purpose of leaving the house the plaintiff, with the defendant's permission and knowledge, opened a glass door of the defendants, which it was necessary to open, and that by the carelessness, negligence, and default of the defendant, the door was in an insecure and dangerous condition and unfit to be opened, by reason whereof, and of the carelessness, negligence, default, and improper conduct of the defendant, a piece of glass fell from the door upon the plaintiff and injured him. Upon a demurrer to the declaration, it was held, that it disclosed no cause of action. In giving his judgment, Bramwell, B., says: "I agree with Mr. Gray that a person lawfully in a house has a right to expect that there is no pitfall, as it were, in his way. If a man says to another, 'Come through my garden, to supper,' and there is a steel-trap in the path, which causes personal injury, I am inclined to think that an action would lie, because the leading another into danger would be an act of commission. The present case is not even so strong as the negligence of a servant in permitting a guest to sleep in a damp bed, and that would be merely an act of omission. The declaration is certainly drawn in a way to create a difficulty. It alleges the act to have

a person who opens a shaft and thus makes an alteration in the normal state of things, should take proper steps to fence it in and protect it, so as to prevent injury happening to him who previously had a right to the use of the surface of the soil." Groucott & another, appellants, Williams respondent, 4 Best. & S. 149; 32 L. J. Q. B. 237.

[1] See supra, § 351.

[2] See supra, § 65.

[3] Southcote *v.* Stanley, 1 Hur. & N. 247; 25 L. J. Ex. 339.

been caused by the 'carelessness, negligence, default, and improper conduct of the defendant.' That is only saying, 'If you, the defendant, had looked at the door, you would have found it to be in an insecure state,' and the defendant is not liable for that act of omission. The only difficulty I felt was as to the allegation of 'improper conduct,' but, although obscure, I think it does not amount to anything more, and that the declaration does not disclose any cause of action."

§ 826. *Gross defects known to owner, the natural consequence of which is injury to visitors.* — If a man has such defects in his house, it is negligence for him to invite or even permit visitors, who are not warned of such defects, to enter it. "If a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, express or implied, and not notified of the danger, if the person injured is in the use of due care."[1] A person injured, without neglect on his part, by a defect or obstruction in a way or passage over which he has been induced to pass, for a lawful purpose, by an invitation express or implied, can recover damages for the injury sustained against the individual so inviting and being in fault for the defect.[2] It is on this principle, assuming in each case that the defect is one of which the occupier of the house ought to be cognizant, and the natural consequence of which is to produce injury to visitors, that the following cases can be sustained.

§ 827. A declaration averred that the defendant was in occupation of an office and passage leading thereto from the street, used by him for the reception of customers and others on business; that the passage was the ordinary means of ingress and egress between the office and street; that the defendant negligently permitted a trap-door in the passage to remain open without being properly guarded and lighted, and that the deceased, having been to the office as a customer, was lawfully passing out by the passage, and through the said negligence of the defendant fell through the

[1] Hoar, J., in Coombs *v.* New Bed. Cord. Co. 102 Mass. 572, citing Sweeny *v.* Old Colony & Newport Railroad Co. 10 Allen, 368; Elliott *v.* Pray, Ibid. 378; Zoebisch *v.* Tarbell, Ibid. 385.

[2] Appleton, C. J. — Tobin *v.* P., S. & P. R. R. 59 Me. 188, citing Barrell *v.* Black, 56 Me. 498; Carleton *v.* Franconia Co. 99 Mass. 216. See infra, § 883.

hole of the trap-door and was killed. Upon demurrer, it was held, that a good cause of action was disclosed on the facts stated.[1]

§ 828. A custom-house officer, visiting a store upon his lawful business, was injured by the fall of sugar-bags from a lift over a door on the defendant's premises. No explanation was given of the cause of the occurrence. The fact was, however, held evidence of negligence, as such a passage-way should be guarded from casualties that could be prevented by due care.[2]

§ 829. A gas-fitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed and by appointment with the defendant, to see that it acted properly. The plaintiff, having for this purpose gone upon the defendant's premises, fell through an unfenced shaft in the floor, and was injured. It was proved that the premises were constructed in a manner usual in the defendant's business, that of a sugar refiner, but that the shaft could, when not in use, have been fenced without injury to the business. It was held, that the plaintiff was entitled to recover damages from the defendant for the injury which he had sustained.[3]

§ 830. On the premises of the defendant, within one foot of the sidewalk of a public street, was a descending roll-way leading to the basement of the defendant's block of stores. The entrance to the south store, occupied by the defendant's tenant as a drug store, was up four narrow steps immediately south of the roll-way. In front of the stores north of the roll-way was a continuous platform extending from the north end of the block to the roll-way. The roll-way was unprovided with railing or other safeguard except a buttress on either side thereof rising nine inches above the level of the platform. The plaintiff went upon the north end of the platform in the evening, and while passing along in the exercise of ordinary care for the purpose of entering the drug store on legitimate business, fell into the roll-way and was injured. It was ruled that the place was unsafe and the defendant liable.[4]

[1] Chapman *v.* Rothwell, 1 Ell., Bla. & Ell. 168. See also Shoelbottom *v.* Egerton, 18 Law Times Rep. 364, 889.

[2] Scott *v.* Liverpool Dock Company, 3 H. & C. 596.

[3] Indermaur *v.* Dames, L. R. 2 C. P. 311.

[4] Stratton *v.* Staples, 59 Me. 94. See infra, § 883.

§ 831. *But the occupier of the house not liable for culpa levissima.* — This is one of the fundamental propositions of the law in this respect,[1] and is one of the qualifications of the proposition by which this subject is introduced. The occupier of a house does not insure its safety to visitors; he is liable only for those obvious defects of which an ordinary head of a family would take notice, and of which his visitor is not warned. We have this illustrated by a case[2] under an Illinois statute, where it appeared that the defendants were large tobacco manufacturers, and in the building occupied by them, hogsheads of tobacco and other heavy material were carried from the first floor to the different floors above, by means of an elevator running through hatchways cut in each floor. These hatchways were situated some distance back from the front of the building, away from the office, and out of the reach of persons having business to transact with the house, where no one except the inmates of the house and employees could be reasonably expected to go, and were surrounded, except when the elevator was in use, by railing from three to four feet high. The building was considered very good as to light, and in the basement, from four to six feet from the hatchway in the first floor, a gas jet was kept constantly burning. At the time of the accident, between nine and ten o'clock in the morning, the elevator was in use, carrying hogsheads of tobacco from the first to the fourth floor. Two men were engaged at the work. They would roll a hogshead on the elevator, get on with it, ride to the fourth floor, unload, and descend. While the elevator was thus in use, the deceased fell through the hatchway in the first floor, receiving injuries from which he died. It appeared the deceased, who was a cooper, furnished the defendants with kegs for packing purposes, and was in the habit of bringing them in a wagon to the front door of the building to unload. The first that was known of him about the building on the morning of the accident, was from his cries in the cellar just under the hatchway, while the elevator was at the fourth story with a hogshead of tobacco. Immediately afterward his wagon was found at the door, with a load of kegs upon it. Keeping the mouth of the hatchway unguarded while the elevator was thus in use, was the only negligence imputable to the defendants. It was correctly ruled by the supreme court that while the defendants

[1] See supra, § 57.

[2] Murray *v.* McLean, 57 Ill. 378.

might have prevented the injury by the employment of an additional force, so as to have kept a guard stationed at the hatchway for the express purpose of protecting persons from injury by falling into it, the law imposed no such burden upon men's conduct of their ordinary private business upon their own premises, and that the defendants were not liable.

§ 832. *Defendant liable to trespassers, if, not heeding the fact of the likelihood of their passing through his premises, he places in their way dangerous instruments by which, in the natural course of things, they will be severely injured.* — This point has been already discussed.[1]

§ 833. *Defendant not liable when plaintiff had notice, or was bound to have taken notice, of the defects.* — This position, also, has been already independently discussed.[2] In addition to the illustrations already given, the following may be here introduced: The plaintiff, who was a carman, having been sent by his employer to the defendant for some goods, was directed by their servant to go to the counting-house. In proceeding along a dark passage of the defendants, in the direction pointed out, the plaintiff fell down a staircase, and was injured. It was held, that the defendants were not guilty of any negligence, for if the passage was so dark that the plaintiff could not see his way, he ought not to have proceeded; and if, on the other hand, there was sufficient light, he ought to have avoided the danger. In his judgment, Pollock, C. B., said: "The learned judge, my brother Bramwell, directed a nonsuit, and I think the nonsuit was perfectly right. I am not aware what question could have been left to the jury. It certainly was not the duty of the owners of the premises to have the passage lighted. It is, generally speaking, the duty of every person to take care of his own safety, so as not to go along a dark passage without the assistance of some light to tell him where he is going, and what the danger is that he is to expect. There was no contract, and no public or private duty on the part of the owners of the premises, that they should be in any other or different condition to that in which they were. It, therefore, seems to us that the nonsuit was perfectly correct." [3]

§ 834. *Landlord not liable for injuries to persons invited by*

[1] See supra, § 345.

[2] See supra, § 300 *et seq.*

[3] Wilkinson *v.* Fairrie, 1 Hur. & C. 633; 32 L. J. Ex. 73.

tenant. — The landlord's liability has been already generally noticed.[1] In the present connection it may be sufficient to say that while the landlord is liable to the tenant's visitors for any radical defects in the house which were existing at the time of the lease,[2] he is not liable to such visitors for such defects as are superficial, and capable of remedy, even though such defects were in the house at the time of the lease.[3]

VI. OBJECTS ON HIGHWAYS CALCULATED TO FRIGHTEN HORSES.

§ 835. *Persons placing objects on a highway calculated to frighten horses liable for natural consequences of their act.* — We have already, when treating of causal connections, noticed that it is one of the natural incidents of the employment of horses on a highway that they should be frightened by extraordinary sights and sounds.[4] Those who negligently and unnecessarily, therefore, place such objects on a highway, are liable for the consequences, if damage of this kind result.[5] Nor can the owner of land erect on it, so as to impinge upon a highway, implements, flags, or banners, thus calculated to frighten horses.[6]

§ 836. *Distinction between necessary and unnecessary instruments of alarm.* — Yet it must be remembered that there are some instruments of alarm, *e. g.* steam-whistles on locomotives, which are essential to important industries, and which are tacitly if not expressly licensed by the state. The use of these is not *per se* negligence, though animals be thereby frightened and injury ensue.[7] It is otherwise when the use is not necessary

[1] See supra, § 817.

[2] Godley *v.* Haggerty, 20 Penn. St. 387.

[3] Robbins *v.* Jones, 15 C. B. (N. S.) 221.

[4] See supra, § 107; infra, § 898.

[5] Hill *v.* New Riv. Co., Q. B. 15 L. T. (N. S.) 555; Judd *v.* Fargo, 107 Mass. 265; Jones *v.* Housatonic R. R. 107 Mass. 261, where it was held that a railroad corporation is liable for injuries sustained by a traveller driving a horse upon a highway with due care, through a fright of the horse occasioned by a derrick which the corporation maintained projecting over the highway so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading freight on the cars.

So as to frightening a horse by reckless driving of another horse. Rowe *v.* Young, 16 Ind. 312; supra, § 820 *i.*

[6] People *v.* Cunningham, 3 Denio, 524; R. *v.* Jones, 3 Camp. 230; Jones *v.* Housatonic R. R. 107 Mass. 261; Congreve *v.* Smith, 18 N. Y. 79; Congreve *v.* Morgan, 18 N. Y. 84; Morton *v.* Moore, 15 Gray, 573. As to liability of town, see infra, § 983. As to liability of railroads for frightening horses, see infra, § 898.

[7] See infra, § 898; C., B. & Q. R. R. *v.* Dunn, 61 Ill. 385.

to the industry. Thus it has been correctly held[1] that the proprietors of factories are not entitled to use steam-whistles on their factories, so located, of such a character, and placed in such a manner, as to frighten horses of ordinary gentleness when passing upon the highway adjoining their land; and they are responsible for an injury caused by an unnecessary, alarming, or frightening use of them. It is conceded, however, that the law is otherwise as to whistles upon railroad engines. At the same time, where the whistle is negligently and wantonly sounded, so that horses lawfully in the vicinity are caused to run off and injury is inflicted, it is correctly held that the company is liable.[2] So liability attaches for frightening horses by the negligent discharge of a gun,[3] or the beating of a drum near a highway.[4]

§ 837. *Frequency of travel on a road during duration of nuisance, an incident of causal connection.* — So, as has been already intimated, we must consider, when we take up the question of the natural and ordinary consequences of an act of this character, the amount of travel on a highway. If two or three horses only in the course of a morning are accustomed to pass, and the nuisance only lasts during a morning, then it is not to be expected that of these two or three one should take fright at anything but a very extraordinary object on the road. It is otherwise when a large number of horses of all kinds, are accustomed to pass. Hence in an action in Massachusetts[5] against the proprietor of a farm adjoining a highway, for damage sustained by a person travelling on the highway with due care, through his horses taking fright at a sled with some tubs on it, which the defendant had left on the highway, near one of his out-buildings into which he intended to remove the contents of the tubs, the question whether the sled and tubs were a nuisance which rendered the defendant liable was held to depend upon whether they had remained on the highway for an unreasonable time, and upon that issue it is competent for the defendant to prove that the highway was little frequented, particularly at the time of year when the

[1] Knight *v.* Goodyear's Glove Man. Co. 38 Conn. 438; Chic., B. & Q. R. R. *v.* Dunn, 61 Ill. 385.

[2] Sneesby *v.* R. R., L. R. 9 Q. B. 263; Penn. R. R. *v.* Barnett, 59 Penn. St. 259; Manchester R. R. *v.* Fullerton, 14 C. B. N. S. 54; Toledo, W. & W. R. R. Co. *v.* Harmon, 47 Ill. 298; Hill *v.* R. R. 55 Me. 438; and see infra, § 898.

[3] Cole *v.* Fisher, 11 Mass. 137.

[4] Loubz *v.* Hafner, 1 Dev. (Law) 185.

[5] Judd *v.* Fargo, 107 Mass. 264.

accident occurred; but not that the state of things in the outbuilding was such as to render it convenient for him to leave the sled and tubs on the highway, nor that his neighbors were accustomed to do so under similar circumstances; and it was held that the use made of highways by others under such circumstances does not determine his liability.[1]

§ 838. *If horse be negligently left unattended plaintiff cannot recover.* — This results from principles heretofore announced.[2] Thus it has been rightly held in Illinois,[3] in an action against a telegraph company for the loss of the plaintiff's horse and wagon, occasioned by the alleged negligence of the defendant's servants, while engaged in repairing a telegraph line on one of the streets in the city of Chicago, in so handling a broken wire as to strike the horse, thereby frightening him and causing him to run, resulting in his death, that as it appeared that the driver had left the horse, attached to a wagon, standing loose in the street, the negligence of the driver, in failing to secure the horse properly, or have him under his control, was a bar to recovery.[4] Yet it is

[1] Ames, J.: "Upon the question whether the use which the defendant was making of the public highway adjoining his own land was reasonable, he was entitled to show, if he could, that it was an obscure cross-road, but little frequented by travellers at all seasons, and particularly at the time of year when the accident happened. The rule is laid down in O'Linda *v.* Lothrop, 21 Pick. 292, that, in deciding what may be deemed a proper and reasonable use of a way, public or private, much must depend on the local situation, and much upon public usage. Carriages may stand, and goods may be received, at the door of the adjoining proprietor, although some temporary inconvenience to travellers may thereby be occasioned. All that the law requires in such a case is, that the obstruction shall not be continued for an unreasonable length of time. Commonwealth *v.* Passmore, 1 S. & R. 217, 219; People *v.* Cunningham, 1 Denio, 254. The standing of a carriage, or the delivery of coals or other bulky articles, by the roadside, in a crowded thoroughfare in a populous city, might occasion so great and general an inconvenience that the reasonable time for the removal of the obstruction would allow no delay that could be avoided. The same kind of obstruction in a country road, but little frequented by travellers, might continue for a much longer time, without amounting to a substantial or practical obstruction to the public right. The measure of diligence and reasonable time would be different in the two cases. It appears to us therefore that the evidence offered by the defendant as to the amount and frequency of the travel upon that road, so far from being immaterial, was competent and important, and should have been received."

[2] Supra, § 102, 300, 820 *e*; infra, § 898.

[3] The Western Union Telegraph Company *v.* Quinn, 56 Ill. 319.

[4] In Lynch *v.* Nurdin, 1 Q. B. 29, a

possible to conceive of a case in which a horse is so gentle and accustomed to cars that it may not be negligence to leave him unattended near a railroad track.[1]

VIII. THINGS WHICH MAY FALL UPON AND INJURE TRAVELLERS.

839. *Negligence to permit things to remain near highway in such a way that in the natural course of events they may fall and injure persons lawfully passing.* — Of this principle the following illustration may be given.

§ 840. It is negligence for a party, in hanging a sign on a windy day in a city, upon an active thoroughfare, to use a swinging stage for the purpose that has no rim, or any other preventive against the sliding off of tools, which may occasion injury to passers on the street.[2]

§ 841. The plaintiff on going to the doorway of a house in which the defendant had offices, was pushed out of the way by a servant of the defendant, who was watching a packing-case which belonged to the defendant and was leaning against the wall of the house. The plaintiff fell and the packing-case fell on his foot, and injured him. There was no evidence as to who placed the packing-case against the wall, or what caused its fall. The court (Martin, B., *dissentiente*) held that there was a *primâ facie* case against the defendant to go to the jury, the fall of the packing-case being some evidence that it had been improperly placed against the wall.[3]

§ 842. As the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers, on which one of the girders rested, and injured the plaintiff. A train had passed just previously. On ex-

case already noticed (supra, § 113; infra, § 860), the defendant had negligently left his horse and cart unattended in the street, and plaintiff, a child seven years old, having got upon the cart in play, another child incautiously led the horse on, whereby plaintiff was thrown down and hurt; and, in answer to the argument, that plaintiff could not recover, having, by his own act, contributed to the accident, it was observed that the plaintiff, although acting without prudence or thought, had shown these qualities in as great a degree as he could be expected to possess them, and that his misconduct, at all events, bore no proportion to that of the defendant.

[1] Supra, § 394.

[2] Hunt *v.* Hoyt, 20 Ill. 544. As to liability of town, see infra, § 982.

[3] Briggs *v.* Oliver, 4 Hur. & C. 403; 35 L. J. Ex. 163.

amination afterwards, other bricks were found to have fallen out. The bridge had been built and in use three years. The jury having found a verdict for the plaintiff, a rule was obtained, pursuant to leave, to enter a nonsuit, on the ground that there was no evidence to leave to the jury. It was held by the exchequer chamber, affirming the judgment of the court of queen's bench, that the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, and that there was evidence from which the jury might infer negligence.[1]

§ 843. *Ice, snow, or water falling from roof.* — When the natural consequence of the structure of a building is that ice, snow, or water, falling from it, injures adjacent property, or travellers

[1] Kearney *v.* London, B. & S. C. R. R., L. R. 6 Q. B. 759.

Kelly, C. B.: "We are all agreed that the judgment of the queen's bench must be affirmed. The declaration alleges a duty on the defendants to maintain and keep in repair the bridge, so that neither it nor any of the materials of which it was constructed should be injurious to any person passing under it. It is not necessary to consider whether any duty was imposed upon the defendants by statute; the defendants were under the common law liability to keep the bridge in safe condition for the public using the highway to pass under it. The declaration charges that the defendants were guilty of negligence; and there can be no doubt that it was the duty of the defendants, who had built this bridge over the highway, to take such care that where danger can be reasonably avoided, the safety of the public using the highway should be provided for. The question, therefore, is, whether there was any evidence of negligence on the part of the defendants; and by that we all understand such an amount of evidence as to fairly and reasonably support the finding of the jury. The lord chief justice, in his judgment in the court below, said *res ipsa loquitur*, and I cannot do better than refer to that judgment. It appears, without contradiction, that a brick fell out of the pier of the bridge without any assignable cause except the slight vibration caused by a passing train. This, we think, is not only evidence, but conclusive evidence, that it was loose; for otherwise so slight a vibration could not have struck it out of its place. No doubt it is humanly possible that the percussion of the iron girder arising from expansion and contraction might have gradually shaken out the mortar, and so loosened the brick; but this is merely conjecture. The bridge had been built two or three years, and it was the duty of the defendants from time to time to inspect the bridge, and ascertain that the brickwork was in good order, and all the bricks well secured. If there were necessity for other evidence, the case is made still stronger by the evidence of the plaintiff, which was uncontradicted on the part of the defendants, that after the accident, on fitting the brick to its place, several other bricks were found to have fallen out. The judgment of the queen's bench must be affirmed." Affirming *S. C.* Law Rep. 5 Q. B. 411.

passing the street on which the building stands, then the owner of the premises is liable for the injury. With regard to the fall of water this point has been long settled. He who fixes to his house a spout or cornice which gathers the water that falls upon his roof, and throws it upon his neighbor's land, is liable therefor.[1] So no man has a right so to construct his roof as to discharge upon his neighbor's land water which would not naturally fall there.[2] "In such a case," says Gray, J.,[3] "the maxim, *Sic utere tuo ut alienum non laedas*, would be applicable. It is not at all a question of reasonable care and diligence in the management of his roof, and it would be of no avail to the party to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against."

The same principle applies to roofs so constructed that ice and snow fall from them on travellers in the street below. Thus it has been held in Massachusetts,[4] that for an injury resulting from the sliding of a mass of ice and snow from a roof upon a person travelling with due care in a highway, the owner of the building is liable, if the roof was subject to his use and control, and he suffered the ice and snow to remain there for an unusual and unreasonable time after he had notice of its accumulation and might have removed it; although all the rest of the building was leased to and occupied by tenants under covenants binding them to keep in repair the premises demised to them. "If," said Chapman, C. J., ... "one's real estate is thus protected, certainly his person must be equally protected. If the water may not be thrown upon his land, it may not be thrown upon his head while he is standing on his land. A traveller in the use of a highway is as much entitled to protection as if he were the owner in fee simple. And, as a formal proposition, it is true that any act of an individual, though performed on his own soil, if it detracts from the safety of travellers, is a nuisance."[5] And in a subsequent trial between

[1] Reynolds *v.* Clarke, 2 Ld. Raym. 1399; *S. C.* 1 Stra. 634; Fay *v.* Prentice, 1 C. B. 828; Bellows *v.* Sackett, 15 Barb. 96; Martin *v.* Simpson, 6 Allen, 102. As to liability of town, see infra, § 982.

[2] Washburn on Easements, 390; Reynolds *v.* Clarke, 2 Ld. Raym. 1399; Tucker *v.* Newman, 11 A. & E. 40; Thomas *v.* Kenyon, 1 Daly, 132; Martin *v.* Simpson, 6 Allen, 102.

[3] Shipley *v.* Fifty Associates, 106 Mass. 194.

[4] Shipley *v.* Fifty Associates, 101 Mass. 251.

[5] Dygert *v.* Schenck, 23 Wend. 447.

the same parties[1] it was ruled that under such circumstances the owner of the building is liable, without other proof of negligence, to a person injured by such a fall upon him while travelling on the highway with due care; and it is immaterial that all the rooms in the building are occupied by tenants, if the owner retains control of the roof.[2]

[1] Shipley *v.* Fifty Associates, 106 Mass. 194.

[2] Ames, J.: . . . . "Water naturally collecting on the surface of his land and naturally passing off upon the land of his neighbor, would not injure the latter in such a sense as to give him a remedy by action. But if the landowner, 'not stopping at the use of his close,' to use the language of Lord Cairns in Rylands *v.* Fletcher, Law Rep. 3 H. L. 330, 339, 'had desired to use it for any purpose which I may term a non-natural use,' the case would stand on very different ground. It has been settled that no one has a right, by an artificial structure of any kind upon his own land, to cause the water which collects thereon in rain or snow to be discharged upon his neighbor's land, either in a current or stream, or in drops. Martin *v.* Simpson, 6 Allen, 102. If the defendants had constructed a reservoir in their attic, to be filled by the rain, they would clearly be liable for damage occasioned to their neighbor by the breaking down of such a reservoir. It can, of course, make no difference that the rain comes in the form of snow, and is lodged on the outside of the roof; in either case it is collected by an artificial structure, for the convenience of one party, without the concurrence of the other. In the case already cited, at an earlier stage, Fletcher *v.* Rylands, Law Rep. 1 Ex. 265, Mr. Justice Blackburn, in giving the judgment which was afterwards affirmed in the house of lords, expresses himself substantially thus: 'Whoever for his own purpose brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril.' He illustrates this proposition by putting various cases in which a party is damnified without any fault of his own, and in which he declares it to be reasonable and just that the neighbor, who has brought something on his own property not naturally there, harmless so long as it is confined to his own property, but which he knows will be mischievous if it should get upon his neighbor's land, should be held responsible to make good all damages, if he should not succeed in confining it to his own property. The case of Fletcher *v.* Rylands was one in which the defendant had constructed a reservoir upon his own ground, which gave way and inundated the plaintiff's mine.

"In the case at bar, it was convenient to the defendants to place their building on the line of the street, and to have their roof so constructed that the snow, which would be harmless if allowed to reach the ground as it falls from the clouds, is intercepted and lodged upon the roof at a great height above the heads of passengers. In the case of a building so situated and so constructed, it is a matter substantially certain and inevitable, that there will be occasions, and perhaps frequent occasions in the winter season, when, with the alternations of the weather common in this climate, the accumulation upon the roof may become very great, so as to come down suddenly upon the sidewalk in a very dangerous

§ 844. *Mere falling not enough; must be something to indicate negligence.* — The mere fact that something on a roof falls is not evidence of negligence on the part of the owner of the house. Snow, for instance, or tiles, may be dislodged by sudden gales of wind; and the mere fact, therefore, of snow or tiles falling to the earth would not be sufficient ground to sustain a suit against the owner of the house. If, however, there is anything to show that the thing fell, as in the cases just cited, through the defective structure of the roof, or through a want of care in repairing the roof, or in permitting it to fall into decay, or through negligence of the owner or his servants in handling the thing that falls, then the owner becomes responsible. Thus, as in a case just cited, where a barrel of flour fell from the upper window of a house and injured the plaintiff, this by itself was held *primâ facie* evidence of negligence, on the ground that in carrying on his trade the defendant would have to move barrels of flour, and the inference to be drawn from a barrel of flour falling from a window in a storeroom (in itself a kind of fall implying negligence) is, that a servant of the defendant had been guilty of negligence in moving it.[1] So, as has been seen, the falling of a bag of sugar from a crane fixed over a doorway was held to be a *primâ facie* case of negligence, on the ground that the accident was one which, in the ordinary state of things, would not happen in the use of machinery.[2] On the other hand, mere proof that a plank and a roll of zinc fell through a hole in the defendants' roof on the plaintiff, and that at the same time a man was seen on the roof, is not *primâ facie* evidence of negligence on the part of the defendant. There was no proof of

manner. Accidents from such causes are well known to be frequent, and as we understand the defence, could not be prevented by any amount of care or diligence under the circumstances of the present case.

. . . . "He has no right so to construct his building that it will inevitably, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed. Ball *v.* Nye, 99 Mass. 582. He must at his own peril keep the ice or the snow that collects upon his own roof within his own limits; and is responsible for all damages, if the shape of his roof is such as to throw them upon his neighbor's land."

In Leonard *v.* Storer, 115 Mass. (reported in Am. Law T. for Sept. 1874, 414), it was held that where the owner lets out the whole building to a tenant with covenant by latter to repair, the tenant and not the owner is liable for things falling from roof.

[1] Byrne *v.* Boadle, 2 H. & C. 722.

[2] Scott *v.* London Dock Co. 3 H. & C. 596.

negligence on the part of this man, nor that he was a servant of the defendants; and hence, said Cockburn, C. J., in order to charge the defendants with negligence, it is necessary to show that the defendants either "knew, or had the means of knowing, or were bound to take steps to know the state in which the roof was. As to that the case is entirely bare of evidence. It does not at all follow that because the roof of a building may require repairing, and a workman is directed to repair it, the person giving the direction knows that the roof is in such a state that if the workman steps upon it, it may give way under him. In the great majority of cases, — I may say in all cases with very few exceptions, — where a person desires to have the roof of a building repaired, he employs some one, not only to repair the roof, but to see to its condition; and if he employ a competent person, the business of that person upon proceeding to repair the roof is to look at its condition, and to see how far it will support him or his workmen in doing the necessary repairs." [1]

§ 845. *Principle the same if the injuring body be dropped through the negligence of a servant.* — Hence a person whose servant carelessly throws a keg out of a window, so that it injures one passing a passage-way below, is liable for such injury, even if his title in the way is such as not to render him responsible for any defect therein, and that he may at any time revoke the permission by which the person injured is passing over it.[2] . . . . "The material question is, whether the keg fell upon the plaintiff's head by reason of the negligence of the defendants' servants. If it did, then, whether this was a public or a private way, and whether the plaintiff was passing over it in the exercise of a public right, or upon an express or implied invitation or inducement of the defendants, or by their mere permission, he was rightfully there, and may maintain this action. Even if he was there under a permission which they might at any time revoke, and under circumstances which did not make them responsible for any defect in the existing condition of the way, they were still liable for any negligent act of themselves or their servants, which increased the danger of passing and in fact injured him." [3]

[1] Welfare *v.* Brighton Railway Co. L. R. 4 Q. B. 693.

[2] Corrigan *v.* Union Sug. Ref. 98 Mass. 577.

[3] Gray, J., citing Gallagher *v.* Humphrey, 6 Law Times (N. S.), 684; Sullivan *v.* Waters, 14 Irish C. L. 474; Indermaur *v.* Dames, Law Rep. 1 C. P.

VIII. NUISANCES ON WATERCOURSES.

§ 846. *Obstacles to navigable streams.* — Any obstacle to travel on a navigable stream is a nuisance, which is abatable by indictment; and injuries arising from which may be redressed by suit instituted by the party injured.[1]

274; Byrne *v.* Boadle, 2 H. & C. 722; Stewart *v.* Harvard College, 12 Allen, 67.

[1] See Wharton Cr. L. § 2419; City of Phil. *v.* Gilmanton, 71 Penn. St. 140; supra, § 254; West River Bridge Co. *v.* Dix, 6 How. U. S. 545; Lansing *v.* Smith, 8 Cow. 146; Monong. Bridge Co. *v.* Kirk, 46 Penn. St. 303. As to flooding, see infra, § 934.

On this subject the following cases will be of interest: —

When the river is a public highway, and the obstruction is a public nuisance, the plaintiffs can only recover for such damage as is peculiar to themselves. Powers *v.* Irish, 23 Mich. 429.

A telegraphic wire, licensed by government, is not *per se* a nuisance, and only becomes such when it blocks navigation. Blanchard *v.* Tel. Co. 3 N. Y. Supreme Ct. 775.

If a stream is capable in its natural condition of being profitably used for any kind of navigation, its use to that extent is subjected to the general rules of law relating to navigation.

Such a stream, generally useful for floating boats, rafts, or logs, or for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passage-way.

The riparian owner has an absolute right to enjoy his lands, in all proper ways; the other party has an absolute right, as one of the public, to navigate the stream; neither can justly deprive the other of his rights and their incidents.

If there had been no necessity for fastening a boom to the plaintiff's land, that act was a trespass; that necessity was a question for the jury.

Keeping such boom fastened too long would be an obstruction; what was a reasonable time for removal of boom is a question for the jury. Weise *v.* Smith, 3 Oregon, 445.

An owner is not bound to raise or remove the hulk of a worthless wreck, sunk in navigable waters, nor is he liable for injuries to other navigators. Winpenny *v.* Philadelphia, 65 Pa. St. 136; Brown *v.* Mallets, 5 C. & P. 599; R. *v.* Watts, 2 Esp. 675.

If instead of abandoning a sunken vessel the owner retains such possession and control of it as it is susceptible of, he is bound to exercise a reasonable degree of diligence in removing it. Ibid. Hancock *v.* York R. R. 10 C. B. 348; Taylor *v.* Atlantic Ins. Co. 37 N. Y. 275.

If he attempts to remove the wreck and fails, the inadequacy of the means will not be proof of negligence. Ibid. In Winpenny *v.* Philadelphia, supra, it was said by Agnew, J.: . . . . "The principle is stated in the 3d vol. Whart. Cr. Law, sec. 2406 (6th edit.), where it is said: 'But if a ship or other vessel sink by accident in a river, although it obstructs the navigation, yet the owner is not indictable as for a nuisance for not removing it.' For this he cites the leading cases of Rex *v.* Watts, 2 Espinasse Rep. 675; and also R. *v.* Russell, 9 D. & R. 561; *S. C.* 6 B. & C. 566; R. *v.* Ward, 4 Ad. & El. 384; R. *v.* Tindall, 6 Ad. & El. 143; and R. *v.* Morris, 1 B. & Ad. 441."

§ 847. *Degree of care and diligence in constructing dam.* — The care and diligence to be used in constructing a dam must be proportioned to the risk encountered. It is not enough if the dam be strong enough to resist ordinary floods.[1] This it may be able to do, yet if it is not strong enough to resist freshets such as those which are in the range of ordinary probability, — *e. g.* occurring in one season out of ten, — those maintaining it are responsible for damages to third parties caused by its giving way.[2] The test is not whether the particular freshet might have been reasonably anticipated at the particular time when it occurred, but whether judging from the past, and from the natural causes at work on the stream, there is a contingency that within the time the dam is expected to last freshets likely to require extraordinary powers of resistance may occur. If so, it is negligence not to give the dam such extraordinary powers of resistance. And the same rule applies where a dam is so constructed as to produce dangerous or offensive accumulations of ice or mud.[3]

§ 847 *a. Wasting or polluting watercourses.* — This topic can only be fully discussed in an independent treatise. It may be here generally noticed that a negligent waste of water, even in pursuance of a license, makes the waster liable to those injured.[4] A person entitled to the use of the water cannot, by waste, or by polluting the stream, interfere with the use of other riparian owners.[5]

[1] See Angell on Watercourses, § 336.

[2] Livingston *v.* Adams, 8 Cow. 175; Pixley *v.* Clark, 32 Barb. 268; Everett *v.* Hydraulic Ram Co. 23 Cal. 228; Gray *v.* Harris, 107 Mass. 492; Lapham *v.* Curtis, 5 Verm. 371; Mayor *v.* Bailey, 2 Denio, 433. See Shrewsbury *v.* Smith, 12 Cush. 177.

[3] Sch. Nav. Co. *v.* M'Donough, 33 Penn. St. 73; Bell *v.* McClintock, 9 Watts, 119.

[4] City of Philadelphia *v.* Gilmanton, 71 Penn. St. 140; supra, § 254; Pratt *v.* Lamson, 2 Allen, 275; Blood *v.* Nash. R. R. 2 Gray, 137; Parker *v.* Griswold, 17 Conn. 299; Bellinger *v.* N. Y. Cent. R. R. 23 N. Y. 42; Crooker *v.* Bragg, 10 Wend. 260.

[5] Mason *v.* Hill, 5 B. & A. 1; Whittier *v.* Cocheco Man. Co. 9 N. H. 454; Embrey *v.* Owen, 6 Exch. 353; and other cases cited in the 3d edition of Professor Washburn's admirable work on Easements, ch. iii. § 1. As to liability for negligence in polluting stream, see Norton *v.* Scofield, 9 M. & W. 665; Call *v.* Buttrick, 4 Cush. 345; Woodward *v.* Aborn, 35 Me. 271; Howell *v.* McCoy, 3 Rawle, 356; and cases cited in Washburn on Easements, 3d ed. 292–309.

IX. NEGLIGENT INTERFERENCE WITH RIPARIAN OWNER.

§ 848. By the Roman law the public have a right to use the banks of a river, for right of way, as much as the river itself.[1] By the common law this right does not exist.[2] The owners of log rafts are liable to the riparian owner for damages accruing to the latter from the former's negligence in managing their rafts.[3] On the other hand, those navigating the stream have a right to protection, as has just been seen, from any interference from the riparian owner.

[1] L. 2. tit. 1. D. De us. et proprietate rip.

[2] Ball *v.* Herbert, 3 T. R. 353; Hooper *v.* Hobson, 57 Me. 276; Weise *v.* Smith, 3 Oregon, 445, cited in note to § 846.

[3] Hooper *v.* Hobson, 57 Me. 276.

CHAPTER IV.

DANGEROUS AGENCIES.

Possessor of dangerous agency bound to guard it, § 851.

Owner of land liable for dangerous material, which may pass naturally from his soil to a neighbor's, § 852.

Negligence in giving dangerous instruments to persons ignorant and incapable of reason, § 853.

Persons forwarding explosive compounds through carrier, § 854.

Explosion of steam-engine, § 857.

Owner of dangerous machinery liable when left with ignorant person, § 859.

And so when it is left in a place where it is probable that it may be meddled with, § 860.

[As to fire-works, see § 881.]

§ 851. *Possessor of dangerous agency bound to guard it.* — Wherever material, dangerous unless particularly guarded, is left unguarded, the party so leaving it is responsible for damages to another thereby produced.[1] At common law a person using dangerous instruments or mechanisms does so at his peril, and is responsible for any damages not caused by extraordinary natural occurrences, or by the interposition of strangers.[2] But if the dangerous material is left at a particular place without the owner's fault, and if there is no special duty imposed on him to remove or guard it, he is not responsible for negligence on account of damages resulting from its continuance in the place where it was thus left.[3]

§ 852. *Owner of land liable for dangerous matter which may pass naturally from his soil to another's.* — The owner of land, on which dangerous or mischievous material is stored, is bound to prevent such material from, in the ordinary course of events, passing to and injuring a neighbor.[4] But he is not responsible for other than the natural and ordinary consequences of such possession on his part; and the case against him must exclude the

[1] Dixon *v.* Bell, 5 M. & S. 188; Gilbertson *v.* Richardson, 5 C. B. 502; Bird *v.* Holbrook, 4 Bing. 628; Jordin *v.* Crump, 8 M. & W. 782; Wootten *v.* Dawkins, 2 C. B. N. S. 412; Ellis *v.* Sheffield Gas Co. 2 E. & B. 767. "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons." Per Erle, C. J. — Potter *v.* Faulkner, 1 B. & S. 805.

[2] Fletcher *v.* Rylands, Law Rep. 1 Ex. 265, 279; aff. L. R. 1 H. of L. 330.

[3] See Brown *v.* Mallets, 5 C. B. 599.

[4] Fletcher *v.* Rylands, 3 H. L. Cas. 330. See Pixley *v.* Clark, 35 N. Y. 520, and cases cited in Washburn on Easements (3d ed.), pp. 382–3, 603.

hypothesis of injury caused by the mischievous interposition of a stranger.[1] So, also, he is not liable unless negligence on his part appear.[2]

§ 853. *When dangerous instrument is given to person ignorant or incapable of reason.* — It has been already shown that a person is primarily liable for mischief by means of a dangerous instrument given by him to an agent incapable of reason, or ignorant of the nature of the thing,[3] though the injury be directly wrought by the latter. As illustrating this position may be cited a leading English case,[4] where the defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done; and an injury ac-

[1] Wilson *v.* Newberry, L. R. 7 Q. B. 31. See supra, § 134.

[2] Smith *v.* Fletcher, L. R. 9 Exch. 64. In Wilson *v.* Newberry, Mellor, J., said: "I am of opinion that this declaration is bad. The duty alleged does not result from the facts stated; the facts upon which this duty is said to be founded are these: The defendant was possessed of certain yew-trees then being in and upon certain lands of the defendant in his occupation, the clippings of which yew-trees were, to the knowledge of the defendant, poisonous. These are the only facts from which the duty charged is to be inferred, and it is alleged in the following terms: 'Whereupon it became and was the duty of the defendant to take due and proper care to prevent the said clippings off the said yew-trees from being put or placed in and upon land other than land of the defendant, or in his occupation, where the horses and cattle of his neighbors and others might be enabled to eat them.' Now, it is not alleged that the defendant clipped the yew-trees; it is not alleged that he knew the yew-trees were clipped; and it is not alleged that he had anything to do with the escape of the yew clippings on to his neighbor's land. It is quite consistent with the averments of this declaration that the cutting may have been done by a stranger without the defendant's knowledge. I cannot think that the duty charged can be deduced from the facts stated.

"The case of Fletcher *v.* Rylands[1] has no analogy to this case. The foundation of the doctrine there laid down is derived from an old case in Salkeld,[2] in which it was determined that it was the duty of a man to keep his own filth on his own ground. If a person brings on to his own land things which have a tendency to escape and to do mischief, he must take care that they do not get on to his neighbor's land. This is a very different proposition from that which has been contended for on behalf of the plaintiff; it is that where a person has yew-trees growing on his land which are clipped by some means, he must prevent the clippings from escaping on to his neighbor's land, and from being placed there by a stranger."

So, Fletcher *v.* Rylands has been held not to apply to ancient reservoirs established in India for irrigation. Madras R. R. *v.* Zemindar, 30 L. T. N. S. 771; cited supra, § 783; infra, § 934.

[3] Supra, § 88, 92, 95.

[4] Dixon *v.* Bell, 5 M. & S. 198.

[1] Law Rep. 3 H. L. 330.

[2] Tenant *v.* Goldwin, 1 Salk. 360.

cruing to the plaintiff's son in consequence of the girl's presenting the gun at him and drawing the trigger, when the gun went off, it was held, that the defendant was liable to damages in an action on the case. So a person who sells gunpowder to a boy, eight years of age, who has no knowledge or experience in its use, and who subsequently injures himself by an explosion, has been held liable for the injury;[1] and so of a retailer of burning fluids, who sells naphtha, a dangerous and explosive fluid, without giving notice of its character, to a person ignorant of such character.[2] So where an inexperienced agent was left in charge of a train of cars, for the purpose of loading the cars with oil, and through his ignorance or unskilful management a collision occurred between one of the cars and the locomotive, resulting in a fire which burned plaintiff's house, the railroad company was held responsible for his acts.[3]

§ 854. *Persons forwarding explosive compounds through carrier.* — A person shipping an explosive compound without notice is liable for consequences, although these result from the opening of the package by a warehouseman ignorant of its contents, who was led to open the package from the fact of its leaking.[4]

§ 855. Where the defendant caused a carboy containing nitric acid to be delivered to the plaintiff, who was one of the servants of a carrier, in order that it might be carried by such carrier for the defendant, and the defendant did not take reasonable care to make the plaintiff aware that the acid was dangerous, but only informed him that it was an acid, and the plaintiff was burnt and

[1] Carter *v.* Towne, 98 Mass. 567. In this case a declaration that the defendant, knowing that the plaintiff, a child eight years old, had neither experience in nor knowledge of the use of gunpowder, and was an unfit person to be intrusted with it, sold and delivered gunpowder to him, and that he, in ignorance of its effects, and using that care of which he was capable, exploded it and was burned thereby, was held to set forth a good cause of action, and to which the fact that the defendant was a duly licensed seller of gunpowder is no defence.

[2] Wellington *v.* Downer Ker. Oil Co. 104 Mass. 64.

[3] Oil Creek, &c. Co. *v.* Keighron, Legal Gazette, January 9, 1874; *S. C.* Legal Int. January 16, 1874. See supra, § 90, 563, 774.

[4] Barney *v.* Burstenbinder, 7 Lansing, 210; *S. C.* 64 Barb. 212. See Pierce *v.* Windsor, 2 Sprague, 35; Jeffrey *v.* Bigelow, 13 Wend. 518; Thomas *v.* Winchester, 2 Seld. 397; Boston & A. R. R. *v.* Shanly, 107 Mass. 568; Williams *v.* E. Ind. Co. 3 East, 192; Brass *v.* Maitland, 6 El. & B. 470; Farrant *v.* Barnes, 11 C. B. (N. S.) 533. As to selling poison without notice, see Norton *v.* Sewell, 106 Mass. 143; supra, § 90; infra, § 859.

injured by reason of the carboy bursting, when, in ignorance of its dangerous character, he was carrying it on his back from the carrier's cart, it was held that the defendant was liable in an action for damages for such injury.[1] In his judgment, Erle, C. J. says: "I am of opinion that it was the duty of the defendant, knowing the dangerous nature of the acid which was in the carboy, to take reasonable care that its dangerous nature should be communicated to all those who were about to carry it. Now it is found by the jury that he did not do so. The accident occurred, perhaps, from the explosive character of the article; but be this as it may, it seems to me that the plaintiff was employed by the defendant to carry it, and so comes within the distinction pointed out in Langridge *v.* Levy,[2] as the principle of that case. I rely, however, on the case of Brass *v.* Maitland,[3] as establishing the principle which governs the present case. There it was held by Lord Campbell, 'that while the owners of a general ship undertake that they will receive goods and safely carry them and deliver them at the destined port, the shippers undertake that they will not deliver, to be carried on the voyage, packages of goods of a dangerous nature, which those employed on behalf of the shippers may not on inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature.' So Willes, J., says: 'I apprehend that a person, who gives a carrier goods of a dangerous character to carry, which require more caution in their carriage than ordinary merchandise, as without such caution they would be likely to injure the carrier and his servants, is bound in law to give notice of the dangerous character of such goods to the carrier, and that if he does not do so he is liable for the consequence of such omission.'"

§ 856. One "who has in his possession a dangerous article that he desires to send to another may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it, or be enabled, if he takes it, to make suitable provisions against the danger."[4]

[1] Farrant *v.* Barnes, 11 Com. B. 553; 31 L. J. C. P. 137.

[2] 4 Mee. & Wel. 337; 7 L. J. Ex. 387.

[3] 6 Ell. & Bla. 470; 26 L. J. Q. B. 49. See supra, § 563.

[4] Chapman, C. J. — Bost. & A. R. R. *v.* Carney, 107 Mass. 676, citing Williams *v.* East I. Co. 3 East, 192; Brass *v.* Maitland, 6 E. & B. 470; Farrant *v.* Barnes, 11 C. B. (N. S.) 553.

Under such circumstances the carrier, unconscious of the character of the package, is not liable for damage caused by its explosion.[1]

[1] Parrott *v.* Wells, 15 Wall. 524. The facts of this case, as related by the reporter, are as follows: In 1866 the defendants, who were expressmen engaged in carrying packages between New York and California, by way of the Isthmus of Panama, received at New York a box containing nitro-glycerine to be carried to California. There was nothing in the appearance of the box tending to excite any suspicion of the character of its contents. It was received and carried in the usual course of business, no information being asked or given as to its contents. On arriving at San Francisco, California, its contents were leaking, and resembled sweet oil. The box was then taken for examination, as was the custom with the defendants when any box carried by them appeared to be damaged, to the premises occupied by them, which were leased from the plaintiff. Whilst a servant of the defendants, by their direction, was attempting to open the box the nitro-glycerine exploded, injuring the premises occupied by them, and other premises leased by the plaintiff to and occupied by other parties. The defendants had no knowledge of and no reason to suspect the dangerous character of the contents. They repaired the injury to the premises occupied by them. *Held*, that they were not liable for the damage caused by the accident to the premises occupied by other parties. It was also ruled that where there is nothing to excite the suspicion of a common carrier as to the contents of a package carried by him, it is not negligence on his part to introduce the package, when appearing to be damaged, into his place of business for examination, and to handle it in the same manner as other packages of similar outward appearance are usually introduced for examination and handled. And it was held that the measure of care against accidents, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own.

Field, J.: . . . "If express carriers are thus chargeable with notice of the contents of packages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the information given by the owner. They must be at liberty, whenever in doubt, to require for their satisfaction, an inspection even of the contents as a condition of carrying the packages. This doctrine would be attended in practice with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered as a condition of carrying them. This was ruled directly by the common pleas in England in the case of Crouch *v.* The London & Northwestern Railway (14 Common Bench, 291). The proposition that a carrier is, in all cases, entitled to know the nature of the goods contained in the packages offered to him for carriage, is there stated to be unsupported by any authority, and one that would not stand the test of reasoning.

"In Brass *v.* Braitland (6 Ellis & Blackburn, 485), it was held by the

§ 857. *Explosion of steam-engines; liability* a steam-engine is a powerful agent, and it is essential to keep in

queen's bench that it was the duty of the shipper, when he offered goods which were of a dangerous nature to be carried, to give notice of their character to the owner of the ship, the chief justice, in delivering the opinion of the court, observing that 'it would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him for a general shipment may not be safely stowed away in the hold, must ask every shipper the contents of every package.'

"The case cited from the common pleas recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain anything of a dangerous character. It is only when such ground exists, arising from the appearance of the package, or other circumstances tending to excite his suspicions, that the carrier is authorized, in the absence of any special legislation on the subject, to require a knowledge of the contents of the packages offered as a condition of receiving them for carriage.

"It not, then, being his duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicions as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged as matter of law with notice of the properties and character of the packages thus received. The first proposition of the plaintiff, therefore, falls, and the second, which depends upon the first, goes with it.

"The defendants, being innocently ignorant of the contents of the case received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. 'Negligence' has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Blyth *v.* Birmingham Water Works, 11 Exch. 784. It must be determined, in all cases, by reference to the situation and knowledge of the parties, and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge, and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances. Shearman & Redfield, § 6.

"The case of Pierce *v.* Winsor (2 Clifford, 18), decided by Mr. Justice Clifford, in the circuit court of the district of Massachusetts, furnishes a pertinent illustration of this doctrine. There a general ship was put up for freight. Among other freight offered and taken was mastic, an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and caused increased expenditure in discharging the vessel. The court

mind the cautions of a leading judgment of the supreme court of the United States, on a suit for damages occasioned by the bursting of a boiler.[1] "That the proper management of the boilers and machinery of a steamboat requires skill must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam-boilers but too painfully proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of a gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress, in clear terms, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property." At the same time, it must also be kept in mind that steam-engines are now among the necessary agents of business life, and that while diligence in their management is required in proportion to their danger,[2] yet in no case is the user to be treated as the insurer of the instrument used.[3]

§ 858. It has been held, it is true, in Illinois,[4] in an action against a company for injuries alleged to have been sustained by the plaintiff, while in the depot of the defendants, from the explosion of the boiler of one of defendants' engines, that the mere fact that the boiler exploded is *primâ facie* evidence of negli-

held the shipper and not the charterer liable, and observed, 'that the storage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be, when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods.'"

[1] Steamboat New World *v.* King, 16 How. U. S. 469.

[2] See supra, § 48.

[3] Loop *v.* Litchfield, 42 N. Y. 351. See supra, § 630–637–8, 774–5.

[4] Illinois Central Railroad Company *v.* Phillips, 49 Ill. 234.

gence, and that the burden of disproving the negligence is thrown upon the company; and this rule has more recently by the same court been adhered to, upon a review of the question, and is applied in a case where the party injured did not hold any relation of trust and confidence towards the company, such as exists between a passenger and the carrier.[1] But in a Pennsylvania case,[2] where a man drove a horse to defendant's steam grist-mill to get some grist which he had had ground, and while lawfully there the steam-boiler exploded and killed his horse, and the action was brought for the value of the horse; it was held that, to entitle the plaintiff to recover, he was bound to show the want of ordinary care, skill, and diligence. And in a recent case in New York,[3] it was held that where one places a steam-boiler upon his premises and operates the same with care and skill, so that it is no nuisance; in the absence of proof of fault or negligence upon his part, he is not liable for damages to his neighbor occasioned by the explosion of the boiler. It was further said that if the explosion was caused by a defect in the manufacture of the boiler, he is not liable in the absence of proof that such defect was known to him or was discoverable upon examination, or by the application of known tests.[4]

[1] Illinois Cent. R. R. *v.* Phillips, 55 Ill. 194.

[2] Spencer *v.* Campbell, 9 Watts & S. 32.

[3] Losee *v.* Buchanan, 51 N. Y. 476; supra, § 775.

[4] Earl, C.: . . . . "I have so far found no authorities and no principles which fairly sustain the broad claim made by the plaintiff, that the defendants are liable in this action without fault or negligence on their part to which the explosion of the boiler could be attributed.

"But our attention is called to a recent English case, decided in the exchequer chamber, which seems to uphold the claim made. In the case of Fletcher *v.* Rylands (1 Exchequer, 265, Law Reports), the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines, under the site of the reservoir and under part of the intervening land, had been formerly worked; and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his colliery and the old workings under the reservoir. It was not known to the defendants, nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but, in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir being filled, the water burst down these shafts and flowed, by the underground communication, into the plaintiff's mines. It was held, reversing the judgment of the court of ex-

§ 859. *Dangerous machinery, when left with an ignorant person or child, creates liability.* — "If the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions *as to its use, or with directions* which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware; as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such materials." [1]

§ 860. *And so where dangerous machinery is left in an exposed position where it is probable, in the ordinary course of things, that it will be meddled with by children.*[2] — This is an interesting position which has been heretofore not infrequently noticed. The principle is thus stated by Lord Denman, delivering the judgment of the court of queen's bench in a leading case: "I am

chequer, that the defendants were liable for the damage so caused, upon the broad doctrine that one who, for his own purposes, brings upon his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. Mr. Justice Blackburn, writing the opinion of the court, says: 'The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is as the majority of the court of exchequer have thought, merely a duty, to take all reasonable and prudent precautions in order to keep it in, but no more;' and he reaches the conclusion that it is an absolute duty, and that the liability for damage from the escape attaches without any proof of negligence. This conclusion is reached by the learned judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property. That case was appealed to the house of lords and affirmed." [1]

[1] Cockburn, C. J. in Grizzle *v.* Frost, 3 F. & F. 622; adopted by Gray, J., in Coombs *v.* New Bedf. Cordage Co. 102 Mass. 599. See Hackett *v.* Middlesex Man. Co. 101 Mass. 101; supra, § 90, 853.

[2] See supra, § 108–9, 145, 315, 344, 826.

[1] 3 H. L. (Law Rep.) 330, and was followed in Smith *v.* Fletcher, 20 W. R. 987, and qualified in Smith *v.* Fletcher, L. R. 9 Exch. 64; supra, § 787. As to burden, see supra, § 421.

guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." [1] And the same principle has been recently affirmed by the supreme court of the United States in a case in which it was held that a railroad company was liable for damages sustained by a boy when playing with a turn-table left by the company unguarded and unlocked on its own grounds; it being shown that the boys of the neighborhood were in the habit of resorting to the place for play, and that this was known by the company.[2]

[1] Lynch *v.* Nurdin, 1 Q. B. 29, 35; supra, § 113, 838, with which compare Mangan *v.* Atterton, L. R. 1 Ex. 239; Lygo *v.* Newbold, 9 Exch. 302; Great Northern R. C. *v.* Harrison, 10 Exch. 376; Austin *v.* Great Western R. C., L. R. 2 Q. B. 442; Caswell *v.* Worth, 5 E. & B. 849.

[2] Railroad Company *v.* Stout, 17 Wall. 659. On the question whether there was negligence on the part of the railway company in the management or condition of its turn-table, the judge charged the jury: —

"That to maintain the action it must appear by the evidence that the turn-table, in the condition, situation, and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that if in its construction and the manner in which it was left it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was as the defendants' property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

Hunt, J.: . . . "That the turn-table was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the road-bed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents.

"So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turn-table on other occasions, and within the observation and to the knowledge of the employees of the defendant, the jury were justified in believing that children would probably resort to it,

and that the defendant should have anticipated that such would be the case.

"As it was in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turn-table when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turn-tables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight; but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors. The charge was, in all respects, sound and judicious, and there being sufficient evidence to justify the finding, we are not authorized to disturb it."

CHAPTER V.

FIRE.

I. For domestic or farming purposes, § 865.
Building fire which by natural law spreads, § 865.
Negligently leaving a fire, § 866.
When fire is lawful, burden on plaintiff to prove negligence; but otherwise with unlawful fires, § 867.
What are unlawful fires, § 867 *a*.
Negligent fires spreading through intervening negligence, § 867 *b*.
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II. In steam-engines, § 868.
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Otherwise with chartered company, when due diligence is used, § 869.
Burden is on plaintiff to prove negligence, § 870.
Slight presumption, however, sufficient to shift burden, § 871.
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Leaving combustible material on track, § 873.
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Dropping coals of fire on track, and firing ties, § 875.
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Intervening negligence of third party, § 879.
Distinctive local statutes, § 880.
III. Fireworks, § 881.
IV. Fire-arms, § 882.

I. FOR DOMESTIC OR FARMING PURPOSES.

§ 865. *Building fire which by natural law spreads.* — A man, for instance, lights a fire on his own hearth, and harbors, at the same time, a wish that a sudden eddy of wind may lodge a spark on his neighbor's roof; yet if the spark really is thus carried, and the neighbor's house catches fire, the builder of the fire, supposing it is prudently made and cared for, is not responsible for the damage.[1] Supposing, however, he negligently sets fire to his own chimney, in such a way as, in the ordinary sequence of events, to set fire to his neighbor's, then the case is otherwise, for he is responsible for all the natural consequences of his negligence. Or suppose the fire be made in a field. If in a sequestered spot, and on a quiet day, then there is no inculpatory negligence; otherwise, on a windy day, when buildings are so near as to make

[1] Cleland *v.* Thornton, 43 Cal. 437; Gagg *v.* Vatter, 41 Ind. 228; supra, § 80.

ignition probable.[1] To this effect is a famous passage in the Digest: —

"Si quis in stipulam suam vel spinam comburendae ejus causa ignem immiserit et ulterius evagatus et progressus ignis alienam segetem vel vineam laeserit, requiramus, num imperitia vel negligentia id accidit; nam *si die ventoso id fecit, culpae reus est;* nam et qui occasionem praestat, damnum fecisse videtur."[2]

So it has been held both in England and this country, that kindling a fire in the open air in such a way that under ordinary circumstances the fire may spread to another's property, makes the party kindling such fire *primâ facie* liable for the consequences, though he may meet this by proving that the fire was blown away from him by a sudden gale of wind, it being kindled in a calm.[3]

[1] Whart. Crim. L. § 751; supra, § 97.

[2] L. 30. § 3. D. ad. leg. Aquil.; supra, § 12, 116.

[3] Tubervill *v.* Stamp, 1 Salk. 13; Filliter *v.* Phippard, 11 Q. B. 347; Perley *v.* East. R. R. Co. 98 Mass. 414; Calkins *v.* Barger, 44 Barb. 424; Hanlon *v.* Ingram, 3 Iowa, 81; Miller *v.* Martin, 11 Mo. 508.

In Higgins *v.* Dewey, 107 Mass. 494, the evidence was, that the defendant, for the purpose of destroying brush on his own land, set fire to the brush within six feet of the plaintiff's adjoining land, which was covered by brush; that shortly afterwards, fire was discovered on the plaintiff's land, some sixteen rods distant; that if this fire was ignited by the defendant's fire, it was done by means of cinders carried by the wind; that the ground was very dry, and there was at the time a high wind blowing from the spot where the fire was started by the defendant to that where it was discovered on the plaintiff's land. There was a verdict for the plaintiff, and on writ of error, Judge Gray disposed of the case as follows: "A man who negligently sets fire to his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground, and *whether he might or not have reasonably anticipated the particular manner in which it is actually communicated.*" See, also, Averitt *v.* Murrell, 4 Jones N. C. 323; Fahn *v.* Reichart, 8 Wisc. 255.

So, it has been held that where a person was engaged in threshing wheat with a steam threshing machine, under a contract therefor with the owner of the wheat, and said owner temporarily left the field, and while he was absent the wind increased so that there was danger of firing the stacks of wheat if the work was continued, and it would so appear to an ordinarily prudent man, it was the duty of the person running the said machine to stop, and it was such carelessness in him not to do so, as to render him liable for the burning of the stacks, if the burning resulted from continuing to run the machine. Collins *v.* Groseclose, 40 Ind. 414.

Gagg *v.* Vetter, 41 Ind. 228, was an action for the destruction by fire of

§ 866. *Negligently leaving a fire*, necessarily made, makes the person so negligent liable for damages incurred to others from such negligence.[1] No doubt that "every person has a right to kindle a fire on his own land for the purposes of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others." But though the time be suitable and the manner prudent, "yet if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages

the plaintiff's factory building, caused by sparks from the brewery of defendant. The grounds on which a recovery was claimed were, first, that the flues, chimneys, and furnaces in defendant's brewery, being near to plaintiff's factory building, were not built in proper shape, or of sufficient height or capacity, thereby causing burning coals, soot, cinders, sparks, and embers to be carried therefrom upon the roof of the factory, whereby it was burned and destroyed; and, second, that defendant was negligent in the use of the furnaces, flues, and chimneys, by making large fires therein, of highly inflammable and dangerous material, so that the sparks, embers, &c., passed from the chimney to the roof of the factory, burning and destroying it. The evidence was that the defendant's brewery was built in a populous part of a large and rapidly increasing city. The property of the plaintiff, which was destroyed by the fire, was there at the time the brewery was constructed. It was held, that this imposed upon the defendant the necessity of exercising a higher degree of care and diligence in the construction and management of his brewery than if it had been located in the country, or in a part of the city where there were no houses in its immediate vicinity; that a mere difference of opinion among men of science and experience, as to the best plan to construct the chimney, furnace, and flues, did not justify the selection of any well-supported theory without further inquiry; for the defendant was bound to use all due care and vigilance to ascertain which theory was correct, and which incorrect, and for that purpose he was bound to avail himself of all the discoveries which science and experience had put within his reach; that while the law does not require absolute scientific perfection in the construction of such works, it does require the exercise of a high degree of care and skill to ascertain, as nearly as may be, the best plan for such structures; and it requires that not only skilful and experienced workmen shall be employed in their construction, but that due skill shall be exercised by such workmen in the particular instance; that the defendant was liable in damages to the extent of the injury sustained by the plaintiff, if it was proved upon the trial either that ordinary care and diligence were not employed in the construction of the chimney, furnaces, and flues, or that he was guilty of negligence in the management thereof, and that the factory building was destroyed from either of these causes.

[1] Cleland *v.* Thornton, 43 Cal. 437. See supra, § 97, 789.

for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care, on the part of the defendant." [1] It is not necessary, however, that the watch should be constant. It does not inculpate the defendant that he left for a short time, when there was no prospect of the wind rising.[2]

Where the plaintiff was possessed of farm buildings and stacks of corn standing in a close in his occupation, and nearly adjoining another close in the occupation of the defendant, and the defendant placed a stack of hay on his close, which heated and smoked and gave out a strong smell indicating that the hay-stack was in danger of taking fire, and the defendant knowing its dangerous condition nevertheless kept it in his close, although he could have removed it, and it ignited and burst into flame and set fire to the adjoining farm buildings of the plaintiffs, — it was held that the defendant was liable.[3]

When a fire is necessary in order to clear the land, it is proper to give notice to those whose property may be thereby affected, and it is negligent to omit such notice. But if after notice the plaintiff could have prevented his property from being burned, but failed to do so, he has no ground of complaint.[4]

§ 867. *When fire is lawful, burden on plaintiff to prove negligence; but otherwise with unlawful fires.*[5] — "Fire, like water or steam," to quote from a pertinent judgment of Earl C.,[6] "is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence.[7] The rule, as laid down in Clark *v.* Foot, is as follows:

[1] Hewey *v.* Nourse, 54 Me. 256; Batchelder *v.* Heagan, 18 Maine, 32; Barnard *v.* Poor, 21 Pick. 378; Tourtellot *v.* Rosebrook, 11 Met. 460.

[2] Calkins *v.* Barger, 44 Barb. 424.

[3] Vaughan *v.* Menlove, 3 Bing. N. C. 468.

[4] Batchelder *v.* Heagan, 18 Me. 32; Hewey *v.* Nourse, 54 Me. 256; Tourtellot *v.* Rosebrook, 1 Met. 460; Bennett *v.* Scott, 18 Barb. 348.

[5] See supra, § 421.

[6] Losee *v.* Buchanan, 51 N. Y. 476.

[7] Clark *v.* Foot, 8 J. R. 422; Stuart *v.* Hawley, 22 Barb. 619; Calkins *v.* Barger, 44 Ibid, 424; Lansing *v.* Stone, 37 Ibid. 15; Barnard *v.* Poor, 21 Pick. 378; Tourtellot *v.* Rose-

'If A. sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of B., his neighbor, no action lies against A. unless there was some negligence or misconduct in him or his servant.' And this is the rule throughout this country except where it has been modified by statute. Tourtellot *v.* Rosebrook was an action to recover damages caused by a fire communicated to the plaintiff's land, from a coal-pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant."[1] But the rule is otherwise when the fire is unlawful, in which case the burden is on the defendant, after proof of the unlawfulness, to defend himself by proving *casus*.[2] Eminently is this the case with fire started on prairies, or other wild lands, where the devastation is likely to be so terrible.[3]

§ 867 *a*. *Unlawful fires.* — Such, as will presently be seen, are the fires of steam-engines, dashing without charter, in all states of the wind through a narrow strip of land, bordered by a territory which from time to time presents peculiarly combustible material. Setting fire to trees and underbrush on another's land is, being a trespass, in itself unlawful. So, in the prairie states, where the danger from fire is so great, statutes exist prohibiting the kindling of fires on the land even by the owner himself, except under strict limitations, and in peculiar seasons.[4]

§ 867 *b*. *Negligent fires spreading through intervening negligence.* — This topic has been already partially discussed.[5] If a fire, being negligently started, is extended by the plaintiff's negligence, the plaintiff has no redress, the causal connection between the defendant's negligence and the plaintiff's damage being broken.[6] The same conclusion, as has been already shown, is reached, when the fire is spread by the intervening negligence of a third party.[7]

brook, 11 Metcalf, 460; Batchelder *v.* Heagan, 18 Maine, 32.

[1] See Harlan *v.* Ingram, 3 Iowa, 81.

[2] Infra, § 868.

[3] See Finley *v.* Langston, 12 Mo. 120.

[4] See Burton *v.* McClelland, 2 Scam. 434; Johnson *v.* Barber, 5 Gil. 426; Armstrong *v.* Cooley, 5 Gil. 509.

[5] See supra, § 130, 149, 300; and see infra, § 877.

[6] Supra, § 130, 300; infra, § 871; Great W. R. R. *v.* Haworth, 39 Ill. 346. See Ross *v.* R. R. 6 Allen, 87; Ill. Cent. R. R. *v.* McClelland, 42 Ill. 355; Chapman *v.* R. R. 37 Me. 92; Smith *v.* R. R., L. R. 5 C. P. 98; Bryan *v.* Fowler, 70 N. C. 596.

[7] Supra, § 145–149; infra, § 879.

§ 867 *c*. *Effect of statute of Anne.* — The statute 6 Anne, ch. 3, sec. 6 (enacted in 1707), which declares that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin," with the construction which makes it include fires caused by negligence of strangers, has been accepted in some parts of the United States as part of the common law.[1] But this statute, even as amended by that of 14 George 3, ch. 78, is not construed to apply to the defendant's negligence, either in this country [2] or in England.[3]

II. FIRES IN STEAM-ENGINES.

§ 868. *Emitting sparks from a locomotive engine traversing a railway track belonging to an unchartered company, whereby fire is communicated to adjacent property, is itself a negligent act which makes the company liable for the damage.* — In the nature of things a locomotive engine, rapidly traversing a narrow strip of land, many miles in length, in periods of drought as well as of rain, in wind-storms as well as in calm, with combustible materials from time to time on either side, will set fire to such materials if it emit sparks; and to emit sparks by such an engine, according to the rules heretofore expressed,[4] is negligence for which, where there is damage done, suit lies. It is one of the sequences of material laws that fire should in this way be communicated, and he who on a windy day emits sparks from a locomotive (putting the charter out of the question), is as negligent as he who on a windy day builds a bonfire on his own land.[5] And as the latter is liable for damage in case he sets fire to his neighbor's field, so is the former.[6]

§ 869. *When, however, a railroad company is chartered with a*

[1] See Spaulding *v*. C. & N. R. R. Co. 30 Wis. 110; though see, *dubitante*, Webb *v*. Rome, &c. R. R. 49 N. Y. 420.

[2] Scott *v*. Hale, 16 Me. 326; Webb *v*. Rome, &c. R. R. 49 N. Y. 420; Maull *v*. Wilson, 2 Harring. 443.

[3] Vaughan *v*. Menlove, 3 Bing. N. C. 468; 4 Scott, 244; Filliter *v*. Phippard, 11 Q. B. 947.

[4] Supra, § 73 *et seq*., 867 *a*.

[5] See supra, § 865.

[6] See Jones *v*. Festiniog Ry. Co., Law Rep. 3 Q. B. 733. In this case (that of an unchartered company), it was proved by the defendants that all reasonable precautions had been taken to prevent the emission of sparks. They were, nevertheless, held liable, on the ground that the locomotive was a dangerous engine to be brought and and used by the defendants upon their premises, and that they must bear the consequences in case of damage to others.

right to propel its trains by steam-engines, then the company is liable only in case, in using its engines, it fails in the diligence good specialists in this department are accustomed to exercise. — The legislature says: "This is an essential industry; you are authorized to engage in it; and as it is necessary that your engines should be driven by fire and steam, you are authorized to use fire and steam in your engines." Such being the case the mere fact of a company emitting sparks from its engines is not negligence unless it is proved that the sparks were negligently emitted.[1] "When the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damage results from the use of such thing, independently of negligence, the party using it is not responsible."[2]

§ 870. *Burden is on plaintiff to prove negligence in construction or management of engine.* — Undoubtedly there are cases (some under local statutes) to the effect that when the plaintiff shows that his property caught fire from the defendant's engine the burden is on the defendant to disprove negligence.[3] This no doubt is sound law as to unchartered companies.[4] When, however, a company is chartered, and thereby lawfully uses fire in its engines, the true doctrine is that it rests on a plaintiff suing

[1] Flynn *v.* San Francisco R. R. 40 Cal. 14; Rood *v.* R. R. 18 Barb. 80; Read. R. R. *v.* Yeiser, 8 Penn. St. (8 Barr.) 366; Frank. T. P. *v.* R. R. 54 Penn. St. 345; Jeffers *v.* P. W. & B. R. R. 3 Houston, 447; Balt. & O. R. R. *v.* Woodruff, 4 Md. 242; Borroughs *v.* Housatonic R. R. 15 Conn. 124; 2 Am. R. R. Ca. 30; Sheldon *v.* R. R. 14 N. Y. 218; Vaughan *v.* Taffvale R. C. 5 H. & N. 679 (recognizing R. *v.* Pease, 4 B. & Ad. 30); cited and explained in Jones *v.* Festiniog R. C., L. R. 3 Q. B. 737; and approved in Hammersmith, &c. R. C. *v.* Brand, L. R. 4 H. L. 171, 201–2; Cracknell *v.* Mayor and Corporation of Thetford, L. R. 4 C. P. 629. *Secus*, if the company were guilty of negligence, Smith *v.* London & South Western R. C., L. R. 5 C. P. 98.

[2] Cockburn, C. J., — Vaughan *v.* Taffvale Co. 5 H. & N. 685.

[3] Hull *v.* Sacramento Valley R. Co. 14 Cal. 387; Ill. Cent. R. R. *v.* Mills, 42 Ill. 407; Chic. & N. W. R. R. *v.* McCahill, 56 Ill. 28 (under statute); Ellis *v.* Portsmouth R. R. 2 Ired. 9, 138; Spalding *v.* C. & N. R. R. 30 Wisc. 110; Galpin *v.* Ch. & N. W. R. R. 19 Wisc. 608; McGready *v.* S. C. R. R. 2 Strobh. L. 356. See Piggott *v.* East. Co. R. R. 3 Man., Gr. & S. 228; Aldridge *v.* Great West. R. R. 3 Man. & G. 515; Gibson *v.* S. E. R. R. 1 F. & F. 23.

[4] See supra, § 867, 867 *a*; Jones *v.* R. R., L.R. 3 Q. B. 733.

it for fire communicated from its engines, to show negligence in the company.[1]

In any view, the burden is on the plaintiff to show that the fire in question was communicated from the defendant's engines.[2]

§ 871. *A slight presumption of negligence, however, raised by the plaintiff's case is sufficient to throw the burden of disproving negligence on the defendant.* — It is a mistake, as has been elsewhere shown, to suppose that negligence can be only proved by positive affirmatory evidence. There may be no direct proof of negligence; yet the way in which an injury is done may be such that negligence is the most probable hypothesis by which it can be explained, and when this is so, the defendant must disprove negligence by showing that he exercised due care.[3]

[1] See supra, § 421; Aldridge *v.* R. R. 3 M. & G. 515; Phil. & Read. R. R. *v.* Yeiser, 8 Penn. St. (8 Barr.) 366; Hayett *v.* Phil. & Read. R. R. 23 Penn. St. 373; Phil. & Read. R. R. *v.* Yerger, 73 Penn. St. 121; Morris & E. R. R. *v.* State, 36 N. J. 553; Burroughs *v.* R. R. 15 Conn. 124; Sheldon *v.* R. R. 29 N. Y. 226; Field *v.* N. Y. Cent. R. R. 32 N. Y. 339; McCready *v.* S. C. R. R. 2 Strobh. 356; Macon & W. R. R. *v.* McConnell, 37 Ga. 481; Smith *v.* R. R. 37 Mo. 287; Gandy *v.* Chic. & N. W. R. R. 30 Iowa, 420; Indianapolis, &c. R. R. *v.* Paramore, 31 Ind. 143; McCummons *v.* R. R. 33 Iowa, 187; Kans. P. R. R. *v.* Butts, 7 Kans. 308. See 4 West. Jur. 333; 5 Am. Law Rev. 208.

[2] Sheldon *v.* R. R. 29 Barb. 226; Smith *v.* R. R. 37 Mo. 287.

[3] Hull *v.* R. R. 14 Cal. 387; Piggott *v.* R. R. 3 C. B. 229. In the opinion of the court, in the case of Field *v.* New York Central Railroad, 32 N. Y. 339, cited by Buskirk, J., in Grigg *v.* Vetter, 41 Ind. 228, the following pertinent passage occurs: "But the defendants now insist that, although they may have caused the injury, the nonsuit should have been granted, for the reason that no cause of negligence, on their part, was made out. If I understood their position correctly, it is, that in this class of cases it is incumbent upon the party injured, if he would make a *primâ facie* case, to show affirmatively that there was something improper in the construction of the defendants' engines, or that they were not in order, or were insufficiently or improperly managed. This is not the rule. Undoubtedly, the burden of proving that the injury complained of was caused by the defendants' negligence was upon the plaintiff. To show negligence, however, it was not necessary that he should have proved affirmatively that there was something unsuitable or improper in the construction or condition or management of the engine that scattered the fire communicated to his premises. It often occurs, as in this case, that the same evidence which proves the injury shows such attending circumstances as to raise a presumption of the offending party's negligence, so as to cast on him the burden of disproving it. Then the injury was caused by dropping from the defendants' engine coals of fire. The fact that the sparks or coals were scattered at all upon their roadway,

§ 872. *Degree of diligence which company in this respect must exert.* — It has sometimes been said that a company is bound to use the most perfect possible contrivances to prevent the escape of sparks.[1] But this is a mistake. If a railroad is required to have perfect mechanism at its command, no railroad can be operated, because no railroad can have perfect mechanism.[2] The best that can be done is, by careful trial of all approved mechanisms, and careful study of all improvements that may be proposed, to get the best apparatus that can, under the circumstances, be obtained.[3] A more perfect contrivance than that employed may be possible, and may be even patented, yet, until it has been accepted in general use a company cannot be charged with negligence in not adopting it. It is unnecessary to give for this position the reason that if the test be a perfect apparatus we lose ourselves in the maze of purely speculative mechanics. It is enough for us to fall back on the essential principle that lies at the base of this branch of the law, that the diligence to be exacted from a specialist is the diligence which good specialists in his department are accustomed to show. Indeed, if we force him to go beyond this limit, and require him to experiment, when working his

in such quantities as to endanger property on abutting premises, raised an inference of some weight that the engines were improperly constructed or managed. But this was not all. It was conceded and proved that if the engine is properly constructed, and in order, no fire of any amount will escape to be distributed along the track. It was shown that four or five of the defendants' engines that passed the plaintiff's farm were defective in apparatus to avoid scattering of fire; and although the others were fitted with the necessary improvements to retain it, and in this respect there was no want of care on the part of the company, yet that constant oversight was required, and if they scattered fire, it was because they were out of order. It was legitimately to be inferred from these facts, that the scattering of coals of fire from the defendants' engines, which were found upon their track, and which produced the injury, was the result either of defectiveness in the machinery, or neglect in repairing it.

"There was enough, therefore, in the evidence to justify a submission of the question to the jury, whether the injury complained of was caused by the negligent conduct of the defendants."

[1] Indiana R. R. *v.* Paramore, 31 Ind. 143; St. Louis, A. & T. R. R. *v.* Gilham, 39 Ill. 455; Ill. Cent. R.R. *v.* McClelland, 42 Ill. 355; Ill. Cent. R. R. Co. *v.* Mills, 42 Ill. 407; Chicago & Alt. R. R. *v.* Quaintance, 58 Ill. 389; Ill. Cent. R.R. *v.* Shamefelt, 47 Ill. 497.

[2] See supra, § 52, 65, 631, and particularly § 635.

[3] See supra, § 635.

engine, with conjectural improvements such as good specialists are not accustomed to apply, disasters much more terrible would be occasioned than those which under the present rule occur. Initiatory experiments should be confined to trial processes, not to the running of ordinary business trains.[1]

[1] See 1 Redfield on R. R. p. 454; Jefferis *v.* P. W. & B. R. R. 3 Houston, 447; Boroughs *v.* Housatonic R. R. 15 Conn. 124; 2 Am. R. R. C. 30; Frankford T. C. *v.* R. R. 54 Penn. St. 345.

In Spaulding *v.* C. & N. R. R. 30 Wisc. 110, it was ruled that the presumption of negligence from the mere escape of fire, may be rebutted by evidence showing, with a *reasonable degree of certainty*, that the company has done its duty in that particular, and the highest and clearest kind of evidence is not required. And it was said the proof that the engines passing over the road were properly constructed and equipped, and were carefully inspected by a competent and skilful person, as often as once in two days, and found to be in proper order, would seem to be sufficient, although it does not come down to the very moment when the fire escaped which caused the injury, and show that at that time there was no defect in the engine.

In the summing up of the judge to the jury, in the case of Freemantle *v.* London, &c. Railway Co. 10 C. B. 89, he said: "The question is, whether, notwithstanding the evidence of impossibility which has been adduced by all that numerous company of witnesses, do you, nevertheless, think that the plaintiffs have established the fact that the fire could not be accounted for upon any other supposition than that it must have come from the engine? If you do, then I must repeat that all this evidence that is so powerful on the first question is cogent against the defendants upon the second; because it then goes to show that the fire was occasioned by an engine which was so perfect in its quality that nothing could have caused the emission of sparks except negligence, either in the condition of the engine or in the way in which it was worked by the driver; and, therefore, the evidence then becomes cogent the other way." . . . .

This, however, is hard measure; putting the company in the attitude of insuring the perfection of their apparatus, in face of the fact that there is no machinery, no matter how perfect, but is liable to *casus*, and that *casus*, when proved, is a defence. See supra, § 114–6.

A peculiar degree of care, however, should be used in passing through a village or city with wooden buildings bordering the track. Fero *v.* R. R. 22 N. Y. 209.

A judicious view was taken in Mich. Cent. R. R. *v.* Anderson, 20 Mich. 244, where it was held that the care which a railroad company must exercise in the running of trains so as not to injure property situated near their track, is not contingent upon such circumstances as the force and direction of the wind, the dryness of the weather, or the combustible character of property liable to be affected. The company not being in fault as to the quality or character of their equipments, the special risks incident to proximity to railroad trains must be borne by those who establish themselves in such localities. Campbell

§ 873. *Facts which lead to a presumption of negligence. Leaving inflammable material on the track.* — For a railroad company to leave light combustible material along its line, in such a situation as readily to ignite from sparks, is such negligence as makes it responsible for damage sustained by a fire communicated from such combustible material to a neighboring field.[1]

Ch. J.: . . . . "The action was brought against the railroad company for negligence in causing the sorghum factory of Anderson to be burned by sparks from their engines passing along the railroad, which was separated by a highway and some intervening ground from the premises destroyed, which had upon them, about the factory, a considerable amount of dry and combustible stalks and similar material.

"The court, under objection, charged the jury that regard must be had to the actual state of things at the time; the force and direction of the wind; the dryness of the weather, and the proximity of the building to the railroad; and that what might be ordinary care on a still and wet day, might not be on a windy and dry one, and when near the combustible matter. The question still being what care a prudent man would exercise in precisely similar circumstances.

"There had been full testimony in the case upon the character of the engines and stacks, and the use of the proper means to render them as secure as possible from doing mischief by the discharge of sparks, and this charge was independent of any question as to the quality and character of these equipments, as suitable to be used.

"We think the rule laid down was incorrect. Vehicles that can choose their track, and can deviate whenever and wherever it is desired, may properly be required to be used differently, according to circumstances. But the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movements of trains. And the risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays. It would not only be vexatious, but in the highest degree dangerous, to make the movements of cars vary with wind and weather. Those who established themselves in the neighborhood of railroads must know that the trains are expected to run with regularity, and if there are special risks arising from no want of care in the proper equipment and management of engines and trains, those risks are not chargeable to the railroad, but are incident to the situation. And extra care, which they demand, must therefore devolve upon those whose interests require the increased vigilance; and the consequences of not exercising it must fall upon the owner, because the railroad is not in fault. We think the judgment must be reversed on this ground."

[1] Supra, § 98; Flynn *v.* San Francisco R. R. 40 Cal. 14; Bass *v.* C. B. & Q. R. R. Co. 28 Ill. 16. As to when the leaving of dry grass and weeds is negligence, see Ill. Cent. R. R. Co. *v.* Mills, 42 Ill. 407; Ohio & M. R. R. *v.* Shanefelt, 47 Ill. 497; Ill. Cent. R. R. *v.* Frazier, 47 Ill. 505; Ill. Cent. R. R. *v.* Munn, 54 Ill. 78.

In an English case already cited,[1] the evidence was that workmen employed by the defendants, a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days, during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails and burnt some of the heaps of trimmings and the hedge, and spread to a stubble field beyond, and was thence carried by a high wind across the stubble field and over a road, and burnt the plaintiff's cottage, which was situated about two hundred yards from the place where the fire broke out. There was evidence that an engine belonging to the defendants had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them. It was held, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed; secondly, that there was evidence for the jury that the defendants were negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble field; and, thirdly, that if the defendants were negligent they were liable for the injury that resulted from their conduct to the plaintiff, although they could not have reasonably anticipated that such injury would be caused by it.

§ 874. *Omission of spark-extinguisher.* — This is *per se* negligence.[2]

[1] Smith *v.* London & S. W. R. R., L. R. 6 C. P. 14; supra, § 98.

[2] Anderson *v.* C. F. Steamboat, 64 N. C. 399. In Kellogg *v.* Milwaukee & St. P. R. R., Central L. J. for June 4, 1874, it was left to the jury by Miller, J., to determine whether neglecting to use a "spark-arrester" on a steam ferryboat, was negligence; and they naturally held that it was. With regard to railway locomotives, such an omission, in a populous country, must be held as negligence as a matter of law. See supra, § 154.

In Teall *v.* Barton, 40 Barb. 137, the defendants were engaged, under a contract with the state authorities, in removing a sunken boat from the channel of the canal, by means of a steam dredging machine, in the vicinity of the plaintiff's buildings, using wood for fuel, without any spark-catcher or screen upon their smoke-stack. A high wind blowing the sparks and cinders to and over the

§ 875. *Negligently dropping coals of fire on track and setting fire to ties.* — This is also negligence for which, on the fire communicating to an adjacent field, makes the company liable.[1]

§ 876. *Burning wood in a coal burning engine.* — It has been held negligence on the part of a railway engineer to use wood in a coal burning engine, while running it over the road, for the reason that the meshes in the wire netting, used to prevent the escape of fire sparks, are made much larger when coal only is used for fuel, and the sparks from wood are much more dangerous because they retain the fire for a much greater length of time. To use wood, therefore, in such an engine, in a dry time, with a high wind prevailing, would be negligence.[2]

§ 877. *Contributory negligence.* — Where the plaintiff or his family or servants was in a position to have prevented damage from the fire, and made no efforts to do so, plaintiff cannot recover from the company whose engines caused the fire.[3] And so when he neglected to remove or to protect goods for whose loss he afterwards claimed damages.[4]

§ 878. *Leaving combustible matter near the track.* — It has been ruled in Illinois that land-owners contiguous to railroads are as much bound in law to keep their lands free from dry grass and weeds as the railroad company is on its right of way; and that unless it appears that the negligence of the company is greater than

farm buildings, the defendants were notified by the plaintiff's agent or servant of the danger to such buildings; notwithstanding which, the defendants continued to use their dredge, keeping up the fire thereon without putting on a spark-catcher, or using any extra precaution to prevent injury from fire. The buildings of the plaintiff being consumed by fire communicated to a pile of straw by sparks, it was held that the defendants were guilty of carelessness and negligence, and were liable for the damages occasioned by the fire.

[1] Where coals, negligently dropped from the defendant's locomotive, set fire to the ties under its track, and from thence spread through the defendant's premises and ran into the plaintiff's woodland adjoining, and burnt and damaged the wood and soil. Held, (following the decision in Field *v.* New York Central Railroad, 32 N. Y. 339, as based upon substantially the same facts,) that the plaintiff could recover for the damages sustained. Field *v.* R. R. and Ryan *v.* Same (35 N. Y. 210), commented upon and compared; Webb *v.* R. R. Co. 3 Lansing, 453; S. P. & S. C. 49 N. Y. 420. See supra, § 151.

[2] Chic. & Alt. R. R. *v.* Quaintance, 58 Ill. 272.

[3] Ill. Cen. R. R. Co. *v.* McClelland, 42 Ill. 355.

[4] Ward *v.* St. P. R. R. 29 Wisc. 144. Supra, § 866, note 4.

that of the land-owner, the latter cannot recover for injuries by fire thus arising.[1]

It is said, however, that where the adjoining land, to which fire has been so communicated, is woodland, that fact should be considered by the court in the instructions as abating the degree of diligence required of the land-owner, on account of the greater difficulty of keeping such land clear of inflammable matter.[2]

[1] Ohio & M. R. R. Co. *v.* Shanefelt, 47 Ill. 497; Ill. Cen. R. R. Co. *v.* Frazier, Ibid. 505; Ill. Cen. R. R. Co. *v.* Munn, 51 Ill. 78. See Brown *v.* Han. & St. Jo. R. R. 37 Mo. 288.

[2] Chicago, &c. R. R. *v.* Simonson, 54 Illinois, 504; and see, as still further qualifying the text, Kans. Pac. R. R. *v.* Butts, 7 Kans. 308. In Spaulding *v.* C. & N. R. R. 30 Wisc. 110, it was assumed on both sides that the only or the usual and most practicable method for removing dry grass and other combustible materials, accumulating on the way, is by burning. The injury complained of was caused by fire in the early spring, soon after the grass and leaves became dry, and there was evidence tending to show that owing to the direction and force of the winds, and to some peculiarities in the exposure at the point where the fire occurred, no reasonable and fair opportunity had been given for burning the grass, &c., at that point, though workmen had been engaged in burning off the right of way in both directions from that point. No other feasible means of removing the combustible material was shown by the testimony. *Held*, that it was error to refuse an instruction that "the defendant was not bound to burn the dry vegetation on any portion of its way where, by reason of the direction and force of the wind, or other attendant circumstances, doing so would endanger its own property or that of others."

Dixon, C. J., said: "An interesting question touched in argument is that respecting negligence, actual or contributory, on the part of the land-owner who suffers combustible materials like dry forest leaves to accumulate on his own land, which are forced and drifted by the wind upon the right of way of the company, and there set on fire, to his injury, or the injury of the company or others. What the liability of the company may be with respect to such owner for injuries thus sustained by him, and what its obligation with respect to him and to others whose property may in this manner become exposed, to remove the inflammable substances so driven and carried upon its way, will be interesting questions when they arise; but it is unnecessary to consider them here. No question of the kind seems yet to have come up for adjudication, except that presented by the windrow of weeds and tickle-grass in the case of Brown *v.* Hann. & St. Joseph R. R. Co. 37 Mo. 288, 298, which involved a somewhat similar point."

In Keese *v.* The Chicago & N. W. R. R. Co. 30 Iowa, 83, Cole, Ch. J. said: . . . . "The general doctrine embodied in this instruction, to wit: that every person may use his own property for any lawful purpose at his pleasure, taking only the risk of accidents, and retaining the right to recover for its injury or destruction by the negligence of another, cannot be disputed. This doctrine was announced in, and was well illustrated by, the case of Cook *v.* The Champlain Transportation Co. 1 Denio, 91. But that it has its limita-

§ 879. *Intervening negligence of third party.* — Suppose that there are intermediate objects between the object for whose burn-

tions is very apparent from the proposition itself, as well as from the equally well-settled doctrine, that when a plaintiff has, by his negligence, contributed to a loss, he cannot recover therefor. The owner of land along a railway has the right to stack his wheat or hay, or to build and operate a powder-house on the line or margin of the right of way of a railroad. But the instinctive sense of prudence innate in every reasonable person would say that such a use of one's own property was *per se* negligence — carelessness. It being negligence to thus place his property in such an exposed position, he could not recover, although it should be destroyed by reason of the negligence of the railroad company, because his own negligence in thus placing his property contributed to the injury and loss. Or, suppose the owner of an elevator on the line of a railroad should make a thatched roof instead of a shingle or a slate roof, which he clearly has an abstract right to do; and, by reason of such thatched roof, and the negligence of the employees of the railroad company, his elevator should be consumed by fire, could he recover? Clearly not; and why? Not because he had no right to build his elevator and thatch the roof, but because to do so was negligence, carelessness, which contributed to the loss.

"Now, although the plaintiff had the right to stack his hay on the open prairie, and thereby only took the risk of accidents and not of the defendant's negligence; yet, if by ploughing around the stacks, or otherwise protecting them, he could have prevented the loss, and to omit thus protecting them was negligence, he could not, under the well settled rule above stated, be entitled to recover. But the instruction says: 'If the plaintiff had his property in an exposed position, or *put it up in an imprudent manner*, if he placed it where he had a lawful right to place it,' &c., he may recover if it was destroyed by the negligence of the defendants. Could he recover if it was negligence to thus place his property and leave it without any protection, and the absence of such protection contributed to its loss? Surely not; for where both parties have been guilty of negligence contributing to the loss, neither can recover. The instruction, then, is fatally defective, in that it does not submit to the jury the question whether the plaintiff, by his negligence, contributed to the loss; and, if so, then he could not recover. And it is not only defective in this, but is affirmatively erroneous in that it says to the jury that the plaintiff may recover, although 'he placed his property in an exposed position, and put it up in an *imprudent manner*.' What is an imprudent act? It is no more or less than a heedless, rash, careless, negligent act. So that in fact the jury were told that plaintiff could recover for his hay, although he was guilty of negligence in the manner of putting it up.

"This error is not cured by any other instruction given in the case. Indeed, the same omission is found in the latter part of the instruction first above noticed; and hence it is said, in the first comments upon it, that it was not error to give it 'in connection with other proper instructions in the case.' The part of the instruction referred to is as follows: 'And if you find, from the evidence, that fire escaped from an engine operated by the defendants, setting fire to accumulated dry grass and weeds within the

ing damages are claimed and the object first ignited, and suppose that the fire, if there had been due diligence, could have been extinguished when passing through one of those intermediate objects, is the original author of the fire liable? This interesting and difficult point has been already discussed in sections in which the doctrine of causal connection in this respect is examined.[1]

§ 880. *Local statutes imposing absolute liability on company.* — By statutes in force in several of the states, railroad companies are made liable for all fires communicated by engines, independently of the question of negligence; and they are authorized to insure such risks. Under these statutes the companies are held only to be liable for the burning of such articles as could be insured, thus excluding mere movable and transitory chattels,[2] but including remote as well as proximate damage.[3]

III. FIREWORKS.

§ 881. The explosion of fireworks on all public occasions, when sanctioned by law or custom, is subject, so far as concerns participants, to the considerations heretofore noticed as applying to public games.[4] But when such fireworks are exploded in grounds not set apart for the purpose, their explosion is unlawful and makes the parties concerned liable for injuries sustained by others not participants.[5]

right of way of the defendants' road, in consequence of which the plaintiff's property was destroyed, *then the defendants are liable.*' Of course, if the plaintiff's negligence contributed to the loss, the defendants would not be liable, although all the collated facts were shown. But this omission could easily be remedied by a further instruction, while the last instruction above set out is erroneous in the breadth of the doctrine it announced, and in failing to properly limit it."

The case of Ohio & Miss. R. Co. *v.* Shanefelt, supra, holding that landowners contiguous to railroads are as much bound in law to keep their lands free from an accumulation of dry grass and weeds as railroad companies are, applies, on reasoning already given (supra, § 148), to cases where a fire is ignited on the company's right of way, and is communicated by negligent third parties.

[1] See supra, § 148–9.

[2] Chapman *v.* R. R. 37 Me. 92. See Ingersoll *v.* R. R. 8 Allen, 438; Hart *v.* R. R. 13 Metc. 99. See for statutes, Shear. & Red. on Neg. § 334.

[3] See Hooksett *v.* R. R. 38 N. H. 242; Hart *v.* R. R. 13 Mete. 99; Ingersoll *v.* R. R. 8 Allen, 438; and cases cited supra, § 150 *et seq.*

[4] Supra, § 401.

[5] Conklin *v.* Thompson, 29 Barb. 218; Scott *v.* Shepherd, 2 W. Bl. 892; supra, § 95.

IV. FIRE-ARMS.

§ 882. The same reasoning applies to the use of fire-arms.[1] A hunter shooting in a wilderness is not bound to the caution required of a person shooting in a populous neighborhood,[2] or of a military officer who, when training his men, negligently shoots a spectator;[3] though in the latter case it must be remembered that as the use of fire-arms is lawful, and that the men take upon them all the risks incident to their employment, the burden on the plaintiff is to prove negligence. But when the firing is unlawful, or when, being lawful, it is negligent, then it brings liability for the consequences, including injuries caused by fright.[4] And as loaded fire-arms are dangerous weapons, it is negligence to place them in the hands of persons incompetent to use them.[5]

[1] See also supra, § 92, 108, 853.

[2] Supra, § 47–8; Bissell *v.* Booker, 16 Ark. 308.

[3] Castle *v.* Duryea, 42 Barb. 480; 2 Keyes, 169.

[4] Supra, § 836. See Haack *v.* Fearing, 5 Roberts, 528.

[5] Supra, § 92, 853. As to construction of Michigan statute concerning careless use of fire-arms, see People *v.* Chappell, 27 Mich. 486.

CHAPTER VI.

DEFECTIVE FENCING CAUSING STRAYING OF CATTLE: COLLISION OF CATTLE WITH LOCOMOTIVE ENGINE.

I. General duty to fence, § 883.
Neglect to repair fences by which cattle escape, § 883.
Fence left open by defendants whereby plaintiff's cattle escapes, § 884.
Neglect by defendant to fence dangerous places, § 885.
II. Fencing by railroads, § 886.
At common law not bound to fence, § 886.
By local statutes this duty is imposed, § 887.
Necessary exceptions to statutes, § 887 *a*.
Limitations as to persons benefited, § 887 *b*.
Degree of diligence required in fencing, § 888.
III. Collision of engine with cattle, § 891.
Company liable when neglecting statutory duty to fence, § 892.
Even when cattle are trespassers, company liable if collision could have prudently been avoided, § 893.
Omission to use bell or whistle, § 896.
Company not liable in case of accident, § 897.
When injury caused only by fright, company not liable, § 898.
Burden of proof on plaintiff, § 899.
Contributory negligence, § 900.
When road is run by several companies, § 901.

I. GENERAL DUTY TO FENCE.

§ 883. THE English common law requiring the owner of cattle to fence them in is in force in Maine,[1] New Hampshire,[2] Massachusetts,[3] Vermont,[4] New York,[5] New Jersey,[6] Pennsylvania,[7]

[1] Little *v.* Lathrope, 5 Greenleaf, 35; Lord *v.* Wormwood, 29 Me. 282.

[2] Avery *v.* Maxwell, 4 N. H. 36. See as to usage modifying this, Wheeler *v.* Rowell, 7 N. H. 515.

[3] In Lyons *v.* Merrick, 105 Mass. 71, the mule of the defendant escaped from his field through an insufficient fence into the field of A., thence into the field of B., and thence into the field of the plaintiff, and injured the plaintiff's mare. Held, that the defendant was liable for the injuries, although, as between him and A., the

[4] Holden *v.* Shattuck, 34 Vt. 336.

[5] Munger *v.* Tonawanda R. R. 4 N. Y. 349; Bowman *v.* T. & B. R. R. 37 Barb. 516. See, as to recent statute prohibiting cattle from running at large, Cowles *v.* Balzer, 47 Barb. 562; Bowyer *v.* Burlow, 3 N. Y. Supreme Court, 884.

[6] Price *v.* R. R. 2 Vroom, 229; Chambers *v.* Matthews, 3 Harrison, 368; Coxe *v.* Robins, 4 Halst. 384.

[7] N. Y. & Erie R. R. *v.* Skinner, 19 Penn. St. 301, where it was strongly declared that the owner of straying cattle is liable for the damage they do; but this is much qualified in N. P. R. R. *v.* Rehman, 49 Penn. St. 101.

Delaware,[1] Maryland,[2] Kentucky,[3] Minnesota,[4] Indiana,[5] and Michigan.[6] No such liability is regarded as in force by common law in Ohio,[7] Iowa,[8] Illinois,[9] California,[10] North Carolina,[11] South Carolina,[12] Georgia,[13] Mississippi,[14] Missouri,[15] and Texas.[16] In those states where the English common law is in this respect not in force, and where there is no local statute requiring fencing in of cattle, it is not negligence in the owner of cattle to permit them

latter was bound to keep the fence between their fields in repair; although the fence between the plaintiff's field and B.'s was insufficient; and although the defendant did not know that the beast was vicious. As to general duty see Eames *v.* Railroad, 98 Massachusetts, 560; Thayer *v.* Arnold, 4 Metc. 589.

In Lee *v.* Riley, 18 C. B. N. S. 722; 34 L. J. C. P. 212, it appeared that through the defect of a gate, which the defendant was bound to repair, his horse got out of his farm into an occupation-road, and strayed into the plaintiff's field, where it kicked the plaintiff's horse; and it was held, that the defendant was liable for the trespass by his horse, and that it was not necessary, for the maintenance of the action, to prove that defendant's horse was vicious, and that the defendant was aware of it; also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable.

[1] Vandergrift *v.* Del. R. R. 2 Houston, 297.

[2] Keech *v.* B. & W. R. R. 17 Md. 32.

[3] Louisville & F. R. R. *v.* Ballard, 2 Metc. Ky. 177.

[4] Locke *v.* St. Paul & P. R. R. 15 Minn. 350.

[5] Williams *v.* N. A. & S. R. R. 5 Ind. 111; Indian. R. R. *v.* Harter, 38 Ind. 557; Brady *v.* Ball, 14 Ind. 317. Though see under statute, M. S. & N. R. R. *v.* Fisher, 27 Ind. 96.

[6] Johnson *v.* Wing, 3 Mich. 163; Williams *v.* Mich. C. R. R. 2 Mich. 259.

[7] C. C. & C. R. R. *v.* Elliott, 4 Ohio St. 474. It is however held that if the owner of cattle permit them to stray, he cannot require those running trains to modify their speed in view of the abstract contingency that cattle may turn up on the road. At the same time, when cattle appear, those running the train must avoid damaging them, if this can be prudently done. C. O. R. R. *v.* Lawrence, 13 Ohio St. (N. S.) 66.

[8] Alger *v.* M. & M. R. R. 10 Iowa, 258; Herold *v.* Meyer, 20 Iowa, 378; Smith *v.* R. R. 34 Iowa, 506.

[9] Stover *v.* Shugart, 45 Ill. 76. Though see Bass *v.* C. B. & Q. R. R. 28 Ill. 9; C. B. & Q. R. R. *v.* Cauffman, 38 Ill. 409.

[10] Waters *v.* Moss, 12 Cal. 535; Comerford *v.* Dupuy, 17 Cal. 308.

[11] Law *v.* N. C. R. R. 7 Jones, 468.

[12] Murray *v.* R. R. 10 Rich. 227.

[13] Macon & W. R. R. *v.* Baber, 42 Ga. 305.

[14] Vicksburg & J. R. R. *v.* Patten, 31 Miss. 156. See Dickson *v.* Parker, 3 How. (Miss.) 219; N. O. R. R. *v.* Field, 46 Miss. 573.

[15] Gorman *v.* Pac. R. R. 26 Mo. 441. See H. & St. J. R. *v.* Kenney, 41 Mo. 271; Crafton *v.* R. R. 55 Missouri, 580.

[16] Walker *v.* Herron, 22 Tex. 55.

to stray at large,[1] Hence cattle thus straying upon uninclosed land are not trespassers; and it is not contributory negligence in their owners if it should appear that when trespassing they were negligently run down.[2] At the same time, if they are injured by any defect or dangerous agencies which are the usual, lawful, and necessary incidents of the place on which they stray, their owner has no redress.[3] But it must not be forgotten that cattle let loose on a railroad track are likely to do much harm; and hence so to let them loose may impose on their owner liability for the consequences, even where there is no law requiring cattle to be inclosed.[4]

Where the English common law is in force, all cattle straying even on uninclosed land are trespassers, and the owner is liable for any damage they may commit.[5] How far such straying constitutes contributory negligence, so as to defeat an action for negligent injury to the cattle, has been already discussed.[6] In any view, the owner of land is not bound at common law to fence out cattle, and if they stray on such land it is at their own risk.[7] He may drive them off, provided he does not do so negligently or with unnecessary force, so as to injure them; and he is not liable for any injury they may subsequently receive.[8] In some

[1] C. C. & C. R. R. *v.* Elliott, 4 Ohio St. 474; Herold *v.* Meyer, 20 Iowa, 378; Stover *v.* Shugart, 45 Ill. 76; Macon & W. R. R. *v.* Baber, 42 Ga. 305; Law *v.* N. C. R. R. 7 Jones (N. C. Law), 468.

[2] Supra, § 345, 396.

[3] Supra, § 350, 353, 837–8. See Walker *v.* Herron, 22 Tex. 55; Cowles *v.* Balzer, 47 Barb. 562; Woodward *v.* Purdy, 20 Ala. (N. S.) 379.

[4] Cent. O. R. R. *v.* Lawrence, 13 Ohio St. N. S. 66; N. Y. & E. R. R. *v.* Skinner, 19 Penn. St. 301. See supra, § 851. Infra, § 908.

[5] Lee *v.* Riley, 18 C. B. N. S. 722; Powell *v.* Salisbury, 2 Young & J. 391; Little *v.* Lothrop, 5 Greene, 35; Avery *v.* Maxwell, 4 N. H. 36; Thayer *v.* Arnold, 4 Metc. 589; Rust *v.* Low, 6 Mass. 90; Munger *v.* Tonawanda R. R. 4 N. Y. 349; Wells *v.* Howell, 19 Johns. 385; Cox *v.* Robins, 4 Halst. 384; Vandergrift *v.* Del. R. R. 2 Houston, 297; Williams *v.* N. A. & S. R. R. 5 Ind. 111; Brady *v.* Ball, 14 Ind. 317; Johnson *v.* Wing, 3 Mich. 163. Infra, § 908.

[6] Supra, § 345, 396.

[7] Chambers *v.* Matthews, 3 Harrison (N. J.), 368; Holden *v.* Shattuck, 34 Vt. 336; Bush *v.* Brainerd, 1 Cow. 78; Knight *v.* Abert, 6 Penn. St. 472; Phil. & G. R. R. *v.* Wilt, 4 Whart. 143; N. Y. & Erie R. R. *v.* Skinner, 19 Penn. St. 301; Deane *v.* Clayton, 7 Taunton, 489; Ilott *v.* Wilkes, 3 B. & A. 304; Buxton *v.* N. E. R. R., L. R. 3 Q. B. 549; Bird *v.* Holbrook, 4 Bing. 628; Lord *v.* Wormwood, 29 Me. 282; and cases cited supra, § 396.

[8] Palmer *v.* Silverthorn, 32 Penn. St. 65. As to Roman law, see supra, § 782.

jurisdictions, however, statutes are in force, providing that the owner of unfenced land can have no redress for injuries committed by straying cattle. In such cases, no suit can be maintained by him for such injuries against the owner of such cattle.[1] And if he, in any way (though unintentionally), tempt such animals on his land, he is liable for the damage they there receive from any peculiar peril.[2]

§ 884. *Fence left open by defendant whereby plaintiff's crops are destroyed.* — So an action lies when by the defendant's negligence plaintiff's fence is left open and his crops destroyed.[3] But the injury must be a natural and ordinary consequence of the negligence.[4] So, also, if caused by the negligent act of a third person, the causal connection is broken, and the defendant's liability is detached.[5]

§ 885. *Neglect by defendant to fence in dangerous places.* — This subject has been already incidentally noticed.[6] It is sufficient here to say that while a person opening near a public way a dangerous hole or ditch is bound to fence it in, yet the dangerous place must be sufficiently near the public way to make it probable that persons travelling the public way might be hurt.[7] Thus in an English case,[8] it appeared that the defendants were possessed of a canal and the land between it and a sluice; an ancient foot-path passed through the land close to the sluice; there was a towing-path nine feet wide by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the foot-path. By the permission of the defendants the intervening space had been lately used for carting, and ruts having been caused, the whole space between the canal and the sluice had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way, and fell into the canal and was drowned; and it was held that the canal was not so near the foot-path as to be adjoining to it,

[1] Studley *v.* Wright, 14 Conn. 292; Wright *v.* Wright, 21 Connecticut, 329.

[2] Crafton *v.* R. R. 55 Mo. 580.

[3] Loker *v.* Damon, 17 Pick. 284.

[4] Saxton *v.* Bacon, 31 Vt. 540.

[5] See Saxton *v.* Bacon, 31 Vt. 540; Crain *v.* Petrie, 6 Hill, N. Y. 522; Vicars *v.* Wilcocks, 8 East, 1. See supra, § 136.

[6] See supra, § 824–32; and infra, § 931.

[7] See supra, § 815, 824 *a*.

[8] Binks *v.* The South Yorkshire Railway & River Dun Co. 3 Best & S. 244; 32 L. J. Q. B. 26.

so as to throw upon the defendants the duty of fencing the canal off, and that the other facts did not render the defendants liable for the accident. Blackburn, J., in giving his judgment said: "In Hardcastle *v.* The South Yorkshire Railway Co.,[1] the court said, 'The proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise; if in every case it was to be left as a fact to the jury whether the excavations were sufficiently near to the highway to be dangerous.' That decision binds us (I do not say it is wrong, but it is sufficient that it binds us), and therefore, in the present case, it is not a question for the jury, but a question of law, whether the canal substantially adjoins the foot-path? and I do not think it possible to say that it is adjoining when there are intervening nine feet of towing-path and grass sufficient to make a real distinction between the towing-path and the foot-path. It is true this distinction has been done away with by the tenants of the land, but even if it had been done by the defendants that would not be sufficient to make them liable: concede that the distinction between the foot-path and the intervening space and the towing-path were not noticeable at night, that is not sufficient to make the canal 'adjoining' the right of way. Again, there might be a case where permission to use land as a path may amount to such an inducement as to lead the persons using it to suppose it a highway, and thus induce them to use it as such; but then, that must be proved by distinct evidence, and the mere fact of spreading cinders over the whole space cannot be said to be such an inducement." Mellor, J., also, said: "By going off the line of foot-path the passenger commits a trespass, though possibly it would not be so here; but even if he were not a trespasser, and if the distinction of the foot-path had been obliterated by the carting and consequent repair, still he must use the permission of the defendants subject to the dangers; and there was, therefore, in my opinion, no evidence of liability on the part of the defendants to go to the jury."[2]

The workmen employed in a government dock-yard were permitted by the government to cross certain lands within the dock-yard premises, to go to the water-closets erected for their ac-

[1] 2 Hur. & N. 67; 28 L. J. Ex. 139. B. 392; 19 L. J. C. P. 195; supra, § 825.

[2] See also Barnes *v.* Wood, 9 Com.

commodation. A government contractor, by permission of the government, had erected machinery in this yard, with a revolving shaft; a portion of this machinery was so placed as to cross the shortest and most convenient way to these water-closets. The shaft was partially covered, but not concealed, by planks, and was found by the jury to have been "insufficiently covered." There were other, though not shorter or more convenient, ways to these water-closets. The plaintiff, who was a workman employed in the dock-yard, but not by the contractor, who had erected the machinery, in going to the water-closet, accidentally fell near the shaft, which caught his arm and severely injured him. In an action against the contractor to recover damages for the injury, it was held, that the plaintiff's right to cross the yard was only the right not to be treated as a trespasser for so doing, and that the defendant was under no obligation to fence the machinery at all, and therefore not liable for insufficiently fencing it, and therefore that the action was not maintainable.[1]

II. FENCING BY RAILROADS.

§ 886. *At common law no such duty.* — At common law, a railway company is not bound to maintain fences sufficient to keep cattle off its line;[2] but is bound to use every reasonable care to prevent them from straying on the line.[3] When on the

[1] Bolch *v.* Smith, 7 H. & N. 736; supra, § 824.

[2] Supra, § 397, 833; R. R. *v.* Skinner, 19 Penn. St. 301; Lord *v.* Wormwood, 29 Me. 282; Perkins *v.* R. R. 29 Me. 307; Tonawanda R. R. *v.* Munger, 4 N. Y. 349; Toledo R. R. *v.* Vickery, 44 Ill. 76; Price *v.* N. J. R. R. 2 Vroom, 229; Chicago & Miss. R. R. *v.* Patchin, 16 Ill. 198; Ill. Cent. R. R. *v.* Reedy, 17 Ill. 581; Knight *v.* R. R. 15 La. An. 105; Williams *v.* R. R. 2 Mich. 259; N. E. R. R. *v.* Sincath, 8 Rich. L. 185; and cases cited supra, 883.

[3] Baxton *v.* N. E. Ry. Co., L. R. 3 Q. B. 549.

"Where there exists no statutory regulations defining the duties of railway companies in respect to fencing, they are under no obligations to make or maintain fences between their road and the adjoining lands. They come within the common law rule; and at common law, the owner of land is not obliged to fence against the cattle of his neighbor. The owner of cattle is bound to keep them within his own lines, and if he suffers them to go at large, and they stray upon the premises of his neighbor, they are clearly trespassers, and he is liable for whatever damage they may commit; and as a general rule, he cannot recover for injuries received by them while thus wrongfully on his neighbor's premises." Gilpin, C. J., in Vandergrift *v.* Delaware R. R. 2 Houston, 297. See Macon & West. R. R. *v.* Baber, 42 Ga. 305.

track, however, lawfully or unlawfully, if they are negligently run down, the road is liable.[1]

§ 887. *By local statutes such duty is imposed.* — By statutes, however, adopted in many jurisdictions, the duty of fencing is imposed on railroads, the object being to prevent collisions with cattle straying on the road; and hence, when in consequence of defective fencing, cattle, in such jurisdictions, stray on the road and are injured, the company is liable for the damages.[2]

[1] See supra, § 396–8; infra, § 893; Munger *v.* Tonawanda R. R. 4 N. Y. 349; N. P. R. R. *v.* Rehman, 49 Penn. 301; Ill. Cent. R. R. *v.* Phelps, 29 Ill. 447; Galpin *v.* Chic. R. R. 19 Wisc. 604; Brown *v.* H. & S. J. R. R. 33 Mo. 309.

[2] See supra, § 398; infra, § 891.

The statutes vary so much in character that any general classification would be futile. The following cases, however, may be of comparative use: —

In Vermont it is settled law that the obligation upon railroad companies to build a fence along their roads only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers therein. Bemis *v.* C. & P. R. R. 42 Vt. 375.

The "suitable" fences which a railroad corporation is required by the Massachusetts Gen. Sts. c. 63, § 43 (St. 1846, c. 271), to erect and maintain on both sides of the railroad, need not of necessity be such fences as are required to be maintained by owners of adjoining improved lands, and described in the Gen. Sts. c. 25, § 1, as "legal and sufficient." Eames *v.* Salem & L. R. R. 98 Mass. 561.

In Maryland, non-fencing is only *primâ facie* evidence of negligence. Keech *v.* R. R. 17 Md. 32. And so in Georgia. Macon R. R. *v.* Davis, 13 Ga. 68. And California, infra, § 899.

In an action by the owner against a railroad company, to recover damages resulting from an injury to his cow, "by reason of the want or insufficiency of fences," &c., as provided by the first section of the act of March 25, 1859 (S. & C. 331), entitled, "An act for inclosing railroads by fences and cattle-guards," it appearing in the petition that the injury complained of was done subsequent to the taking effect of the act of April 13, 1865 (S. & S. 7), entitled, "An act to restrain from running at large certain animals therein named," it is sufficient answer to allege, "That the plaintiff did not live along the line of its said road, nor was his said cow grazing in any inclosed field adjacent thereto. That said plaintiff knowingly, wilfully, and unlawfully permitted his said cow to run at large on the highways and uninclosed lands adjacent to defendant's said railroad, whereby said cow went upon said road and was accidentally killed." P., Ft. W. & C. R. R. Co. *v.* Methven, 21 O. St. 586. See supra, § 398.

A railroad company is not required by the Indiana statute to fence its road, where such fencing would result in cutting itself off from the use of its own land, or leased property, or buildings, or wood-sheds, although the buildings or sheds may not be in present use; and if cattle are killed at such a point by the cars of the company, it is not liable, unless there is proof of negligence or want of care or skill on the part of the persons oper-

§ 887 *a*. *Necessary exception to statute.* — Of special exceptions, several have been noticed in the note to the preceding

ating the train. Jeffers., Med. & I. R. R. *v.* Beatty, 36 Ind. 15.

See also Toledo R. R. *v.* Daniels, 21 Ind. 256; Ill. Cent. R. R. *v.* Swearingen, 33 Ill. 289, to the effect that the road leading to a machine shop, and other appurtenances, need not be fenced. So, also, as to station, In. & S. R. R. *v.* Christy, 43 Ind. 143.

In the same state it is necessary for the complaint, in charging negligence to the company, to aver that there was no negligence on the part of the plaintiff, though such an averment is not necessary when the defendant's negligence is in not fencing. But in the latter case it must be averred that the road was not securely fenced. It is not enough to charge that the road was not fenced "according to law." Jeffersonville, &c. R. R. *v.* Underhill, 40 Ind. 229; Jeffersonville, &c. R. R. *v.* Vanzant, 40 Ind, 233; Indianapolis, &c. R. R. *v.* Robinson, 35 Ind. 380.

"The Indiana statute makes no exceptions as to the place where the stock shall be killed, as to liability, if the road is not securely fenced; but this court has interpolated exceptions, such as the crossings of highways, streets, and alleys, in towns and cities, and at mills, where the public has a right and a necessity to go undisturbed; but this court has not made, and ought not to make, under the statute, an exception of large blocks of ground, merely because they are situated in a city. There is no reason why such lands not in a city must be fenced, which does not apply with equal, if not greater force, when they are within the limits of a city." Pettit, J., in Toledo, &c. R. R. *v.* Howell, 38 Ind. 448, citing Bellefontaine R. R. *v.* Reed, 33 Ind. 476; Indianapolis, &c. R. R. *v.* Parker, 29 Ind. 471; Toledo, &c. R. R. *v.* Cary, 37 Ind. 172.

The fencing of a railroad contemplated by the Illinois statute of March 4th, 1863, providing compensation to the owners of animals killed or injured by the cars, &c., of a railroad company, includes the putting in of proper cattle-guards to prevent animals from passing from streets and highways upon the railroad track on each side of said streets and highways. Pitts., C. & S. R. R. *v.* Ehrhart, 36 Ill. 119.

The Illinois railroad companies are required to fence the tracks of their roads with sufficient fences to turn stock, and after erecting them, to keep them in repair; they are required to put in gates at farm crossings, which are a part of the fence, and the duty to keep their fences in repair includes the duty of keeping these gates safe and securely closed, so as to afford equal protection from stock getting upon their roads at such places as to other points. Chic. & N. W. R. R. *v.* Harris, 54 Ill. 528.

The Iowa statute requiring railroads to fence, makes the railroad neglecting to fence liable only for damages to cattle "running at large," and not to those driven by their owner and within his control. Hinman *v.* C., R. I. & P. R. R. 28 Iowa, 491; Smith *v.* C., R. I. & P. R. R. 34 Iowa, 96.

The Iowa statute does not compel railroads to fence their depot grounds. Davis *v.* Bur. & M. R. R. Co. 26 Iowa, 549; Durand *v.* C. & N. W. R. R. Co. 26 Iowa, 559; Smith *v.* Chic. & R. I. R. R. Co. 34 Iowa, 506. As to Missouri, see Crafton *v.* R. R. 55 Mo. 580.

Under the Iowa statute, to attach liability to a railroad for injury to cattle from its failure to repair its fences, it must have knowledge, either actual

section. As a general exception, it may be mentioned that when a railroad crosses a city, though it is required, as has been seen, to take every reasonable precaution to prevent collision, it is a necessity of business that it should be relieved from the necessity of putting up fences.[1] But where this does not interfere with the necessary current of business, cattle-guards should be put up.[2]

§ 887 *b. Limitations in statutes as to persons to be benefited.* — In England and in several of our own states, the protection of the statutes is limited to the occupiers of land adjoining the road. Hence the company is not bound to fence out cattle straying on a highway which runs alongside of the road in parallel lines.[3] It has no doubt been held under local statutes that a railroad is not bound to fence against cattle unlawfully in a pasture adjoining,[4] but at common law this view is irreconcilable with principle and with the weight of authority.[5]

§ 888. *Degree of diligence in fencing.* — The degree of diligence to be exercised in fencing is not that of perfect vigilance and accuracy, but such as good business men, in this particular branch of industry are accustomed to exercise.[6] Thus it has been

or implied, that the fence is out of repair, and a reasonable time to put it in good condition. Aylesworth *v.* R. R. 30 Iowa, 459.

[1] See Halloran *v.* R. R. 2 E. D. Smith, 257; Bowman *v.* R. R. 37 Barb. 516; Ill. Cent. R. R. *v.* Goodwin, 30 Ind. 117; Great W. R. R. *v.* Morthland, 30 Ill. 451; Galena & C. R. R. *v.* Griffin, 31 Ill. 303.

[2] Perkins *v.* R. R. 29 Me. 307; Brace *v.* R. R. 27 N. Y. 269; Great W. R. R. *v.* Morthland, 30 Ill. 468; Toledo R. R. *v.* Howells, supra; Tol., W. & N. R. R. *v.* Owens, 43 Ind. 465.

[3] Eames *v.* R. R. 98 Mass. 560; Ricketts *v.* R. R. 12 C. B. 160; Manchester R. R. *v.* Wallis, 14 C. B. 213; Jackson *v.* R. R. 25 Vt. 150; Ellis *v.* R. R. 2 H. & N. 424.

[4] Lawrence *v.* Combs, 31 N. H. 331; Chapin *v.* R. R. 39 N. H. 53; Mayberry *v.* R. R. 47 N. H. 391; Jackson *v.* R. R. 25 Vt. 150; Ellis *v.* R. R. 55 Mo. 33.

[5] Browne *v.* R. R. 12 Gray, 55; Corwin *v.* R. R. 3 Kernan, 42; Isbell *v.* R. R. 27 Connecticut 393; Fawcett *v.* Railroad, 16 Ad. & El. 618; Sharrod *v.* Railroad, 4 W., H. & G. 586.

[6] See supra, § 48–65. 635; Bessant *v.* R. R. 8 C. B. (N. S.) 368; Polar *v.* R. R. 16 N. Y. 476; Lemmon *v.* R. R. 32 Iowa, 151; Chic. R. R. *v.* Atley, 38 Ill. 410; Indian. R. R. *v.* Marshall, 27 Ind. 300; Enright *v.* R. R. 33 Cal. 230.

A railroad corporation omitted to fence the line of its road in front of a culvert under the road-bed; and did not construct any barrier to prevent cattle from entering the culvert, although it was practicable to maintain such a barrier without interfering with the flow of the water. The depth of the water being usually enough to prevent the escape of cattle from the land of the adjoining proprietor at the unprotected place; but on a day

correctly ruled in Illinois,[1] that while railroad companies will be held to a high degree of diligence in keeping their fences in good repair, they are not bound to do impossible things, nor are they required to keep a constant patrol, night and day. If, where a railroad is inclosed by a sufficient fence, a breach occurs therein by reason of the unlawful act of a stranger, and through such breach stock get upon the track and are injured; in the absence of negligence on their part, the company will not be liable, unless the accident happened after the lapse of a sufficient time for the company, in the exercise of reasonable diligence, to have discovered and repaired the breach before the injury occurred. It has been also ruled in the same state that while these companies are not required to keep such a guard on their roads as would see a breach at the instant it occurs, and repair it at the time, still the law requires them to keep such a force as may discover breaches and openings in their fences, and close them in a reasonable time. And to neglect doing so, for a week or more is a neglect of duty that will ordinarily render them liable for an injury ensuing therefrom. In an action, therefore, against a railroad company, to recover for injuries to two horses, inflicted by a train on defendants' road, where it appeared the horses passed upon the track through an open gate at a farm crossing, the company, having permitted the gate to remain open for a week previous to the accident, was regarded as guilty of such negligence as rendered them liable.[2]

§ 889. So if a horse takes fright, runs away, and gets upon a railroad at a point where the company is bound to fence, and is killed upon the track, the fact that the fence or cattle-guard was insufficient at that point will alone render the company liable. But if the horse breaks a fence or leaps a cattle-guard, which would be sufficient under all ordinary circumstances to turn stock, then it will not devolve on the company to prove an absence of negligence in running the train, and the company will only be

when the water was low, a cow which he was pasturing there passed through the culvert, and over land of another person on the other side of it, and then entered the road at a place which was also defective for want of a suitable fence, and was there injured by a passing train. Held, that the railroad corporation was liable for the injury. Keliher *v.* Conn. R. R. 107 Mass. 411.

[1] Chic. & N. W. R. R. *v.* Barric, 55 Ill. 226.

[2] Chic. & N. W. R. R. *v.* Harris, 54 Ill. 528.

liable upon proof that it was guilty of carelessness or wilful injury.[1]

§ 890. *Diligence in maintaining.* — The duty to *make* involves the duty to *maintain;* and hence the company becomes liable if it permits, as has already been incidentally seen, a broken fence to remain unrepaired after notice of the breach could reasonably have been received by the company.[2] But where an employee went over the road at four P. M. Saturday, and found the fence in repair, and the next Monday morning he passed over the road and found the fence recently broken and stock injured, it was held that the company showed due diligence, and were not liable for the injury to the stock.[3]

III. COLLISION OF STEAM-ENGINE WITH CATTLE.

§ 891. This topic is so intimately blended with others that have been already discussed, that at this place it is best considered by presenting in connection with it a few general propositions, with references to the sections where the propositions have been already examined.

§ 892. *When cattle wander on a railroad through a fence which it was the duty of the company to maintain, then the company is primâ facie liable for injuries sustained by them through collision.* — This principle is established by a series of cases already cited;[4] and will be more fully discussed when we consider the question of burden of proof.[5]

§ 893. *If cattle trespass on a railroad through the negligence of their owner, the company is liable for a collision if it could have been prudently avoided.*[6]

[1] C. & A. R. R. Co. *v.* Utley, 38 Ill. 410.

[2] McDowell *v.* N. Y. C. R. R. 37 Barb. 195; Murray *v.* N. Y. C. R. R. 4 Keyes, 274; Bartlett *v.* D. R. R. 20 Iowa, 188; Indian. R. R. *v.* Snelling, 16 Ind. 435; Brown *v.* Milwaukee R. R. 21 Wisc. 39.

[3] Ill. Cen. R. R. Co. *v.* Swearingen, 47 Ill. 206.

[4] See supra, §§ 397–8, 883–8; and see also McCoy *v.* Cal. Pac. R. R. 40 Cal. 532; Bay City *v.* Austin, 21 Mich. 390; Child *v.* Hearn, L. R. 9 Exch. 176; Brady *v.* R. R. 3 N. Y. Supreme Ct. R. 537.

[5] See infra, § 899.

[6] Supra, § 397; Eames *v.* S. & L. R. R. 98 Mass. 560; Ill. Cen. R. R. Co. *v.* Middlesworth, 46 Ill. 294; Ill. Cen. R. R. Co. *v.* Baker, 47 Ill. 295; Toledo, P. & W. R. R. *v.* Bray, 57 Ill. 514; R. I. & St. L. R. R. *v.* Lewis, 58 Ill. 49. (*The contrary doctrine* to the above announced in Central Mil. Tract R. R. Co. *v.* Rockafellow, 17 Ill. 541; Ill. C. R. R. Co. *v.* Reedy, Ibid. 580; and Chi. & Miss. R. R. Co. *v.* Patchin, 16 Ill. 198,

§ 894. *The diligence to be exercised by an engineer in avoiding cattle on the road is to be such as would be exercised under such circumstances by good engineers having in view the safety of their trains.*[1] — An engineer seeing cattle ahead of him on a road is not bound to reverse his engine, unless it appear that he can do so without danger to his train, and unless it also appear that the cattle would otherwise be injured.[2] Nor are the company bound to break up their time appointments for the purpose of thus avoiding cattle.[3]

§ 895. Where, however, it appeared the cattle could have been seen on the track by the engineer, if he had been on the look-out, for a distance of more than half a mile, there being nothing to obstruct his view; and yet, with the stock standing on the track in full view, the engineer made no effort to avoid the danger, and never slackened the speed of the train, but rushed on at a rapid rate, without any signal to give the alarm: it was held,

is overruled. Ill. C. R. R. Co. *v.* Middlesworth, 46 Ill. 494.) Locke *v.* St. Paul & P. R. R. 15 Minn. 350; Shepard *v.* R. R. 35 N. Y. 641; New Orl. &c. R. R. *v.* Field, 46 Miss. 573; Mem. & Chi. R. R. *v.* Blakeney, 43 Miss. 218; Mem. & Chi. R. R. *v.* Orr, 43 Miss. 279; Hance *v.* R. R. 26 N. Y. 428; R. R. *v.* Cauffman, 28 Ill. 513; Needham *v.* R. R. 37 Cal. 409; Vandergrift *v.* Rediker, 2 New Jersey, 185; and other cases cited at large, supra, § 397, 883.

The statutes requiring railroads to fence do not make the railroads liable for damage, except in cases of negligence by the engineer, for injury to cattle wrongfully on the railway track. Towns *v.* Cheshire R. R. 21 N. H. 364; Perkins *v.* East. R. R. 29 Me. 307; Cornwall *v.* Sullivan R. R. 28 N. H. 161; Eames *v.* Salem & L. R. R. 98 Mass. 566; Bemis *v.* C. & P. R. R. 42 Vt. 378; Chapin *v.* Sull. R. R. 39 N. H. 53, 564; Mayberry *v.* Concord R. R. 47 N. H. 391.

[1] See supra, §§ 345, 397.

[2] Parker *v.* Dubuque S. W. R. R. 34 Iowa, 399; Lou. & F. R. R. *v.* Ballard, 2 Metc. (Ky.) 177.

[3] 1 Red. on R. R. 498; Keech *v.* R. R. 17 Md. 32; Fisher *v.* Farm. Loan Co. 21 Wisc. 73. See fully, supra, § 397, and cases cited infra, § 896–7.

Where an engineer runs a train with ordinary care and vigilance, and watches the track in advance as much as he can consistently with his other duties, he discharges all obligation which the company is under to one whose animal is on the track through the wrongful act or neglect of the owner, unless the safety of the passengers and interests of the company would allow the train to be stopped or its speed checked. When proper care and vigilance are being exercised in respect to these other interests, neither the mere fact that the speed of the train was not checked while it was approaching the animal, nor the mere fact that the engineer did not see it until so near it that he could not avoid the accident, tends to show any want of care as to the animal. Bemis *v.* C. & P. R. R. 42 Vt. 375.

that for the negligence of the engineer in not stopping the train in time to avoid the danger, the company was liable, even though the cattle were upon the track without the fault of the company.[1]

A railroad company, however, is not liable for the wilful acts of its engineer in running down stock.[2]

§ 896. *Omission to use bell or whistle.* — Engineers are required to use the ordinary means, the bell and whistle, to remove animals from the railway track.[3] To omit this, however, proves only a *primâ facie* case against defendants,[4] and they can show that the injury was not due to such omission.[5] When such means fail, then the question whether the engineer should stop the train, or check its speed, if in his power, would depend upon what the safety of the passengers and train required, and whatever is required in this respect, under the circumstances, would be allowable as to property wrongfully on the track.[6]

§ 897. *Company not liable in cases of accident.* — Thus, in accordance with principles already discussed,[7] if an animal is suddenly driven on the track by a dog, and there is no fault on the part of the engineer, the company is not responsible.[8] So it has been ruled[9] that a railroad company is not responsible for the value of a mule which passed through a gap in the fence near the railway, jumped on the track, only about fifty yards ahead of the locomotive, and was killed by an inevitable collision, there being no proof of negligence, unskilfulness, defective machinery, or recklessness. Had the mule, it was said, been on the railroad track far enough ahead to enable the engineer, by proper means, to stop the locomotive before it reached the animal, or to have enabled him to retard the train's progress until the mule could have been driven out of all danger of collision, it was his duty to see and save the mule, and, for failing to do so, the railroad company would have been responsible for its value. And so the

[1] Chic. & N. W. R. R. *v.* Barrie, 55 Ill. 226.

[2] De Camp *v.* R. R. 12 Iowa, 348; Cooke *v.* R. R. 30 Iowa, 202.

[3] Bemis *v.* R. R. 42 Vt. 375; Trout *v.* R. R. 23 Grat. 619.

[4] Memph. R. R. *v.* Bibb, 37 Ala. 699; Howenstein *v.* R. R. 55 Missouri, 33.

[5] Great W. R. R. *v.* Geddis, 33 Ill. 304; Ill. Cent. R. R. *v.* Phelps, 29 Ill. 447. See Aycock *v.* R. R. 6 Jones (N. C.), 231; supra, § 804.

[6] Bemis *v.* R. R. 42 Vt. 375: Trout *v.* R. R. 23 Grat. 619; supra, § 894.

[7] Supra, § 114, 553.

[8] Ill. Cen. R. R. *v.* Wren, 43 Illinois, 77.

[9] Lou. & Nash. Railroad Co. *v.* Wainscott, 3 Bush, 149.

company is not liable for breaches in its fence produced by causes beyond its control.[1]

§ 898. *Not sufficient if the injury was caused by fright, there being no collision.* — A railroad company is not liable, under the fencing statutes, for an injury to an animal, where a train caused the animal to take fright, and the injury was the result of the fright, there being no negligence in the company. And hence the company has been held not liable, where a colt frightened by a train, without negligence on the latter's part, ran from an adjoining field upon the railroad track, which was not properly fenced, and there broke its leg between the bars of a cow-pit.[2] And this is in accordance with the law as expressed in other relations.[3] A railroad company in exercise of its chartered privileges must sound whistles and do many other things calculated to frighten horses. If unchartered, it would be liable for damage thus produced; if chartered, its charter is a defence for its acts done in necessary exercise of its privileges. *But if the fright be produced by the company's negligence*, then it is liable for all the consequences. Thus when those driving a train wantonly cause cattle to take alarm, so that they become uncontrollable, the company is liable for the injury done the cattle by the fright.[4]

§ 899. *Burden of negligence is on plaintiff, as in other cases of collision.*[5] — It is necessary for the plaintiff to prove negligence on part of the defendant; it is not enough to prove the collision alone.[6] When there is a duty to fence, then it is enough to

[1] Ind. R. R. *v.* Wright, 13 Ind. 213; Ind. R. R. *v.* Oestel, 20 Ind. 231; Toledo & W. R. R. *v.* Daniels, 21 Ind. 256.

[2] Ohio & Miss. R. R. *v.* Cole, 41 Ind. 331.

Osborn, J. : . . . . "In the case of the Peru & Indianapolis Railroad Co. *v.* Hasket, 10 Ind. 409, this court held, and we now hold, that to render a railroad company liable for animals killed or injured by the cars or locomotive, or other carriages of the company, under the statute, it must be proven that there was an actual collision between the locomotive, cars, or other carriages of the company, with the animal injured. It is not enough to prove that the train caused the animal to take fright, and the injury was the result of the fright." To same effect is Burton *v.* P., W. & B. R. R. 4 Harring. 452.

[3] See supra, § 836.

[4] See cases cited supra, § 836; Sneesby *v.* Lancast. & Y. R. R., L. R. 9 Q. B. 263; relying on Lawrence *v.* Jenkins, L. R. 8 Q. B. 274. And see Moshier *v.* Ut. & Sch. R. R. 8 Barb. 427; Coy *v.* Ut. & Sch. R. R. 23 Barb. 643.

[5] See supra, § 421.

[6] Supra, § 421; Chicago & Miss. R. R. *v.* Patchin, 16 Ill. 198; Ill. Cen. R.

show a failure in fencing, in order to make out a *primâ facie* case. But in places where it is not required to fence, the law is otherwise; and where the evidence shows that a horse got upon a railroad track within the corporate limits of a city (where fencing is not required), and was driven by the train and finally killed at or beyond the city limits, and there is no evidence of negligence on the part of the company; the owner cannot recover if no negligence is proved.[1] But where a statute requires a railroad corporation to fence its road, the fact that animals stray upon it from an adjacent field, no intermediate fence having been put up, and that such animals are injured by a train on the road, establishes a *primâ facie* case of negligence against the corporation.[2] Nor does the putting of his cattle by the plaintiff in such unfenced field, he knowing that there was no fence separating it from the railroad, amount to such contributory negligence as bars the plaintiff's recovery.[3] But where a part only of a fence is defective, then the burden on the plaintiff is to show that the cattle entered through the defective part,[4] the company not being liable unless the cattle entered by the defective place.[5] On the other hand, when cattle come upon a railroad whose statutory duty it is to fence at a place where there is no fence, and wander along the road to a place where the road is not fenced, and cannot be fenced, and are there injured, the company is liable on the ground that it did not fence at the place where the cattle entered.[6]

§ 900. *Contributory negligence.* — This topic has been already

R. *v.* Reedy, 17 Ill. 580; Vandergrift *v.* Del. R. R. Co. 2 Houston, 297; Macon & West. R. R. *v.* Baber, 42 Ga. 305; Chic. & N. W. R. R. *v.* Barrie, 55 Ill. 226; Macon R. R. *v.* Vaughan, 48 Ga. 464.

[1] Great Western R. R. Co. *v.* Morthland, 30 Ill. 451.

[2] McCoy *v.* Cal. Pac. R. R. 40 Cal. 532; Keech *v.* R. R. 17 Md. 32; Cecil *v.* R. R. 47 Mo. 246; Macon R. R. *v.* Davis, 13 Ga. 68. Supra, § 398.

The plaintiff may close with such evidence, the burden being on defendant to prove *casus*. Great W. R. R. *v.* Helm, 27 Ill. 198; Suydam *v.* Moore, 8 Barb. 358; Waldron *v.* R. R. 8 Barb. 390; Horn *v.* R. R. 35 N. H. 169, 440. See as to Missouri, Meyer *v.* R. R. 35 Mo. 352; Powell *v.* R. R. 35 Mo. 457.

[3] McCoy *v.* Cal. Pac. R. R. 40 California, 532. But see supra. § 396, 892.

[4] See Morrison *v.* R. R. 32 Barb. 568.

[5] Bennett *v.* R. R. 19 Wisc. 145; Brooks *v.* R. R. 13 Barb. 594; Great W. R. R. *v.* Morthland, 30 Ill. 458; Sharrod *v.* R. R. 4 Exch. 580; Towns *v.* R. R. 21 N. H. (1 Foster), 363. See supra, § 398.

[6] Toledo, &c. R. R. *v.* Howell, 38 Ind. 447.

discussed.[1] It is important, however, to remember that whether there be or be not fencing statutes, it is negligence in the owner of cattle to permit them to stray in any place where they are likely to strike a locomotive engine;[2] though this will not excuse the company for recklessly running them down.[3]

§ 901. *When road is run by several companies.* — A company whose road is leased by another cannot defend itself from liability on the ground of such lease.[4] The company running the train is itself liable for the collision, and for the neglect of the company whose road it leases.[5] Each company, in fact, is liable: the company owning the road, for its negligence in thus endangering cattle; and the company running the road, for its negligence in running trains over a road by which the required precautions are not taken.[6]

[1] See supra, § 396.

[2] Supra, § 883; Bellefontaine R. R. *v.* Bailey, 11 Ohio St. 333; C. O. R. R. *v.* Lawrence, 13 Oh. St. 166; Corwin *v.* R. R. 13 N. Y. 42; Shepard *v.* Buff. R. R. 35 N. Y. 641; Ind. R. R. *v.* Shimer, 17 Ind. 295; Joliet R. R. *v.* Jones, 20 Ill. 221; Jef., M. & I. R. R. *v.* Adams, 43 Ind. 402.

[3] Supra, § 397.

[4] Wyman *v.* Railroad, 46 Maine, 162; Parker *v.* Railroad, 16 Barbour, 315.

[5] Ill. Cent. R. R. *v.* Kanouse, 39 Ill. 272. See Tracy *v.* R. R. 38 N. Y. 433.

[6] Toledo R. R. *v.* Rumbold, 40 Ill. 143.

CHAPTER VII.

NOXIOUS ANIMALS.

Roman law: Distinction between natural and non-natural harm, § 904.
Animals naturally noxious, § 905.
Wild animals, § 906.
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Cattle, § 908.
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Knowledge of noxious propensity to be presumed, § 923.
Effect of general character of animal, § 924.
Who are liable. "Owners," § 925.
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§ 904. *Roman law. Distinction between natural and non-natural harm.* — The Roman law on this topic presents some distinctive features which lie at the basis of our own jurisprudence. When the owner of an animal is sued for injuries done by the animal, the first question is whether the animal, in doing the harm, acted against its nature (*contra naturam*) or in conformity with its nature (*secundam naturam*). In the first case (*contra naturam*), the injury is called *pauperies;* or *damnum sine injuria facientis datum, vel noxa;* and assumes that the animal was not provoked to the mischief, and was not led on by a stranger. If the animal is provoked by the person injured, then the latter, if himself responsible for the provocation, has no redress. If the animal is led on by the defendant, then the latter is in *culpa* (whether he be the animal's owner or not), and may be proceeded against by the *actio legis Aquiliae.*[1] But independently of this process, a distinct remedy, called the *actio de pauperie*, sometimes called *quadrupedaria*, is given against the owner as owner, to whom the harm done by the animal is imputed. To this process

[1] Koch, Forderungen, III. 1179; L. I. § 3-6. D. h. t. Pr. Inst. h. t.

it is essential that the animal is tame, and the injury done by it *contra naturam;* and the action is inapplicable, therefore, to provoked animals and to wild beasts (*feris*). Originally only *quadrapedes* were the subject of this action; but subsequently it was extended to other animals.[1] By the modern Roman law, in the shape it assumes in German legislation,[2] the *actio legis Aquiliae* is the sole remedy for injuries of this class; and to entitle the plaintiff to recovery, negligence on the part of the defendant must be shown, and this with the following qualifications: if the injury comes from a domestic animal, then the owner is only liable in case he is either negligently ignorant of the mischievous tendencies of the animal, or, being cognizant of such tendencies, does not properly restrain it. If, however, the animal is at the time of the injury under the care of a keeper or herdsman, then the owner is liable only in case of his negligent selection of such keeper or herdsman. If the animal, though of a domestic and innoxious character, is vicious, and the owner knows this, or ought to know it, then he is liable for any damages caused by neglect in restraining such animal.

§ 905. *Animals naturally noxious.* — When the injury is done by an animal according to its natural instincts and habits (*secundam naturam sui generis*), the Roman law gave no remedy unless in some way this injury was induced by human negligence. But it was negligence in the owner of such animals to permit them to range at large; and the owner, by one of the prescriptions of the Twelve Tables, was liable for all the injuries produced by such freedom.[3] By the law as subsequently expanded, the owner was made personally liable for all injuries inflicted by the escaped animal.[4]

[1] L. 1. § 2. 7–10. L. 4. D. h. t.

[2] Koch, Forderungen, III. 1181.

[3] L. 14. § 3. D. XIX. 5; Koch, Forderungen, III. 1182. By the Prussian law, it is negligence to permit such animals to wander without a herdsman or keeper. Koch, Forderungen, III. 1183.

[4] This appears from the reason given why it was not necessary to seize the animal (as in some modern jurisprudences), to meet damages: "Quoniam, si quid ex ea re damnum cepit, habet" (*i. e.* the party injured), "proprias actiones." L. 39. § 1. D. ad. leg. Aquil. IX. 2. The animal, wherever it went, was subject to the claim for damages adhering to it as a lien: *noxa caput sequitur.* L. 1. § 12. D. si quadr. (IX. 2.) Hence as the animal could, at any future time, be seized to make good this claim, there was no reason that it should be immediately impounded to meet damages. Curious questions however, as to priority of liens, must have arisen when an

§ 906. *Wild animals.* — As by the Roman law there could be no property in wild animals, the possessor of such animals was held liable for their depredations only in case he negligently permitted them to escape his custody. No liability attached to him for them by reason of anything done by them after they obtained their liberty, if such liberty was obtained without their possessor's fault. But for injuries immediately consequent upon a negligent escape the Aediles provided a penal action for damages commensurate to the injury.[1] By the modern Prussian law, which forbids the keeping of a savage animal without license from the government, the keeping of such animal without license is *per se* negligence, which makes the delinquent responsible for all injuries which may thereby accrue to others.[2]

§ 907. *Anglo-American law. The owner of animals kept for use is liable for mischief done by them, when unrestrained, such mischief being in accordance with their nature; nor in such case is it necessary to prove knowledge on his part that their nature prompts them to mischief of this kind.* — We have already seen that a person who negligently puts animals in a position in which they are likely to do harm is, on principles heretofore fully discussed, liable for such harm;[3] and that he who uses a dangerous instrument is liable for the natural and probable mischievous consequences of the use of such instrument, in case he could by due circumspection have prevented such mischievous consequences.[4] The chief point as to which difficulty arises in the application of these principles is that which concerns the degree of knowledge the owner of the animal is presumed to possess of its mischievous tendencies. And as to this it is assumed by both the Roman law and our own, that when these tendencies are natural to the animals, they are to be regarded as natural laws, knowledge of which is supposed to belong to all men. On the same principle in which the tendency of heavy bodies to fall is regarded as a matter of common notoriety, so the tendency of animals to act according to their nature is regarded as a matter of common notoriety. Hence a person who negligently puts an animal in a position in which, following the laws of its nature, it does mischief, is as

animal, on a general excursion through several fields, committed a series of depredations.

[1] L. 1. § 10. D. si quad. (IX. 1.) § 1. Inst. eod. (IV. 9.) L. 4. D. eod.

[2] Koch, Forderungen, III. 1190.

[3] See supra, § 100.

[4] See supra, § 851.

liable for the consequences as is a person who negligently puts a heavy body in such a position that it falls.[1] This principle may be applied as follows: —

§ 908. *Cattle.* — It is the nature of cattle when straying at large to ravage the land on which they stray; and hence it is a principle of ethics as well as of jurisprudence, that he who permits his cattle so to stray is liable for the damage they do. By Plato this is announced as a primary principle of ethical jurisprudence: "και εαν ὑποζυγιον, ἢ ἵππος, ἢ τι τῶν ἀλλων δρεμματων σινηται τι τῶν πελας, κατα ταυτα ἐκτινειν την βλαβην."[2] By the Roman law the owner is vicariously liable for the harm done, *secundum naturam* by his domestic animals, in the same way as he is liable for the delicts of his slaves and of his children, within the scope of their representative relations.[3] That the English common law retains in some measure this doctrine is illustrated by the cases in which it is held that he who keeps animals which he knows are prone to mischief is liable for the harm done by them irrespective of the question of negligence.[4] Hence it is that the owner of cattle, by the English common law in force in several of our American states, is liable for any damage caused by his leaving them unfenced. And though the difficulties which in newly opened settlements attend fencing have led to some tardiness in the adoption of the rule in our less populated states, the principle is one which it is a necessity of all advanced agricultural communities to maintain.[5] Hence in modern German and Swiss law, which does not impose fencing as a uniform necessity, the owner of cattle who permits them to stray without a herdsman is in like manner liable.

§ 909. When we come, however, to the exhibition of unusual viciousness, such as is not natural to cows as a class, then, in conformity with the principles just stated, the knowledge of this individual peculiarity of particular cows must be properly imputable to the owner in order to make him liable for the mischief caused by such viciousness. But such knowledge is to be presumed if the cow in question has been in the habit of displaying such vi-

[1] See supra, § 73–100.

[2] De Legg. Lib. II. p. 170.

[3] Zimmern, Noxalklagen, § 92.

[4] Jackson *v.* Smithson, 15 M. & W. 563; May *v.* Burdett, 9 Q. B. 101.

[5] See supra, § 883; see Stumps *v.* Kelley, 22 Ill. 140; Van Leuven *v.* Lyke, 1 N. Y. 515.

ciousness; and it is clear that negligently to drive a vicious cow makes the drover liable for the damage she may inflict.[1]

§ 910. *Bulls.* — Here we enter on ground more debatable. Is it the natural tendency of bulls, when running at large, not merely to damage crops but to attack persons? Certainly the number of the cases in which bulls make such attacks is sufficient reason, in view of the severe injuries thus inflicted, to require the owners of bulls to keep them restrained. Yet the English law, departing in this respect from the Roman, seems to assume that in order to make the owner liable he should be in some way shown to be cognizant of the evil propensities of the particular bull. Thus where the defendant's bull, which was being driven along the public streets, ran at a man who had a red handkerchief round his neck and gored him, and the defendant after the accident was heard to say, that the red handkerchief caused the mischief, as a bull would run at anything red, — it was held, that this was some evidence to go to a jury, to show that the defendant knew that his bull was a dangerous animal. Pollock, C. B., said: "As the circumstance of persons carrying red handkerchiefs is not uncommon, and it is reasonable to expect that in every public street persons so dressed may be met with, we think it was the duty of the defendant not to suffer such an animal to be driven in the public streets, possessing as he did the knowledge that if it met a person with a red garment it was likely to run at and injure him."[2] And when of another bull the characteristic was a habit of goring gray horses, it was held that although it was contributory negligence in a boy, knowing this peculiarity of the bull, to expose a gray horse to the bull, yet it was negligence in the defendant to let the bull wander where he might hit upon gray horses.[3]

§ 911. *Rams* seem to be viewed in the same light as bulls, a *scienter* being necessary to make the owner liable. When, however, the owner knows that the ram has a propensity to butt, he is bound to secure it so that it can do no harm.[4]

[1] Hewes *v.* McNamara, 106 Mass. 281.

[2] Hudson *v.* Roberts, 6 Ex. 699; 20 L. J. Ex. 299; see Cockerham *v.* Nixon, 11 Ired. 269.

[3] Earhart *v.* Youngblood, 27 Penn. St. 327.

[4] Jackson *v.* Smithson, 15 M. & W. 561; Oakes *v.* Spaulding, 40 Vt. 347, where it was held that the owner of a ram, knowing of its propensity to butt persons, is bound so to secure it as to keep it under safe restraint. It was further ruled that a joint owner of

§ 912. *Dogs.* — This brings up questions still more complicated. The first is, is it in the nature of dogs to worry sheep and other defenceless animals? The Roman law, following in this respect the doctrine of Plato, held, as we have seen, that it is the nature of dogs when unrestrained to do mischief, and that hence their owner is liable for the mischief they do when unrestrained. Whether because in the course of centuries the nature of the domestic dog has become essentially changed, or whether, as is more likely, the English judges were influenced by the desire not to impose too great a liability upon those who kept dogs

a ram is chargeable with damage done by its butting while in the pasture of his co-owner, although the latter, of his own accord, and without permission of, or consultation with, the former, and in his absence took the ram, and put it into his pasture, where the injury was done, without trying to restrain it, the former having given no directions as to restraining the ram, and not having been consulted as to the keeping, care and management of it.

Barrett, J. . . . . "And, we think, the true view is well stated in the opinions, taken together, of Barons Platt and Alderson, in the case of Jackson & wife *v.* Smithson, 15 M. & W. Ex. R. 561. Platt, B., said: 'No doubt a man has a right to keep an animal which is *ferae naturae*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible.' Applying this principle in a case in which such a ram was the subject, Alderson, B., said: 'In truth there is no distinction between the case of an animal which breaks through the tameness of his nature, and is fierce, and known by the owners to be so, and one which is *ferae naturae*.' In the case of Brown *v.* Carpenter, 26 Vt. 638, a ferocious dog was the subject. Ch. J. Redfield said: 'His being in the presence of his keeper affords no safe assurance that his known propensities will not prevail over the restraints of authority.' That is the case often with men, and always liable to be with ferocious animals, as is said by one judge: 'I think sufficient caution has not been used. One who keeps a savage dog is bound so to secure it as to effectually prevent it doing mischief.' These expressions convey what this court regard as the true idea of the law on this subject — treating the words '*keeper*' and '*keeps*,' as referring to the person who is chargeable with the duty of keeping the beast under safe restraint. The origin, development, and application of the law in this respect is well shown in the arguments of counsel, and notes, and the opinions of the judges, as the case is reported in Card *v.* Case, 57 E. C. L. 622; 5 C. B. 633. Popplewell *v.* Pierce, 10 Cush. 509, is to the same effect. These cases so fully bring to notice the learning of the subject, that further special references seem not to be required." A special statute in Vermont dispenses with proof of *scienter* as to rams, between August 1 and December 1. See Town *v.* Lamphire, 37 Vt. 52.

for hunting or sporting purposes, the English common law at an early period assumed that to make the owner of dogs liable for their mischievous acts, he must be shown to have been aware of their particular tendency to such acts. "The domestic dog," says Mr. Campbell,[1] "has occasioned many legal disputes; and the presumption by the common law of England is that he is tame, and therefore the owner is not held responsible, unless the dog in question is by disposition ferocious, and reasonable ground be shown for presuming that this ferocious character is known to the owner. This is technically called proof of the '*scienter*,' from the terms anciently used in pleading. But this presumption was carried to an absurd extent, when the wolfish nature of the creature was deemed so completely extinguished that it was against his nature to worry sheep and cattle. And it did astonish the Scotch sheep-farmers when this doctrine was brought to their notice by the decision of a Scotch appeal by Lords Brougham and Cranworth,[2] who applied the rule to Scotland, so that, as Lord Cockburn observed, 'every dog became entitled to at least one worry.' The consequence was that an act (26 & 27 Vict. c. 100) was soon afterwards passed (for Scotland), declaring it unnecessary in an action against the owner of the dog to prove a previous propensity to injure sheep or cattle. An act to a similar purport was afterwards passed for England (28 & 29 Vict. c. 60)." Similar statutes have been passed in several of the United States; and in construing one of these statutes it has been ruled that the fact of knowledge in the owner of the vicious disposition of his dog, while not any longer essential to constitute the offence, is a proper subject to be taken into account and weighed by the jury in estimating the damages; it being held that recklessness of conduct or the want of due and reasonable care is an important element in estimating the damages in such a case, as it is in most cases of tort.[3]

§ 913. So far, however, as concerns the worrying and biting of human beings, it seems by Anglo-American law to be settled that the ferocious nature of the dog is so far extinguished by domestic life as to throw upon a party injured the burden of proving that the owner of the dog had knowledge of its tendency so to worry and bite.[4] When, however, such knowledge is established,

[1] Negligence, § 27.
[2] Fleming *v.* Orr, 2 Macq. 14.
[3] Swift *v.* Applebone, 23 Mich. 252.
[4] See Read *v.* Edwards, 17 C. B.

or when, as it will presently be seen, the defendant is in a position in which it is his duty to have such knowledge, then liability accrues. "Whoever," says Lord Denman, C. J., "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked or injured by the animal, without any averment of negligence or default in the securing or taking care of it. The *gist* of the action is the *keeping* the animal after knowledge of its mischievous propensities." [1]

§ 914. *Keeping a ferocious dog for defence does not impute liability unless the dog be kept negligently.* — In this respect the rule is to be distinguished from that laid down as to spring-guns. A spring-gun is an unnecessary and cruel engine; [2] a watch-dog, who will assail invaders, is sanctioned by usage and law, and may be maintained chained or inclosed for household protection.[3] Hence when the defendant, for the protection of his yard, kept a fierce dog, which was tied up all day and was let loose in the yard by night, and the defendant's foreman negligently went into the yard after dark, knowing that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he was not entitled to recover damages.[4] A man, however, has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there may be injured by it.[5] Even the putting up of a notice, to beware of the dog, will not exempt the owner of the animal from liability to a person injured, unless knowledge of the notice is brought home to the plaintiff.[6]

§ 915. *Horses.* — Horses, when left unattended, are not only apt, as are cattle, to damage crops, but they are liable to take

(N. S.) 245; Thomas *v.* Morgan, 1 C., M. & R. 496; Marsh *v.* Jones, 21 Vt. 378; Brown *v.* Carpenter, 26 Vt. 638; Woolf *v.* Chalker, 31 Conn. 21; Fairchild *v.* Bentley, 30 Barb. 147; Buckley *v.* Leonard, 4 Denio, 500; Sherfy *v.* Bartley, 4 Sneed, 58; Burden *v.* Barnett, 7 Ala. 169; McCaskill *v.* Elliott, 5 Strob. 196; Jackson *v.* Smithson, 15 M. & W. 563; Hudson *v.* Roberts, 6 Exch. 697; Vrooman *v.* Sawyer, 13 Johns. 339; Wheeler *v.* Brant, 23 Barb. 324.

[1] Judgt., May *v.* Burdett, 9 Q. B. 110, 111; Card *v.* Case, 5 C. B. 633; Hudson *v.* Roberts, 6 Exch. 697.

[2] See supra, § 347.

[3] See infra, § 924.

[4] Brook *v.* Copeland, 1 Esp. 302.

[5] Supra, § 860; Sarch *v.* Blackburn, 4 Car. & P. 300; Moo. & M. 505; Tindal, C. J. — Curtis *v.* Mills, 5 Car. & P. 489; Charlwood *v.* Greig, 3 Car. & Kir. 48.

[6] Sarch *v.* Blackburn, supra. See more fully infra, § 922–4.

fright, and then to do hurt by collision. Hence it is properly held that the owner of horses left without guard is liable for all the mischief they do, in pursuance of their natural habits, in consequence of their being thus left unguarded;[1] and it has even been held that if a horse and cart be left standing in the street without any person to watch them, and a person jostle against the horse and cause it to back against a shop window, the owner is liable for the damage, for he must take the risk of all the consequences that result from the horse being unattended, though an action would also lie against the person who struck the horse.[2] Nor is it necessary that the mischief done by the horse should be from *viciousness*. If done from mere playfulness the master's liability is the same.[3]

§ 916. *Animals contagiously diseased.* — Where cattle, which were afflicted with a contagious disorder, trespassed upon an adjoining pasture and infected other cattle with the disease, it was held that the owner of the trespassing cattle was responsible for the damage arising from the spread of the disorder as well as for the injury to the grass and herbage.[4]

§ 917. *Animals ferae naturae.* — These, as a class, are known to be mischievous, and whoever undertakes to keep them is liable for the consequences if damage ensue.[5] In an English case,[6] the declaration stated that the defendant wrongfully kept a monkey, well knowing that it was of a mischievous and ferocious nature, and used and accustomed to attack and bite mankind, and that it was dangerous to allow it to be at large; and that the monkey, whilst the defendant kept the same as aforesaid, did attack, bite, and injure the female plaintiff, whereby, &c. It was objected, on the part of the defendant, that the declaration was bad, for

[1] Lynch *v.* Nurdin, 1 Q. B. 38. Supra, § 100–1, 113, 838. In some states this liability is imposed by statute: Barnes *v.* Chapin, 4 Allen, 444; Goodman *v.* Gay, 15 Penn. State, 188.

[2] Illidge *v.* Goodwin, 5 C. & P. 192. See supra, § 838, for cases where it is held contributory negligence to leave horses unattended on highways; and see McCahill *v.* Kipp, 2 E. D. Smith, 413. In Cox *v.* Burbridge, 13 C. B. N. S. 430, however, it was said that none but the public, or the owner of the fee, could complain of animals wandering on the highway.

[3] Dickson *v.* McCoy, 39 N. Y. 400.

[4] Andrews *v.* Buckton, 1 Strange, 192; Barnum *v.* Vandusen, 16 Conn. 200; Mullett *v.* Mason, Law Rep. 1 C. P. 559; Fultz *v.* Wycoff, 25 Ind. 321; Jeffrey *v.* Bigelow, 13 Wend. 518; Penten *v.* Murdock, 22 Law T. R. 371.

[5] See Besozzi *v.* Harris, 1 F. & F. 92; Scribner *v.* Kelley, 38 Barb. 14.

[6] May *v.* Burdett, 9 Q. B. 101.

not alleging negligence or some default of the defendant in not properly or securely keeping the animal; and it was said that consistently with this declaration, the monkey might have been kept with due and proper caution, and the injury might have been entirely occasioned by the carelessness and want of caution of the plaintiff herself. Lord Denman, C. J., however, said: "The conclusion to be drawn from an examination of all the authorities appears to us to be this — that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if it does mischief, negligence is presumed without express averment." When, however, the animal has escaped from its keeper and returned to wild life, as no ownership in it remains, there can be no further liability, as the Roman law above stated well determines, on the part of its late keeper.

§ 918. *Negligence need not be averred when knowledge is averred.* — Nor is the principle announced by Lord Kenyon in the case last cited to be confined to animals *ferae naturae*. Domestic animals, relapsing into their wild habits, are included in the same rule; the *gist* of the action in such cases not being the *negligent* keeping, but the keeping with the *knowledge* of the mischievous propensity.[1] At the same time, when the keeping of the animal is lawful, the defendant may set up either due diligence, *casus*, or the intervention of the negligence of others, as a defence.[2]

§ 919. *Owner of noxious animal bound to appropriate diligence.* — Here, again, must we invoke the old standard of the *bonus paterfamilias* or good business man.[3] No one has a right to use instruments he knows to be dangerous to others without acquainting himself with their properties and guarding them in proportion to their risk.[4] In the Roman law is this doctrine expressly[5] and in our own implicitly applied to animals.[6]

§ 920. *When vicious animal is transferred to another, notice*

[1] Jackson *v.* Smithson, supra; May *v.* Burdett, supra; Cox *v.* Burbidge, 13 Com. B. N. S. 430; 32 L. J. C. P. 89; see Brown *v.* Carpenter, 26 Vt. 638; Pepperell *v.* Pierce, 10 Cush. 509; Stiles *v.* Cardiff Steam Nav. Co. 33 L. J. Q. B. 310; Scribner *v.* Kelly, 38 Barb. 14; Van Leuven *v.* Lyke, 1 N. Y. 515.

[2] Supra, § 114, 130, 148.

[3] Supra, § 31–7.

[4] Supra, § 48–9.

[5] See Zimmern's valuable treatise on Noxalklagen, § 24 *et seq.*

[6] See cases cited supra, and Meredith *v.* Reed, 26 Ind. 334.

should have been given of its viciousness. — This is in conformity with the principle heretofore stated, that he who confides to another a dangerous instrument is guilty of negligence if he does so without notice of its character.[1] But this only applies to viciousness directly calculated to produce injury. Where the evidence was that the defendant owned a mare, which had a habit of suddenly "pulling" back upon her halter when excited or restless, and that this habit was known to defendant, who left the mare at a hotel, kept by the plaintiff's employer, to be cared for, giving plaintiff no notice of the habit, and while the plaintiff was hitching the mare in the stable, and in doing so, had put her halter rope through a ring, she pulled suddenly back, drawing the rope through the ring, thereby severely injuring the plaintiff's finger, caught between the rope and ring and torn to pieces; it was held, that defendant was not bound to notify plaintiff of the habit of the mare to pull.[2] It was said, however, that it would be otherwise if the habit was flagrantly dangerous; *e. g.* kicking or biting.

§ 921. *But no liability attaches for a sudden and unnatural act of mischief done by an animal whose natural tendency is not to do such mischief.*[3] — Thus the owner of a horse is not liable for damages caused by a sudden fright of the horse, supposing there was no negligence on part of the driver, and the horse was one fit to be driven.[4] Nor according to the Roman law, and no doubt to our own, would the owner of a quiet house-dog be liable for injury done by him in a sudden attack of madness. And according to the Roman law, as just stated, the master is not liable when a wild animal escapes through *casus*.[5] So, the fact that a mare ordinarily gentle is in the habit of kicking other horses when in heat, it has been ruled in a case already cited, imposes no duty upon the owner to restrain her at other times, and his failure to do so would not be sufficient to make him responsible for her kicking another horse when she was not in heat.[6] So the owner of an elephant, lawfully in its place, has been held

[1] Blakemore *v.* R. R. 8 E. & B. 1035; supra, § 565.

[2] Keshan *v.* Gates, 2 N. Y. Supreme Ct. 288.

[3] Park *v.* O'Brien, 23 Conn. 339.

[4] Goodman *v.* Taylor, 5 C. & P. 410; Wakeman *v.* Robinson, 1 Bing. 213; 8 Moore, 63; Hammock *v.* White, 11 C. B. (N. S.) 588; Aston *v.* Heaven, 2 Esp. 533; Sullivan *v.* Scripture, 3 Allen, 364; Welden *v.* R. R. 5 Bosw. 576; Ficken *v.* Jones, 28 Cal. 618.

[5] Supra, § 866.

[6] Tupper *v.* Clark, 43 Vt. 200.

not to be liable for the fright its mere appearance occasioned to a passing horse.[1]

§ 922. *Character of notice required to make owner liable for special and non-natural tendencies of animal.* — It has already been seen that while the owner of an animal is liable without notice for its generic peculiarities, notice of some kind is necessary in order to make him liable for mischief done by it in accordance with tendencies as to which it differs radically from its race. In what way this notice is proved in respect to dogs is illustrated by several cases.

Notice to agents enough. — In an action for injury inflicted by the bite of a dog, in order to establish the *scienter*, it was proved that the wife of the defendant (who was a milkman) occasionally attended to his business, which was carried on upon premises where he kept the dog, and that a person had gone there and made a formal complaint to the wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew. Upon this it was held, that there was evidence of the husband's knowledge of the dog's propensity to bite.[2] In giving his judgment, Bovill, C. J., said: "I am not prepared to assent to the proposition, that notice to an ordinary servant, or even to a wife, would in all cases be sufficient to fix the defendant, in such an action as this, with knowledge of the mischievous propensity of the dog; but here it appears that the wife attended to the milk business, which was carried on upon the premises where the dog was kept, and that a formal complaint as to that dog was made to the wife when on the premises, and for the purpose of being communicated to the husband." Subsequently, however, it was held,[3] that if the owner of a dog permit it to run about his business premises and into the street near his shop during his absence, and his servants, ordinarily serving in his shop, are informed of the dog's ferocity, the fact of their knowledge is evidence sufficient to be left to the jury of the master's knowledge.

Prior ferocity. — In New Hampshire and Connecticut one in-

[1] Scribner *v.* Kelley, 38 Barb. 14.

[2] Gladman *v.* Johnson, 36 L. J. C. P. 153. See Thomas *v.* Morgan, 2 C., M. & R. 496; Gallagher *v.* Piper, 10 L. T. N. S. 718.

[3] Applebee *v.* Percy, 30 L. T. N. S. 785. See also McKone *v.* Wood, 5 C. & P. 1. Supra, § 223.

stance of prior biting is enough to charge notice,[1] and in New York two instances.[2] So it has been held, that in a suit for a bull hurting a horse it was competent to show that the owner knew that the bull had previously attacked a man;[3] and so, as to a dog, that the dog had previously shown a ferocious temper, though without biting.[4]

§ 923. *Knowledge of noxious propensity by owner may however be presumed.* — It has been just stated that the keeper of wild animals is liable for any damage which they may cause by his detention of them, and that it is not necessary to prove that he knew of their evil propensities,[5] and that the owner of animals of all classes, tame or wild, is assumed to be cognizant of their generic noxious tendencies; but that the owner of domestic animals is not liable for such damages perpetrated by them as are not in accordance with their nature, unless he knows or ought to know their tendency to such noxiousness. Not infrequently do we meet with cases in which this doctrine is so expressed as to make it appear necessary that notice was brought home to the defendant of some prior similar mischievous exploits of the animal.[6] Indeed so common was this misapprehension of the law that, as has been seen, it has been thought necessary in England and some parts of the United States to pass statutes protecting at least the sheep-growing and other industries, by enacting that in actions against the owners of dogs for worrying, it is not necessary to prove a *scienter* on part of the owner.[7] But the true view is that

[1] Arnold *v.* Norton, 25 Conn. 92; Kittredge *v.* Elliott, 16 N. H. 77.

[2] Buckley *v.* Leonard, 4 Denio, 500. See Loomis *v.* Terry, 17 Wend. 496.

[3] Cockerham *v.* Nixon, 11 Ired. (N. C.) 269.

[4] Worth *v.* Gilling, L. R. 2 C. P. 1. See supra, § 910.

[5] See May *v.* Burdett, 9 Q. B. 101 (a monkey); Besozzi *v.* Harris, 1 F. & F. 92 (a bear).

[6] Cox *v.* Burbridge, 13 C. B. N. S. 430, supra; Beck *v.* Dyson, 4 Camp. 98; Card *v.* Case, 5 C. B. 622; Applebee *v.* Percy, 30 L. T. N. S. 785; Woolf *v.* Chalker, 30 Conn. 121; Earl *v.* Van Alstone, 8 Barb. 630; Vrooman *v.* Lawyer, 13 Johns. 339; Fairchild *v.* Bentley, 30 Barb. 147; Stiles *v.* Nav. Co. 33 L. J. Q. B. 310, quoted Campb. on Neg. p. 103.

[7] So in Pennsylvania, as to horses and cattle, Goodman *v.* Gay, 15 Penn. St. 188; as to sheep, Campbell *v.* Brown, 19 Penn. St. 359; 1 Grant, 82. In Vermont, as to rams, Town *v.* Lamphire, 37 Vt. 52. In Massachusetts, as to animals straying on highway, Barnes *v.* Chapin, 4 Allen, 444; as to sheep, McCarthy *v.* Guild, 12 Metc. 291; Pressey *v.* Wirtly, 3 Allen, 191. As to dogs, special statutes are enacted in Massachusetts and other states. See Shearm. & Redf. on

the owner is to be presumed to know the viciousness of the animal in all cases where it is his duty to know of such viciousness. Such, indeed, is the rule as to negligence in other analogous branches of the law. A master is liable for his servant's negligence, not because he is proved to know that on one or two prior occasions that servant had been negligent, but because it is his business to be acquainted with the character of the servant he employs. A capitalist who opens a mill with cheap and defective machinery is held liable for the mischief this machinery does, not because this machinery has on prior occasions done injury to life or limb, but because it is his business, when he puts it in operation, to acquaint himself with its character, and his failure to do so is imputable to him as negligence.[1] If, however, instead of buying defective machinery, he should buy as motive power horses rejected in the market on account of their viciousness, he could not set up want of knowledge on his part of this viciousness as a defence; and the answer applies as effectively in one case as in the other, "You are bound to know the character of the instruments you employ, and your neglect to acquaint yourself with their character is itself a negligence for whose consequences the law holds you liable." Yet here we must again remember that the "knowledge" which is thus made obligatory on employers is not that perfect knowledge which is involved in the exploded theory of the *diligentia diligentissimi*.[2] The question is, not whether a particular animal may not on some single exceptional occasion be mischievous, for this does not prove a character for viciousness,[3] but whether the animal's nature and

Neg. § 205–8, for a valuable compilation of those statutes; and see Barrett *v.* R. R. 3 Allen, 101. In New York, as to sheep, Osincup *v.* Nichols, 49 Barb. 146; Auchmenty *v.* Ham, 1 Denio, 495; Wiley *v.* Slater, 22 Barb. 506. In Wisconsin, as to sheep, Denney *v.* Lenz, 16 Wisc. 566.

[1] See supra, § 730–7.

[2] See supra, § 65.

[3] See Tupper *v.* Clark, 43 Vt. 200, where it was held that the fact that a mare kicks when she is in heat does not prove her to be vicious. And see Decker *v.* Gammon, 44 Me. 322; Dickson *v.* McCoy, 39 N. Y. 400; Goodman *v.* Gay, 5 Penn. St. 188; Barnes *v.* Chapin, 4 Allen, 444; Conger *v.* Hudson River R. R. 6 Duer, 375; and supra, § 237–8, for the parallel case of evidence of incompetency in employees.

"By a vicious propensity," says Grover, J. (Dickson *v.* McCoy, 39 N. Y. 400; see Keshan *v.* Gates, 2 N. Y. Supr. 288), "is included a propensity to do any act that might endanger the safety of the person or property of others in a given situation; not such only as would impair the utility of the

character are such that mischief is a likely and natural result of his being let loose.[1] If the nature of an animal is fierce, so that mischief naturally flows from it, it is not necessary to prove that his owner knows that he has been guilty of prior acts of mischief, to make the owner liable for his depredations. Indeed this is now expressly held in England. Thus in a famous case already frequently cited,[2] where the defendant was held liable for mischief done by a horse which he left unattended on a highway, it was not even suggested that to make the defendant liable it was necessary to prove that the horse had to his knowledge on some prior occasion done mischief when left unattended. So it has been expressly held that it is not necessary, in order to sustain an action for damages for negligent keeping of a ferocious dog, to prove that the dog has bitten some one. It is enough to show that the animal was of a fierce and savage nature, and had evinced on former occasions an inclination to bite.[3] This brings us back to the principle already expressed, that a person whose duty it is to know a particular thing is liable for the consequences of his ignorance.[4] A man is bound to take notice of the agencies he uses, and if ignorance of their nature is a defence, then, as Pascal argues in a passage already quoted, the more reckless or stupid is the violator of law, the more complete his exemption from liability. I may choose, for instance, to carry a ferocious animal about with me, which I may be pleased to regard as harmless; but the law tells me that this, whether it be affectation or arrogance, is not permitted, and that if I undertake to indulge in such an eccentricity, my very non-acquaintance with the nature of the creature, instead of being a defence, is an act of negligence which makes me liable for any damage he may inflict. *Cui facile est scire, ei detrimento esse debet ignorantia sua.*[5]

§ 924. *Effect of general character of animal to charge master with notice.* — On the one side, when the suit against the master

animal for the purpose for which it is kept."

[1] See supra, § 73.

[2] Lynch *v.* Nurdin, 1 Q. B. 36. See supra, § 112, 860, 915.

[3] Worth *v.* Gilling, Law Rep. 2 C. P. 1; Judge *v.* Cox, 1 Stark. 285, qualifying Beck *v.* Dyson, 4 Campb. 198; McCaskill *v.* Elliott, 5 Strobh. 196.

[4] See supra, § 415; and see Conger *v.* Hudson Riv. R. R. 6 Duer, 375, cited supra, § 565; Van Leuven *v.* Lyke, 1 N. Y. 515.

[5] See supra, § 15, 16.

is for mischief done *contra naturam* by the animal, it is enough to put the master on his guard to show that the animal's general character is ferocious.[1] It is certainly notice enough that the animal has even once before[2] relapsed into savage habits. If there be such proof, then, in case of a renewal of such savage tendencies, resulting in the attack under trial, it is clear that evidence of the intermediate good character of the animal is irrelevant. It is true that the practice in this respect is fluctuating. In an English case,[3] the dog in litigation was brought into court in order that it might be inspected by the jury so that they might judge of its disposition. In a case reported by Zimmern, in the valuable treatise already referred to,[4] Madame Leclerc is reported to have been sued before a Parisian court in 1750 as the owner of an ass by which the plaintiff was bitten; and the character of the ass being in issue, the defendant was allowed to put in evidence the certificate of the pastor and five of the most respectable inhabitants of the place to the animal's innocency and goodness (Unschuld und Frömmigkeit); evidence which Zimmern tells us is, on the principles of the Roman law, clearly irrelevant. That such evidence is irrelevant, when there are prior instances of ferocity proved, has been ruled in New York, in a suit brought for damages sustained by the bite of a dog.[5] It was proved that the dog had previously bitten two persons; and the defendant then called witnesses to prove that it was quiet and inoffensive. But Jewett, J., on reviewing the admission of this evidence by the court at *nisi prius*, declared that the admission was erroneous, as the testimony "was immaterial. If the evidence proved that the dog bit the plaintiff, that the defendant was the owner and knew or had notice that the dog was accustomed to bite others, he was responsible for the injury, however high the character of the dog for mildness stood among the neighbors."

§ 925. *Who are "owners" liable for damages so inflicted.* — On the one hand, all who derive profit or service from animals are liable for the damage they inflict in the ordinary range of their service, in the same way that the master is liable for the

[1] McCaskill *v.* Elliott, 5 Strobh. 196; Worth *v.* Gilling, L. R. 2 C. P. 1.

[2] See supra, § 921.

[3] Line *v.* Tayler, 3 F. & F. 731.

[4] Zimmern, *ut supra*, p. 31.

[5] Buckley *v.* Leonard, 4 Denio, 500.

negligences of his servant,[1] and the engine-owner for defects in his machinery.[2] According to the Roman law, as already stated, a mere fiduciary possession of an animal, accompanied by its control, is sufficient to impose this liability; and the same rule is accepted by ourselves.[3] So he who permits an animal to reside on his premises becomes liable for the mischief it commits, under the limitations above stated;[4] but this, as has been correctly ruled in a case already referred to,[5] does not make the owner of premises liable for the depredations of a strange dog which he has not tolerated and has sought to drive off. On the other hand, when a drover undertakes the care of animals as an independent business, he may become exclusively liable for their trespasses resulting from his own particular negligence.[6] In several states the keepers of dogs are made by statute liable in all cases for their trespasses.[7]

§ 926. *Contributory negligence.* — The principles of contributory negligence, as already announced,[8] are of ready application to the topic immediately under consideration. We may, for instance, correctly assume that when a dangerous animal is put in such a position that even trespassers wandering through the premises are likely to be assailed by him without notice to them of the danger, the fact that the party assailed is a trespasser is no defence,[9] though notice may be inferred when the trespasser entered at night upon a close likely to be guarded by dogs.[10] We may also hold that if a dangerous animal is placed on a spot which children are apt to frequent, the fact that the children are trespassers cannot protect the owner from liability.[11] We may also, in analogy with the law laid down in other relations, hold, that where the defendant invites the plaintiff to cross the dog's path,

[1] Supra, 156–7.

[2] See supra, § 851, 857, 860.

[3] See Barnum *v.* Vandusen, 16 Conn. 200; Hewes *v.* McNamara, 106 Mass. 281; Sherman *v.* Bean, 8 Mete. 284; Marsh *v.* Jones, 21 Vt. 378; Fish *v.* Skut, 21 Barb. 333.

[4] See McKone *v.* Wood, 5 C. & P. 1.

[5] Smith *v.* R. R., L. R. 2 C. P. 4.

[6] Supra, § 778; Hewes *v.* McNamara, 106 Mass. 281.

[7] See as to Massachusetts, Barrett *v.* R. R. 3 Allen, 101.

[8] See supra, § 300–403.

[9] See supra, § 345; Loomis *v.* Terry, 17 Wend. 496; Sherfy *v.* Bartly, 4 Sneed, 5; Woolf *v.* Chalker, 31 Conn. 121.

[10] Supra, § 914, and cases there cited.

[11] Supra, § 345, 824, 851, 859, 860; Munn *v.* Reed, 4 Allen, 431.

no warning "to beware of the dog" will be an excuse.[1] It is clear, also, that the owner of land on which animals trespass may drive such animals into the highway, provided he inflict on them no unnecessary harm,[2] and that he may also drive off animals who endanger his person or property.[3] But it certainly is contributory negligence for a trespasser to pry in the night time into an inclosure which in the natural order of things may be guarded by dogs,[4] and so it would also be regarded as contributory negligence for a person visiting a menagerie to put himself within the bounds in which a wild beast is permitted to range.[5]

[1] See supra, § 379; Curtis *v.* Mills, 5 C. & P. 489.

[2] See supra, § 883–8.

[3] See supra, § 396–8.

[4] Supra, § 914.

[5] See supra, § 401.

CHAPTER VIII.

SUPPORT TO LAND AND HOUSES.

Excavation of soil, so that adjoining land or building is damaged, § 929.

Damage through interference with contiguous wall, § 930.

§ 929. *Excavation of soil so that adjoining land or building is damaged.* — By both the Roman law [1] and our own, the owner of land, who excavates it in such a way as to damage the soil of an adjoining proprietor, is liable for the injury, though he confines himself to his own soil. "If every proprietor of land was at liberty to dig and mine at pleasure on his own soil, without considering what effect such excavations must produce upon the lands of his neighbors, it is obvious that the withdrawal of the natural support would, in many cases, cause the falling in of the land adjoining. . . . . The negation of this principle would be incompatible with the very security for property, as it is obvious that if the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone." [2] The support, however, which the owner of soil is thus bound to give to the soil of an adjacent owner, is only such support as is necessary for unincumbered land; the rule being that no one shall excavate his own soil so as to cause his neighbor's to loosen and fall. But this rule only requires that support should be kept for the soil of the adjacent neighbor, and to any division fence he may erect,[3] but not to buildings on it unless erected for twenty years. If the excavations would have caused

[1] Supra, § 115.

[2] Gale on Easements, 335; Met. Works *v.* R. R., L. R. 3 C. P. 612; Farrand *v.* Marshall, 19 Barb. 380; Lasala *v.* Holbrook, 4 Paige, 169; Radcliff *v.* Brooklyn, 4 N. Y. 195; Howland *v.* Vincent, 10 Metc. 371. So also People *v.* Canal Board, 2 Barb. Sup. Ct. 275; McGuire *v.* Grant, 1 Dutch. 356; Foley *v.* Wyeth, 2 Allen, 131; Washburn on Easements, 542. See, as to interference with canals, Midland R. R. *v.* Chickley, L. R. 4 Eq. C. 20.

[3] O'Neil *v.* Haskins, 8 Bush., 653.

a subsidence of the ground without a building erected on it, but the damage would then have been inappreciable, there will be no right of action, although a building less than twenty years old has been considerably damaged.[1] Besides the exception arising from prescription, there is an exception recognized where a common owner originally held both parcels; that on which the plaintiff's house was built, and that which the defendant subsequently bought and excavated. In this case the defendant is charged with the duty of supporting not merely the soil, but the house of the plaintiff's parcel.[2] But wherever the owner of the soil has the right, so far as concerns adjoining buildings, so to excavate, he must exercise this right with the diligence good builders are in this respect accustomed to employ in similar circumstances,[3] and he is liable for any damage caused by the lack of such diligence.[4] But this does not preclude him, even supposing the adjoining houses may have acquired an easement by prescription, from draining his land, or from taking other steps necessary to its usefulness, when the land is in a large town.[5] And the first

[1] Smith *v.* Thackerah, L. R. 1 C. P. 564; Hunt *v.* Peake, Johns. (Eng.) Ch. 705; Partridge *v.* Scott, 3 M. & W. 220; Humphries *v.* Brogden, 12 Q. B. 736; Thurston *v.* Hancock, 12 Mass. 226. See comments in Farrand *v.* Marshall, 19 Barb. 380; Richardson *v.* R. R. 25 Vt. 465; Washburn on Easements, 545.

In Lasala *v.* Holbrook, 4 Paige, 169, where a church, which had been built for thirty-eight years, was injured by excavating an adjoining lot, the English limitation of twenty years was not sustained. The chancellor refused to enjoin the persons excavating, saying: "My neighbor has the right to dig a pit upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to my land in its natural state. I cannot, therefore, deprive him of this right by erecting a building on my lot, the weight of which will cause my land to fall into the pit which he may dig, — in the proper and legitimate exercise of his previous right to improve his lot."

[2] Cox *v.* Matthews, 1 Vent. 237; Humphries *v.* Brogden, 12 Q. B. 739; Harris *v.* Ryding, 5 M. & W. 71; U. S. *v.* Appleton, 1 Sumn. 492; Eno *v.* Del Vecchio, 4 Duer, 53; McGuire *v.* Grant, 1 Dutch, 356.

[3] Supra, § 31–46; Charless *v.* Rankin, 22 Mo. 566; Shrieve *v.* Stokes, 8 B. Monr. 453.

[4] Jeffries *v.* Williams, 5 Exch. 792; Elliott *v.* R. R. 10 H. L. Ca. 336; Bradbee *v.* Hospital, 4 M. & G. 714; Dodd *v.* Holme, 1 A. & E. 493; Foley *v.* Wyeth, 2 Allen, 131; Richardson *v.* R. R. 25 Vt. 465; Panton *v.* Holland, 17 Johns. 92; Radcliff *v.* Mayor, 4 N. Y. 195; McGuire *v.* Grant, 1 Dutch. 356; Shrieve *v.* Stokes, 8 B. Monr. 453; Richart *v.* Scott, 7 Watts, 460; Charless *v.* Rankin, 22 Mo. 566; *Casus*, of course, excuses. Shrieve *v.* Stokes, 8 B. Monr. 453; Chadwick *v.* Trower, 6 Bing. N. C. 1.

[5] Popplewell *v.* Hodkinson, L. R. 4 Exch. 248.

builder, if building so negligently as to make his building incapable of bearing such adjacent excavations as are made with due care, cannot, on the ground of contributory negligence,[1] recover, even in cases of prescription, for damages resulting from such excavation.[2]

The occupier of the ground floor of a house is responsible for damages to occupiers of an upper floor occasioned by his negligence in so excavating the ground as to weaken the support of the upper floors.[3]

§ 930. *Damage through interference with contiguous wall.* — Independently of rights acquired by prescription, no man has a right to require his neighbors to support his house. But while this is clear, it is also plain, in accordance with the law just stated as bearing on excavations, that the owner of a house which is being repaired or pulled down, who conducts the work so negligently that injury is produced thereby to the adjoining house, will be liable to make compensation in damages for the consequences of his want of caution.[4] The mere fact of juxtaposition, however, does not, in the absence of any right of easement, render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall, nor is such person, if he be ignorant of the existence of the adjoining wall, bound to use extraordinary caution in pulling down his own.[5] Prescription, it is said, does not run to protect one who builds a weak house which derives its support from another's.[6] So it has

[1] See supra, § 130, 300.

[2] Richart *v.* Scott, 7 Watts, 400; Washburn on Easements, 551; Smith *v.* Hardesty, 31 Mo. 412.

[3] Humphries *v.* Brogden, 12 Q. B. 739.

[4] Supra, § 115; Walters *v.* Pfiel, Moody & M. 362; Dodd *v.* Holme, 1 Ad. & E. 493; Bradbee *v.* Mayor, 5 Scott N. R. 120; Charless *v.* Rankin, 22 Mo. 566; Radcliff *v.* Brooklyn, 4 N. Y. 195; Eno *v.* Del Vecchio, 4 Duer, 53; 6 Duer, 17; Partridge *v.* Gilbert, 15 N. Y. 601; and other cases cited; Washburn on Easements, 563. See Peyton *v.* Mayor, &c. of London, 9 B. & C. 725; Butler *v.* Hunter, 7 H. & N. 826, where the maxim *Respondeat superior* applied to exonerate the defendant from liability. For Roman law, see supra, § 115.

See further, as to right to support by an adjacent house, Solomon *v.* Vintners' Co. 4 H. & N. 585, where the cases are collected; and see Napier *v.* Bulwinkle, 5 Rich. S. C. 311; Wash. on Easements, 559.

[5] Chadwick *v.* Trower, 6 Bing. N. C. 1; reversing *S. C.* 3 Bing. N. C. 334; cited 5 Scott N. R. 119; Grocers' Co. *v.* Donne, 3 Bing. N. C. 34; Davis *v.* R. R. 2 Scott N. R. 74.

[6] Solomon *v.* Vintners' Co. 4 H. & N. 585; Napier *v.* Bulwinkle, 5 Rich. 311; Wiltshire *v.* Sidford, 8 B. & C. 259.

been held that there is no "obligation towards a neighbor cast by law on the owner of a house, merely as such, to keep it repaired in a lasting and substantial manner; the only duty is to keep it in such a state that his neighbor may not be injured by its fall; the house may, therefore, be in a ruinous state, provided it be shored sufficiently, or the house may be demolished altogether."[1] Where, however, several houses belonging to the same owner are built together, so that each requires the support of the adjoining house, and the owner parts with one of these houses, the right to such support is not thereby lost.[2] And the *right* to pull down, it need scarcely be repeated, does not protect the defendant, any more than in the analogous case of excavation just noticed, from the consequence of damages produced by his negligent exercise of this right.[3]

[1] Judgm., Chauntler *v.* Robinson, 4 Exch. 170. As to the right of support for a sewer, see Metropolitan Board of Works *v.* Metropolitan R. C., L. R. 4 C. C. P. 192.

[2] Richards *v.* Rose, 9 Exch. 218. See Partridge *v.* Gilbert, 15 New York, 601; Webster *v.* Stevens, 5 Duer, 553.

[3] Massey *v.* Goyder, 4 C. & P. 161; Walters *v.* Pfeil, *ut supra*; Trower *v.* Chadwick, *ut supra*; Radcliff *v.* Brooklyn, 4 N. Y. 195. So in Roman law, supra, § 115.

CHAPTER IX.

WATERCOURSES.

Liability for negligent flooding, § 934.
Liability for diverting or diminishing surface stream, § 935.
Rule as to artificial streams, § 936.
Unusual freshet or stress of weather a defence, § 938.
Liability for diversion of subterranean waters, § 939.
Nuisances on navigable streams, supra, § 846.
Sewerage, supra, § 262.

§ 933. THE subject of easements and servitudes in reference to watercourses is too vast and complicated to be introduced in its elements into the present volume; and I feel less embarrassment at this omission from the fact that this whole department of law is thoroughly and ably discussed in Professor Washburn's work on Easements and Servitudes, the third edition of which introduces the authorities as late as 1873. My object in the present chapter is to touch the subject only as far as it bears upon the Law of Negligence.

§ 934. *Liability for negligent flooding.* — He who builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or who brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, is not liable for the damage without proof of some fault or negligence on his part.[1] Hence where a railway company so constructed an embankment as to serve the purpose of a dam to create a reservoir for the accommodation of the mill-owners below, whereby the company obtained some indirect advantage; it was held that the company was

[1] Earl, C., in Losee *v.* Buchanan, 51 N. Y. 476, citing Angell on Watercourses, § 336; Taphan *v.* Curtis, 5 Vt. 371; Todd *v.* Cochell, 17 Cal. 97; Everett *v.* Hydraulic, &c. Co. 23 Ibid. 225; Shrewsbury *v.* Smith, 12 Cush. 177; Livingston *v.* Adams, 8 Cowen, 175; Bailey *v.* Mayor, &c. of New York, 3 Hill, 531; *S. C.* 2 Denio, 433; Pixley *v.* Clark, 35 N. Y. 520, 524; Sheldon *v.* Sherman, 42 Ibid. 484. See supra, § 846. Suppose A. has a drain through the lands of B. and C., and C. stops up the inlet into his land from B.'s, and A. nevertheless, knowing this, pours water in the drain and damages B., A. is liable to B. Collins *v.* Middle Level Commissioners, L. R. 4 C. P. 279; Judgm., Harrison *v.* Great Northern R. C. 3 H. & C. 238. See Ogburn *v.* Connor, 46 Cal. 346.

liable to proprietors on a lower grade of land for damages arising from a flood produced by the defective construction of the land.[1] So a municipal corporation is liable for negligence in defective sluices, culverts, drains, sewers, and dams.[2] So where, by a drainage act, the commissioners were to construct a cut, with proper walls, gates, and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and to keep the same at all times open; but in consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands; upon which the plaintiff and other owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, reopened it, and so let the waters through on to the plaintiff's land to a much greater extent: it was held that the commissioners were responsible for the entire damage thus caused to the plaintiff's land.[3] A similar position is taken in the Roman law. "Si fistulae, per quas aquam ducas, aedibus meis applicatae damnum mihi dent, in factum actio mihi competit."[4] . . . . This, however, is subject to the qualification that "fistulae" were not constructed with the "diligentia" of a "bonus et diligens paterfamilias." If they were so constructed, there was no liability. The same view obtains in our own jurisprudence. "Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable."[5] It is true that in a famous English case it was held, that, as between adjoining owners, one who diverts water from its natural flow, and accumulates it on his own land for his own purposes, is bound at all hazards to prevent its escape; and if it does escape, negligence or no negligence, he is re-

[1] Jones *v.* R. R. 27 Vt. 399.

[2] Supra, § 262, 846; Lacour *v.* Mayor, 3 Duer, 406; Smith *v.* Milwaukee, 18 Wisc. 63; Kensington *v.* Wood, 10 Penn. St. 93; Merrifield *v.* Worcester, 110 Mass. 216.

[3] Collins *v.* Commis. 4 C. P. 279.

[4] L. 18. D. de serv. praed. urb. 8. 2. Supra, § 115.

[5] Opinion in Livingston *v.* Adams, *ut supra*, as adopted by Earl, C., in Losee *v.* Buchanan, *ut supra*.

sponsible for the damage to his neighbor.[1] But this strict liability, so far as it makes the defendant liable irrespective of the question of negligence, is not, as has just been seen, accepted in this country, and has been much qualified in England by a case decided in 1874,[2] where it was held that when through exceptional rains the defendant's mines were flooded, and the water passed from thence to the plaintiff's, the defendant was not liable if he pursued, in his dealing with the water, the ordinary, reasonable, and proper mode of working the mine. Nor does this unqualified liability apply, even in England, to the occupiers of distinct portions of the same house, in reference to the water-pipes or reservoirs. If there be no negligence, one tenant in whose apartment a pipe bursts, or gutter overflows, is not responsible to another tenant, for damages produced by such bursting or overflowing.[3] Nor can it be extended to cases where the volume of descending water is increased by the necessities of non-negligent irrigation.[4]

§ 935. *Owner of land through which surface stream passes diverting or diminishing its volume.* — The owner of land through which a stream passes has a right to the advantage of the stream flowing in its natural course over his land, and to use the same as he pleases for any purposes of his own, provided that they be not inconsistent with a similar right in the owner of the land above or below; the law, however, being that the upper owner cannot diminish the quantity or injure the quality of the water, which would otherwise naturally descend.[5] Where, therefore,

[1] Rylands *v.* Fletcher, Law Rep. 3 H. L. 330; supra, § 787. See also Stout *v.* Adams, 2 Scam. 67; Tillotson *v.* Smith, 32 N. H. 90; Pixley *v.* Clark, 32 Barb. 268; *S. C.* 35 N. Y. 520, 530; Washburn on Easements, 382.

[2] Smith *v.* Fletcher, L. R. 9 Exch. 64, reversing a decision of the court of exchequer. Supra, § 787.

[3] Ross *v.* Fedden, Law Rep. 7 Q. B. 661; Carstairs *v.* Taylor, Law Rep. 6 Exch. 217. See also Ortmayer *v.* Johnson, 45 Ill. 469.

[4] Madras R. R. *v.* Zemindar, 30 L. T. N. S. 771; Alb. L. J., Sept. 5, 1874, 150; supra, § 787; Williams *v.* Gale, 3 Har. & J. 231; Kauffman *v.* Greisemer, 26 Penn. State, 407.

[5] Mason *v.* Hill, 5 B. & Ald. 1; Wright *v.* Howard, 1 Sim. & Stu. 190; cited Judgm. 12 M. & W. 349; Judgm., Embrey *v.* Owen, 6 Exch. 368, 373; Chasemore *v.* Richards, 7 H. L. Cas. 349; Rawstron *v.* Taylor, 11 Exch. 369; Broadbent *v.* Ramsbotham, Ibid. 602. See also Whaley *v.* Laing, 3 H. & N. 675, 901; Hipkins *v.* Birmingham & Staffordshire Gas Light Co. 6 H. & N. 250; *S. C.* 5 Ibid. 74; Snow *v.* Parsons, 28 Vt. 459; Judd *v.* Wells, 12 Metc. 504; Newhall *v.* Ireson, 8 Cush.

it is held in England, the owner of land applies the stream running through it to the use of a mill newly erected, or to any other purpose, he may, if the stream is diverted or obstructed by the proprietor of land above, recover against such proprietor for the consequential injury to the mill; and the same principle seems to apply where the obstruction or diversion has taken place prior to the erection of the mill, unless, indeed, the owner of land higher up the stream has acquired a right to any particular mode of using the water by prescription, that is, by user continued until the presumption of a grant has arisen.[1] But priority of occupation gives no priority of right to the use of the stream, beyond the actual extent of such occupancy.[2]

§ 936. *Artificial streams, however, may be absorbed by owner.* — On this subject we have the following authoritative remarks from an English judgment: "The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These natural rights and liabilities may be altered by grant or by user of an easement to alter the stream, as by diverting, or fouling, or penning back, or the like. If the stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of the flow is not subject to any rights or liabilities towards any other person, in respect of the water of that stream. The owner of such land may make himself liable to duties in respect of such water by grant or contract; but the party claiming a right to compel performance of those duties must give evidence of such

595; Sackrider *v.* Beers, 19 Johns. 241; Van Hoesen *v.* Coventry, 10 Barb. 518; Thomas *v.* Brackney, 17 Barb. 654; Hartsall *v.* Sill, 12 Penn. St. 248; Wash. on Easements, 348. See Phil. *v.* Gilmanton, 71 Pa. St. 140. Supra, § 127, 254, where it was held the city of Philadelphia was liable to persons navigating the river Schuylkill for a wasteful use of its water so as to impair such navigation. See also Woolman *v.* Garringer, 1 Montana, 535; Merrifield *v.* Worcester, 110 Mass. 216.

[1] Judgm., Mason *v.* Hill, 5 B. & Ad. 25.

[2] See Wash. on Easements, p. 353.

right beyond the mere suffering by him of the servitude of receiving such water." [1]

§ 937. A party who floods the land of another with an artificial stream is of course as liable for this as he would be for any other kind of flooding. But it is otherwise with regard to supplying a neighbor with such water. "If there is uninterrupted user of the land of the neighbor for receiving the flow as of right for twenty years, such user is evidence that the land from which the water is sent into the neighbor's land has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbor's land has become subject to the easement of receiving that water. But such user of the easement of sending on the water of an artificial stream is of itself alone no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbor below. The enjoyment of the easement is of itself no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbor. . . . . A party by the mere exercise of a right to make an artificial drain into his neighbor's land, either from mine or surface, does not raise any presumption that he is subject to any duty to continue his artificial drain by twenty years' user, although there may be additional circumstances by which that presumption could be raised, or the right proved. Also, if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned permanently, without intention to resume the works by which the flow was caused, and given up all right to and control over the stream, such stream may become subject to the laws relating to natural streams." [2]

§ 938. *Unusual freshet a defence.* — On principles heretofore announced,[3] it is a good defence that the flooding, whether this

[1] Judgm., Gaved *v.* Martyn, 19 C. B. N. S. 759, 760, and cases there cited; see Nutall *v.* Bracewell, L. R. 2 Exch. 1.

[2] Gaved *v.* Martyn, 19 C. B. N. S. 755–9, 760, quoted with approval in Brown's Legal Maxims, 575; and see Arkwright *v.* Gell, 5 M. & W. 203; Mason *v.* R. R., L. R. 6 Q. B. 578; Norton *v.* Valentine, 14 Vt. 237; Curtis *v.* Ayrault, 47 N. Y. 578; Wash. on Easements, pp. 386–411, where the subject of artificial watercourses is discussed.

[3] Supra, § 114–130.

be in backing the water on an upper proprietor, or throwing it forwards on a lower, is caused by an extraordinary freshet or sudden breaking up of ice.[1] It is otherwise, however, as to such freshets as are periodical and calculable.[2]

§ 939. *Subterranean waters.* — It will be inferred from what is already stated,[3] that if a man digs a well in his own land, so close to the soil of his neighbor as to require the support of a rib of clay or of stone in his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it makes no difference as to the legal rights of the parties if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary. Hence it properly follows that the owner of land through which subterranean waters flow has no right or interest (at all events, in the absence of an uninterrupted user of the right for more than twenty years), which will enable him to maintain an action against a land-owner, who, in conducting without negligence, and in a workman-like manner, excavations, in his own land, drains away the water from the land of the first mentioned owner, and causes his well to dry.[4]

[1] McCoy *v.* Danley, 20 Penn. St. 85; Monong. Nav. Co. *v.* Coon, 6 Penn. St. 379; see Young *v.* Leedom, 67 Penn. St. 355; Stout *v.* Millbridge Co. 45 Me. 76; Cowles *v.* Kidder, 4 Fost. 364; and cases cited in Wash. on Easements, p. 346.

[2] Bell *v.* McClintock, 9 Watts, 119.

[3] Supra, § 929.

[4] Acton *v.* Blundel, 12 M. & W. 324; Chasemore *v.* Richards, 2 H. & N. 168; *S. C.* 7 H. L. Cas. 349; South Shields Water Works Co. *v.* Cookson, 15 L. J. Exch. 315. See Bassett *v.* Company, 43 N. H. 573; Frasier *v.* Brown, 12 Ohio St. 364; Goodale *v.* Tuttle, 29 N. Y. 466; Bliss *v.* Greely, 45 N. Y. 671; Haldeman *v.* Bruckhardt, 45 Penn. St. 521; Roath *v.* Driscoll, 20 Conn. 533; Brown *v.* Ilius, 25 Conn. 583; Hoy *v.* Sterrett, 2 Watts, 230; Wheatly *v.* Baugh, 25 Penn. St. 528; Greenleaf *v.* Frances, 18 Pick. 117; Harwood *v.* Benton, 32 Vt. 737; Dexter *v.* Boston, 1 Story, 387; and see for a full consideration of the law, Wash. on Easements, ch. iii. § 7.

CHAPTER X.

COLLISIONS ON WATER.

Ships to be governed by maxim *Sic utere tuo ut non alienum laedas*, § 943.
Rule when one is stationary and another moving, § 945.
Sailing vessels colliding with steamers, § 946.
Care to be proportioned to emergency, § 947.
Lookout is to be maintained, § 948.
Signals and lights, § 949.
Casus, "Act of God," "Inevitable accident," § 950.
Contributory negligence, § 952.

§ 943. *Ships to be governed by maxim* Sic utere tuo ut non alienum laedas. — A vessel traversing the sea is bound, *mutatis mutandis*, to the same care in respect to the rights of another, as is a passenger traversing a highway. The law of collisions at sea, however, is affected by so many distinctive technical considerations that it cannot be here adequately discussed. All that is now proposed is to present such general propositions in reference to collisions on water as are of interest in suits at common law.

§ 944. "There seems no doubt," said Maule, J., in a leading case,[1] "that it is the duty of a person using a navigable river, with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to other vessels; and that in case of a collision arising from his negligence he must sustain without compensation the damage occasioned to his own vessel, and is liable to pay compensation for that sustained by another navigated with due skill and care. And this liability is the same whether the vessel be in motion or stationary, floating or aground, under water or above it: in all these circumstances the vessel may continue to be in his possession, and under his management and control; and supposing it to be so, and a collision with another vessel to occur from the improper manner in which one of the two is managed, the owner of the vessel properly managed is entitled to recover damages from the owner of that which is improperly managed." At the same time it was in the same case ruled that where a ves-

[1] Brown *v.* Mallets, 5 C. B. 599.

sel was sunk from unavoidable accident, the owner being wholly blameless, and there being no special circumstances throwing on him a continuing liability, he was not compellable to remove the obstruction to the navigation caused by the sunken vessel, nor even to take measures for diminishing the dangers arising from it.[1]

§ 945. *When one vessel is stationary and another moving.* — In cases of collision between a stationary and a moving vessel, the presumption of negligence is against the latter.[2] Thus in a Connecticut case[3] the evidence was that a dredging machine was anchored outside of but close to the channel of a navigable river, with an outrigger extending three feet over the channel, but ample room was left for the passage of vessels in the channel. A steamer going up the river by daylight in fair weather ran against the outrigger and damaged the dredging machine. In a suit brought by the owner of the latter against the owners of the steamer the court below found the facts, but did not find the defendants guilty of negligence, unless the law would infer it from the facts, and found that the plaintiff was not guilty of want of care, unless to be inferred from the facts. It was ruled by the supreme court, first, that the degree of care which the defendants were bound to exercise was that of skilful navigators; secondly, that the burden of proof as to the exercise of such care was on the defendants, and as the fact was not found in their favor the law would presume their negligence; and thirdly, that the law could not upon the facts infer want of care on the part of the plaintiff.

It may happen, however, that a stationary body may be placed in such a position in the channel that collision cannot be avoided without great risk, and in such case the negligence is with those so placing the stationary body. A steamship coming into New York, in charge of a pilot, ran over a seine, in which had been inclosed a quantity of fish, which are caught for the manufacture of fish oil and guano. A libel in admiralty being filed against her to recover damages, it was ruled that, inasmuch as it appeared that the steamship was in a regular course of navigation, and that the seine was in such a part of the channel that if the steamship had

[1] S. P. Winpenny *v.* Phil. 65 Pa. St. 136. Cited more fully supra, § 846.

[2] Culbertson *v.* Shaw, 18 How. 584; The Granite State, 3 Wall. 310; The Bridgeport, 7 Blatch. C. C. 361; The Julia M. Hallock, Sprague, 539; Bill *v.* Smith, 39 Conn. 206.

[3] Bill *v.* Smith, 39 Conn. 206.

deviated to go around it she would have been in danger of grounding, the seine was an obstruction to navigation. It was also held, that as the seine was put in the way while the ship was in sight, coming in, and as no negligence was shown on the part of the ship, the libel must be dismissed.[1]

§ 946. *Sailing vessel and steamer.* — When a sailing vessel and a steamer are proceeding in such directions as to involve collision, it is the duty of the steamer to keep out of the way of the sailing vessel, and of the sailing vessel to keep her course.[2] And the rule applies to a steamer transporting a train of cars across a river at a railway junction.[3]

§ 947. *Care to be proportioned to emergency.* — It has been already shown that diligence must be in proportion to duty; and that the care to be exercised in any given service is to rise so as to meet the dangers of such service.[4] To apply this principle to collisions at sea belongs to treatises on maritime law, of which it forms so important a branch. At present, all that can be done is to simply announce the principle with a single illustration. A steamer having a very large tow, and approaching a place where, from the number of vessels in the water and the force of counter currents, navigation with such a tow is apt to be dangerous — a place, for example, like that near the Battery, New York, where the East River and the Hudson meet — is bound to proceed with great care, and if within two or three miles of the place, though not nearer, she can divide her tow, she is bound to divide it.[5]

§ 948. *Lookout.* — This is always imperative, and when a vessel is sailing in close proximity to other vessels the fact that her hands are engaged in reefing her mainsail is no sufficient excuse for failure to keep a lookout, or to take such precautions as are needful to avoid collisions.[6] It seems that where the captain of a steamer is acting at the same time as pilot and lookout the vessel has not a proper lookout, and the owners would be liable for any injury caused by such omission.[7]

[1] The Steamship City of Baltimore, 5 Benedict, 474.

[2] St. John *v.* Paine, 10 How. U. S. 583; Jameson *v.* Drenkald, 12 Moore, 148; Handaysyde *v.* Wilson, 3 C. & P. 528; Mellon *v.* Smith, 2 E. D. Smith, 462.

[3] Phil. W. & B. R. R. *v.* Kerr, 33 Md. 331.

[4] See supra, § 47–8.

[5] The Steamer Syracuse, 12 Wall. 167.

[6] Thorp *v.* Hammond, 12 Wall. 408.

[7] Bill *v.* Smith, 39 Conn. 206.

§ 949. *Signals and lights.* — The same general considerations apply to the use of signals and lights, — a subject, however, governed by distinctive admiralty law, to which it is now practicable simply to refer. It may be noticed, however, that neglect to use the proper lights will not defeat a recovery if it appear that the colliding vessel was not misled by the neglect, and that the collision was in no way caused by such neglect.[1] And it is not negligence in those in charge of a vessel aground to omit to give signals to an approaching vessel as to which side is the proper course to take, even if such course is known to them. The customary signal from steam-vessels by blasts of the steam-whistle are to indicate the course which the vessel giving them intends herself to take, and are not, therefore, appropriate to be given by a steamer not in motion.[2]

§ 950. *Casus*, "*Act of God*," "*Inevitable accident*." — The meaning of these terms has been already discussed, and it has been shown that by the intervention of *casus* or *vis major*, causal connection is broken.[3] So far as concerns the topic immediately before us, we may regard it as settled that inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill.[4] It is consequently held, in accordance with views heretofore generally stated,[5] that where in a case of collision the defence of inevitable accident is raised, the *onus* of proof lies, in the first instance, on those who bring the suit against the vessel and seek to be indemnified for damage sustained; and does not attach to the vessel proceeded against until a *primâ facie* case of negligence and want of due seamanship is shown.[6] In a late important case before the English privy council, where this question arose, the evidence was that two sailing vessels approaching stern on in such a manner as that, under the sailing rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about two hundred yards, and the defendants' vessel, having been close hauled on the port tack, was then preparing to go about, and had eased off her head-sheets. Both vessels imme-

[1] Hoffman *v.* Union Ferry Co. 47 N. Y. 176; Whitehall Tr. Co. *v.* N. J. Steamb. Co. 51 N. Y. (6 Sick.) 369.

[2] Austin *v.* New Jersey Steamboat Co. 43 N. Y. 75.

[3] Supra, § 114–131.

[4] The Virgil, 2 W. Rob. 205; The Marpesia, L. R. 4 P. C. 212.

[5] Supra, § 421, 429.

[6] The Bolina, 3 Notes of Cases, 210; The Marpesia, *ut supra*.

diately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The plaintiffs' petition alleged that the defendants' vessel neglected to port, and it was stated, in answer to a question by the judge of the admiralty court, that the head-sheets of the defendants' vessel were not again hauled aft. On this evidence, that vessel was held to blame by the admiralty court, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel. It was held by the privy council (reversing the decision of the admiralty court), that the collision was the result of an inevitable accident, the defendants' vessel having done all that could be effected by ordinary care, caution, and maritime skill in the short space of time that elapsed, and that the plaintiffs, if they meant to rely upon the fact that the head-sheets had not been again hauled back, ought to have alleged that fact in their petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission.[1]

§ 951. But *casus* brought on by the plaintiff's negligence is, as has been already noticed,[2] no defence. Thus, to illustrate this by a recent case, where a steamboat collided with a vessel aground in or near the channel of a navigable river, it will not relieve the colliding vessel from liability for the injury, that, from some hidden and unforeseen cause, her bow was suddenly sheered directly toward the injured vessel, when so near that, by the exercise of the utmost care and vigilance, the collision could not be avoided, when it appears that at the time the steamer's bow so sheered, her pilot, under an erroneous impression as to the true direction of the channel, was negligently steering her away from it and out of the accustomed course.[3]

§ 952. *Contributory negligence.* — Here, again, must we fall back, so far as concerns general principles, upon the law already declared on the subject of contributory negligence in the abstract,[4] referring, for contributory negligence in its relation to maritime collisions, to treatises on Maritime Law. It is enough here to say that in suits for negligent collisions at sea, the plaintiff whose negligence directly contributed to the result breaks the casual

[1] The Marpesia, L. R. 4 P. C. 212. See The London, Br. & L. 82.

[2] Supra, § 123.

[3] Austin *v.* New J. Steam Co. 43 N. Y. 75.

[4] See supra, § 300.

connection between the defendants' negligence and the disaster, and cannot, therefore, recover. Thus it has been ruled that if by want of proper lights upon a vessel those in charge of another vessel are deceived and a collision happens, this is such contributory negligence as will prevent the owner of the former from recovering for the injuries resulting; but if those in charge of the latter knew the true state of the facts, and with reasonable care could have avoided the injury, the absence of the proper lights is no defence. In such a case, however, it is ruled that the presumption of contributory negligence would arise in the absence of proof of facts to repel it; but if there is evidence tending to repel this presumption, the jury is the only proper tribunal to weigh and determine the proper effect of it.[1]

[1] Silliman *v.* Lewis, 49 N. Y. 379. In this case plaintiff's barge and another were in tow immediately in the rear of a line of canal boats forming part of the tow, and about ten rods distant from them; instead of having the lights required by the navigation acts of Congress upon a vessel being towed, its lights indicated that the barge was at anchor. Defendants' schooner attempted to pass between the barge and the canal boats; there was ample room to pass in the channel outside of the tow, and there was no apparent necessity in the sudden change in the schooner's course. Held, there was evidence from which the jury might have found that those in charge of the schooner knew the barge belonged to the tow, and that the attempt to pass between it and the canal boats was negligence. A nonsuit, therefore, was error.

CHAPTER XI.

GAS COMPANIES.

§ 953. *Injury to consumers.* — The duties and liabilities of gas companies can be easily inferred from the elementary principles of the law of negligence as hereinbefore stated. Gas is an important yet delicate agent both of industry and comfort, an agent which when rightfully used is of great value, but which when badly made or applied may produce discomfort and business disorder. The gas producer may therefore be regarded as an agent who, for reward, undertakes to render a service requiring the skill of a specialist. From him, therefore, are expected the possession and the application of such skill and the use of diligence proportioned to the delicacy and difficulty of his business.[1] Yet here we must not fall into the error of imposing on him speculative duties, such as the highest conceivable scientific perfection might impose. No doubt great improvements in this, as well as all other manufactures, are possible; but he who undertakes to supply gas for family and business use is not expected to experiment with such improvements, because, if for no other reason, the experimenting with improvements is the experimenting with risks. His duty is to exert, not a possible yet unusual degree of keenness and inventiveness in his work, but that degree of diligence which good specialists in his particular department are accustomed to exert.[2]

§ 954. *Injury to third parties from imperfection of machinery.* — Were the duties of gas producers limited to their customers, this chapter would more properly have fallen into that portion of the present volume which treats of negligence in the discharge of contracts. But it so happens that most of the cases on this topic relate to the defects in gas apparatus causing injury to third parties. We have, therefore, to appeal to non-contractual analogies for the solution of the question that now immediately

[1] See supra, § 48.

[2] See supra, § 46; Hipkins *v.* Gas Co. 6 H. & N. 250; Lannen *v.* Gas Light Co. 46 Barb. 264; Holly *v.* Gas Light Co. 8 Gray, 123; Mose *v.* Gas Co. 4 F. & F. 324.

presses on us; and here, also, the answer is plain. Whoever wields a dangerous agency must exercise the skill usual among specialists who employ such agency, and if he fail to do this he is liable to those who are damaged by his neglect.[1] A gas company is, therefore, bound to diligence of this class in the structure and repairing of its pipes, which must be kept free from leakage,[2] and in the structure and repairing of its tanks and other apparatus.[3] For these purposes the company is bound to keep on hand a body of operatives sufficient for the ordinary contingencies of damage, though, of course, it is not bound to that extreme cautiousness which would oppress business by a load of precautions, such as a reserve of extra hands, which only rare and improbable emergencies would require.[4] As a rule,[5] the company is liable for the negligence of such operatives in the scope of their employment.[6] Where notice of a defect to the company is either expressed or implied it is its duty to repair the defect at once, and notice will be implied wherever the defect was caused by the company's negligence.[7]

Interposition of other causes. — Of course if the managers place their apparatus, properly guarded, in its necessary location, they are not liable for the damage produced by the mischievous or negligent meddling of a trespasser.[8] If, however, they are guilty of negligence, the ordinary and natural consequence of which is that, in the common run of things, some one will negligently interfere with their machinery, and thereby cause damage, then they are not exonerated from the consequences by the fact that this last negligent interference was the proximate cause.[9]

[1] Supra, § 851.

[2] Blenkiron *v.* Gas Co. 2 F. & F. 437; Burrows *v.* Gas Co., L. R. 5 Ex. 67; Emerson *v.* Gas Co. 3 Allen, 410; Hunt *v.* Gas Co. 1 Allen, 343; 3 Allen, 418; Mose *v.* Gas Co. 4 F. & F. 324.

[3] Hipkins *v.* Gas Co. 6 H. & N. 250.

[4] Supra, § 65; Holly *v.* Gas Co. 8 Gray, 123.

[5] See supra, § 156–185.

[6] Lannen *v.* Gas Co. 46 Barb. 264.

[7] Hunt *v.* Gas Co. 1 Allen, 343; 3 Allen, 418; Holly *v.* Gas Co. 8 Gray, 123.

[8] See supra, § 851; Flint *v.* Gas Co. 9 Allen, 552.

[9] See supra, § 108, 134, 145; Burrows *v.* Gas Co., L. R. 5 Exch. 67; Sherman *v.* Iron Co. 5 Allen, 213.

CHAPTER XII.

DUTY OF PUBLIC AUTHORITIES IN REPAIRING ROADS.

I. General grounds of liability.
Distinction between New England towns and municipal corporations, § 956.
Liability of New England towns, § 957.
Distinctive duty of cities, § 959.
When repairing is discretionary no action lies, § 959 *a*.
II. Limits of liability, § 960.
Liability not to extend beyond duty, § 961.
Not bound to repair latent defects except upon notice, § 962.
And so as to defects caused by *casus* or interference of third parties, § 963.
Notice to agents of corporation is notice to corporation, § 967.
Defects out of beaten track of road, 968.
Railroad crossings and interferences, § 969.
Crowds of idlers, § 970.
Coasting on sleds; wagons on road, § 971.
Unskilful grading, § 972.
Defective lights during repairs and at other times, § 973.
Defective guards or railings on bridge, § 974.
Railing to close up dangerous bridge or tunnel, § 975.
Neglect in fencing road, § 976.
Decay of bridge, § 977.
Defective guarding of trench, § 978.
Derrick on land, § 979.
Ice and snow on road, § 980.
Excavations by side of road, § 981.
Snow falling from roof; signs, awnings, § 982.
Objects calculated to frighten horses; horse injuring master, § 983.
Unaccountable fright of road-worthy horses, § 984.
Unfitness of horse, § 985.
Where plaintiff is injured by jumping from carriage in fright, § 986.
Latent defectiveness of wagon or harness, § 987.
Road to be constructed on the best plan practicable under the circumstances, § 988.
"Safety and convenience" of the road mixed questions of law and fact, § 989.
Burden of proof, § 990.
"Travellers" only are within the benefit of statutes, not occupiers of houses or loiterers, § 991.
Sidewalks, § 992.
Horse hitched and breaking loose, § 993.
Special damage necessary to entitle plaintiff to recover, § 994.
When plaintiff was at the time violating law, § 995.
Roads are to be made fit for the infirm as well as for the strong and capable, § 996.
No defence that the plaintiff could have taken another road, § 997.
Inevitable accident as a defence, § 998.
Intervening negligence of third party, § 999.
Individual liability of officers, § 1000.
Proximate cause, 1001.

I. GENERAL GROUNDS OF LIABILITY.

§ 956. *Distinction between New England towns and municipal corporations. Towns liable when made so by statute; municipal corporations by acceptance of power.* — The question of the liability of towns and municipal corporations for negligence in making and repairing roads is one which, for several reasons, it is impos-

sible to discuss with systematic accuracy. We have a great mass of adjudications before us when we proceed to enter on this investigation, but when we scrutinize these adjudications we find that they fall into three distinct classes, two of which, at least, are liable to minute subdivision. Out of New England, the States of the American Union, with but few exceptions,[1] vest in special officers the duty of maintaining country roads; while as to cities it is held that when a city or other municipal corporation accepts a charter, investing it with the charge of the highways within its borders, it becomes liable, on common law principles, for negligence in the discharge of this duty.[2] As to municipal corpora-

[1] Wisconsin may be conspicuously noticed, having adopted the New England system.

[2] No doubt an indictment lies against a municipal corporation for defective discharge of the duty imposed upon it by statute of keeping roads in good condition. It is true, that when there is no compensation or benefit for the duty received by the municipal corporation, it is not liable to a private action for omission or neglect to perform a corporate duty imposed by a general law on all towns and cities alike. Oliver *v.* City of Worcester, 102 Mass. 490; citing Providence *v.* Clapp, 17 How. 161–167; Riddle *v.* Prop. of Locks & Canals, 7 Mass. 169; Mower *v.* Leicester, 9 Mass. 247; Brady *v.* Lowell, 3 Cush. 121.

The law in this relation is thus stated by Clifford, J., in a late case in the supreme court of the United States. Water Co. *v.* Ware, 16 Wall. 566: —

. . . . "Cities and towns are usually required by statute to keep their streets and highways safe and convenient for travellers, and if they neglect so to do, in a case where that duty is imposed by law, and suffer the same to get out of repair and defective, and any person, as a traveller, receives injury through such defect, either to his person or property, the delinquent corporation is responsible in damages to the injured party. Such a party, however, cannot maintain an action against the corporation grounded *solely* on the defect and want of repair in the highway; but he must also allege and prove that the corporation had notice of the defect or want of repair, and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the highway, as the duty to repair in such cases is a duty owed to the public; and consequently, if one person might sue for his proportion of the damages for the non-performance of the duty, then every other member of the community would have the same right of action, which would be ruinous to the corporation, and for that reason it was held, at common law, that no action, founded merely on the neglect to repair, would lie. Weightman *v.* Washington, 1 Black, 52.

"Nor will an action lie in such a case at the present time; but it is settled law, by the highest authority of the country from which the common law is derived, that where it appears that the corporation is under a legal obligation to repair the way in question, and that such obligation is a matter of general and public concern, and also

tions, therefore, to which this common principle applies, it is possible to approach a uniform system. It is otherwise, however, when we come to the statutory liability imposed on supervisors of roads and county commissioners, for here the legislation of each state not only shifts from year to year, but is often special for particular counties.

§ 957. *Liability of New England towns.* — In New England a new factor, requiring independent treatment, is introduced by the town system, it being held by the New England courts that the

that the place in question is out of repair, and that the plaintiff has sustained some peculiar damage in his person or property, by means of such defect or want of repair, that the corporation, if the means of performing the duty to make the repairs are within their control, is liable to compensate the injured party for the injury which he suffered from their neglect.[1] Since the decision in Mayor of Lyme-Regis *v.* Henley, the case last referred to, many decisions to the same effect have been made by the state courts in this country approving that rule and applying it in all similar controversies." [2]

In New York it is well settled that, in the case of a village or city where the trustees, or common council, are made commissioners of highways, the corporation is liable for its negligence in not keeping the streets and sidewalks, within its corporate limits, in a condition safe for the use of passengers thereon. Mosey *v.* The City of Troy, 61 Barb. 580.

The negative, however, has been held in New Jersey. Sussex *v.* Strader, 3 Harr. (18 N. J.) 108; Cooley *v.* Essex, 27 N. J. 415; Livermore *v.* Camden, 29 N. J. 242; 2 Vroom (31 N. J.), 507; Pray *v.* Jersey City, 32 N. J. 394. In the latter case it was ruled that an action will not lie in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty. Consequently the plaintiff's horse having, by accident, come in contact with an obstacle in one of the streets of Jersey City, which obstacle would not have existed but for the neglect of the corporate officers to fill in such street to the proper grade, it was held that a civil action would not lie against the city for the damages thus sustained. The case of Strader *v.* Freeholders of Sussex, 3 Harr. 108, reaffirmed. So in Michigan, Dermont *v.* Detroit, 4 Mich. 435; Detroit *v.* Blackby, 21 Mich. 84, Cooley, J., dissenting. It was, however, agreed by Cooley, J., that "a municipal corporation is not liable to an individual damnified by the exercise, or the failure to exercise, a legislative authority; and the political divisions of the states, which have duties imposed on them by general law without their assent, are not liable to respond to individuals in damages for their neglect, unless expressly made so by statute."

[1] Henly *v.* The Mayor, &c. of Lyme, 5 Bing. 91; The Mayor *v.* Henly, 3 Barnewall & Adolphus, 77; Mayor, &c. of Lyme-Regis *v.* Henly, 2 Clark & Finnelly, 331.

[2] Hutson *v.* New York, 5 Sandford, 304; Erie *v.* Schwingle, 22 Pennsylvania State, 384; Storrs *v.* Utica, 17 New York, 104; Conrad *v.* Trustees of Ithaca, 16 Ibid. 159; Browning *v.* Springfield, 17 Illinois, 145; Lloyd *v.* Mayor, 1 Selden, 369.

towns have no common law duty imposed on them[1] to maintain highways, and the New England legislatures having passed statutes making this the duty of the towns, and imposing on them a liability for damages arising from a defective discharge of this duty. Here, however, a fresh distracting agent arrests us, for while the statutes imposing this liability are, at first sight, alike, they exhibit shades of difference which are the constant source of judicial divergence. Without giving the distinctive features of these statutes it is impossible to show how far the decisions on them are exacted by local legislation, and how far they may be viewed as touching the question of the general liability of the road-makers for defects. Yet thus to analyze these statutes would require the labor and the space of an independent treatise.

§ 958. It is true that there are certain leading expressions in those statutes which will be forced upon our notice by the constant adjudications of which they have been the subjects. Thus, for instance, in Massachusetts, the town is required to keep its roads "in repair," so that the same may be made "safe and convenient for travellers with their horses, teams, and carriages, at all seasons of the year," and the test "safe and convenient" is introduced into the statutes of other states. In Connecticut, the repair the towns are required to make must be "good and sufficient." In Vermont, the town is liable for special damage to the traveller "by means of the insufficiency or want of repairs" of the roads the town is required to keep; while New Hampshire declares that the liability of the town is to the traveller for damages happening "by reason of any obstructions, defect, insufficiency, or want of repair, which renders it (the road) unsuitable for the travel thereon." Prominent peculiarities such as those demand our consideration; but beyond this, so far as concerns the special interpretation of the statutes, we cannot in this treatise proceed.

§ 959. *Distinctive duty of cities.* — The task, in reference to cities and other municipal corporations, is far simpler. The law is that the city, undertaking the task of road-repairing, is bound to due diligence in the task, and as to what due diligence is, the leading maxims of the law of negligence enable us to reach a satisfactory conclusion. But even as to municipal corporations, there are so many local variations in the powers and duties pre-

[1] See supra, § 266.

scribed by charter, that we are sometimes baffled, at the moment when we think we are reaching a decision based on the common law, by finding that the court is directed in its opinion by statutory provisions which makes the decision valuable simply as a matter of statutory exegesis. Under such circumstances, the best we can do is to group the adjudications before us under certain obvious titles, reserving to other investigators, undertaking distinct treatises, the task of connecting each decision with the local legislation from which it springs. At the same time, we must accept it as a settled and fundamental doctrine that where a municipal corporation is vested, under the provisions of a charter granted at the request of its citizens, with the charge of roads, and accepts the charter, it is liable to parties injured for negligence in the defective construction or repair of such roads.[1] The general characteristics of this liability have been already examined.

[1] Bill *v.* Norwich, 39 Conn. 222; Jones *v.* New Haven, 32 Conn. 1; Bigelow *v.* Randolph, 14 Gray, 541; Eastman *v.* Meredith, 36 N. H. 284; Hutson *v.* New York, 9 N. Y. 163; Hines *v.* Lockport, 5 Lansing, 16; Heiskill *v.* Penn Yan, 5 Lansing, 43; West *v.* Rockport, 16 N. Y., note, 161; Conrad *v.* Ithaca, 16 N. Y. 158; Storrs *v.* Utica, 17 N. Y. 104; Mills *v.* Brooklyn, 32 N. Y. 489; Lee *v.* Sandyhill, 40 N. Y. 442; Requa *v.* City of Rochester, 45 N. Y. (6 Hand) 129; Bush *v.* Trustees, 3 N. Y. Supreme Ct. 409; Deyoe *v.* Saratoga, 3 N. Y. Supreme Ct. 504; Pittsburg *v.* Grier, 22 Penn. St. 63; Erie *v.* Schwingle, 22 Penn. St. 388; Lower Merion *v.* Merkhoffer, 71 Penn. St. 276; Allentown *v.* Kramer, 73 Penn. St. 406; Stackhouse *v.* Lafayette, 26 Ind. 17; McCalla *v.* Multnomah County, 3 Oregon, 424; Browning *v.* Springfield, 17 Ill. 143; Bloomington *v.* Bay, 42 Ill. 503; Springfield *v.* Le Claire, 49 Ill. 476; Sterling *v.* Thomas, 60 Ill. 264; Rockford *v.* Hildebrand, 61 Ill. 155; Meares *v.* Wilmington, 9 Ired. 73; Shartle *v.* Minneapolis, 17 Minn. 308; Smoot *v.* Wetumpka, 24 Ala. 112; Cook *v.* Milwaukee, 24 Wisc. 270; Weightman *v.* Washington, 1 Black, 39; Supervisors *v.* U. S. 4 Wall. 435; Mayor *v.* Sheffield, 4 Wall. 190; Thurston *v.* St. Joseph, 51 Mo. 510; Johnston *v.* Charleston, 3 Richards. 232.

In England a common law liability, enforcible by indictment, rests on the parishes. See R. *v.* Ecclesfield, 1 B. & A. 348; R. *v.* Eastington, 5 A. & E. 765; R. *v.* Oxfordshire, 4 B. & C. 194. No liability arises against a vestry for a defective repairing, though the vestry is empowered by law to make the repairs. Parsons *v.* Vestry, &c., Law R. 3 C. P. 56. No action lies against a local board under the public health acts for damage done to an individual through their neglect in repairing a parish road placed by those acts under their management, the ground of the decision being that the duty of repairing was left to the discretion of the board. Gibson *v.* Mayor of Preston, L. R. 5 Q. B. 218; affirming Wilson *v.* The

II. LIMITS OF LIABILITY.

§ 960. *When the repairing of a road is left to the discretion of the corporation, no action ordinarily lies for non-exercise of the power.* — This has been already incidentally noticed,[1] and there can be no question that when an officer of government is left with discretionary powers, he is not liable to an individual for damages arising from his honest refusal to act.[2] When, however, the work is undertaken, it must be done in a workman-like and suitable manner.[3]

§ 961. *Liability not to extend beyond duty.* — Where also the duty is limited, the liability is only to do what the duty prescribes. Thus where the statutory duty is simply to put a road in order, and this is done, the parties thus charged cease to be

Mayor and Corporation of Halifax (L. R. 3 Ex. 114; 37 L. J. Ex. 44), where it was held, that the 68th section of the Public Health Act, 1848, which vests the management in the local board for the district, and enacts that "they shall, from time to time, cause the streets to be repaired, and may, from time to time, cause the soil thereof to be raised or lowered, and place and keep in repair fences and posts for the safety of foot-passengers," does not make it obligatory on the board to place posts or rails by the side of ancient foot-paths where none have existed before.

In giving judgment in the case, of Wilson *v.* Mayor, Kelley, C. B., said: "The cause of action alleged in the second count is that the defendants had wrongfully neglected to fence off for protection of passengers the footway near the goit, and that thereby the deceased met his death. The 68th section vests all the streets, being highways, in the local board, who are in this case the defendants, and enacts that they *shall*, from time to time, cause the same to be repaired, and that they *may*, from time to time, cause the soil of the streets to be raised, &c., and place and keep in repair fences and posts for the safety of foot-passengers. It was contended for the plaintiff that this section made it obligatory upon the defendants to place fences and posts along the footway, and that part of this section may be read as a parenthesis. But we think, whether these words be so read or not, that upon the true construction of the whole enactment a discretion was necessarily vested in the board as to what fences and posts should be placed or erected in ancient foot-paths where none had ever existed before. The supposed absolute duty of the defendants, upon which the second count is framed, therefore, does not exist, and this cause of action also fails."

[1] See supra, § 260; Gibson *v.* Mayor, L. R. 5 Q. B. 218; Wilson *v.* Mayor, L. R. 3 Ex. 111.

[2] See supra, § 285–6.

[3] Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Wheeler *v.* Worcester, 11 Allen, 604; and cases hereinafter cited, infra, § 988.

liable for subsequent mischief to the road arising from subsidence of the soil.[1]

§ 962. *Not bound to repair latent defects except upon notice either actual or constructive.* — To expect a municipal corporation to be cognizant of latent defects, when it has taken due care in the construction of a road, would exact from it a greater diligence than that required from common carriers, and would revive the extinct *culpa levissima* of the Schoolmen. Hence, if a road be properly constructed, a municipal corporation is not liable for a latent defect of which it had no notice.[2]

So in Vermont it has been ruled[3] that when a sudden and unforeseen defect occurs in a highway, without fault on the part of the town, such town is not chargeable for the damages resulting from such defect, unless it has been in default in respect to getting seasonable knowledge of the defect, or unless, having such knowledge, it was reasonably practicable to have repaired the defect, or put up a warning or barrier to avoid it, before the happening of the accident.[4]

[1] Hyams *v.* Webster, L. R. 2 Q. B. 264; affirmed in Exch. Ch. L. R. 4 Q. B. 138. For suits under Connecticut statute against municipal corporations, for negligence in management and repair of road, see Bill *v.* City of Norwich, 39 Conn. 222; Young *v.* City of New Haven, 39 Conn. 435.

[2] Rapho *v.* Moore, 68 Pa. St. 404. In this case, Agnew, J., said, after affirming the above principle: "But what is negligence is itself a question in each case, and must always depend on its peculiar circumstances. 'Great danger demands higher vigilance and more efficient means to secure safety; where the peril is small, less will suffice.' F. & B. Turnpike Co. *v.* Phila. & Trent. Railroad Co. 4 P. F. Smith, 350. 'The degree of care having no legal standard, but being measured by the facts that arise, it is reasonable such care must be required as, it is shown, is ordinarily sufficient under similar circumstances, to avoid the danger and secure the safety needed.'" See, however, McCarthy *v.* Mayor of Syr. 36 N.Y. (1 Sick.) 194; Requa *v.* City of Rochester, 45 N.Y. (6 Hand) 129.

[3] Ozier *v.* Hinesburg, 44 Vt. 220.

[4] In Doulon *v.* The City of Clinton, 13 Iowa, 399, the cases are thus recapitulated by Miller, J.: . . . . "Before the defendant can be held guilty of negligence, on account of defects in the sidewalks (not arising from their original construction), or from an obstruction placed thereon by a wrongdoer, either express notice of the existence of the defect or obstruction must be brought home to it, or they must be so notorious as to be observable by all. Mayor, &c. of N. Y. *v.* Sheffield, 4 Wall. 189; Griffin *v.* Mayor et al. of N. Y. 9 N. Y. 456; Vandyke *v.* Cincinnati, 1 Disney, 532; Howe *v.* Plainfield, 41 N. H. 135; Bardwell *v.* Jamaica, 15 Vt. 438; Prindle *v.* Fletcher, 39 Ill. 255; Lobdell *v.* New Bedford, 1 Mass. 153; Reed *v.* Northfield, 13 Pick. 94; Bigelow *v.* Weston,

§ 963. *Not bound to remove defects caused by accident or by third parties, except upon notice actual or constructive.* — This rests on the same principles as the point last stated. There must be notice, and a reasonable time to remedy, to impose liability.[1] Lapse of time, however, at common law, supplies such notice, for, after a reasonable time has elapsed, it is negligence on the part of the corporation not to know of the defect when patent; and for such negligence suit lies.[2] But no mere inci-

3 Ill. 267; Manchester *v.* Hartford, 30 Conn. 118; McGinity *v.* Mayor, &c. of N. Y. 5 Duer, 674; Dewey *v.* Detroit, 15 Mich. 307; Montgomery *v.* Gilmar, 33 Ala. (N. S.) 116; Hart *v.* Brooklyn, 36 Barb. 226; Shearman & Redfield on Negligence, § 407, 408, 146; Hutson *v.* The Mayor, &c. of N. Y. 9 N. Y. 163; Mayor, &c. of N. Y. *v.* Furze, 3 Hill, 612; Goodnough *v.* Oshkosh, 24 Wis. 549."

In Pennsylvania, however, in a case where the plaintiff, whilst loading his cart, was injured by the falling of a pole in the street, erected by citizens years before, the pole having become rotten, it was held that it was the duty of the town to have had the pole removed, and they were liable for the injury to the plaintiff, whether the neglect was wilful or not. It was further held, that it was not necessary that the town should have had notice of the condition of the pole; and that it was not material that the pole was in such part of the road as not to obstruct the travel. Norristown *v.* Moyer, 67 Pa. St. 355.

[1] See Rapho *v.* Moore, 68 Penn. St. 404; Rowell *v.* Williams, 29 Iowa, 210; Atchison *v.* King, 9 Kansas, 550; Hardy *v.* Keene, 52 N. H. 370; Fahey *v.* Howard, 62 Ill. 28.

[2] Horn *v.* Barkhoof, 44 N. Y. 113; Manchester *v.* Hartford, 30 Conn. 118; Requa *v.* City of Rochester, 45 N. Y. 129; Hume *v.* Mayor of N. Y. 47 N. Y. (2 Sick.) 639; Holt *v.* Penobscot, 56 Me. 15; Colley *v.* Westbrook, 57 Me. 181; Reed *v.* Northfield, 13 Pick. 94; Moore *v.* Minneapolis, 19 Minn. 300; Howe *v.* Plainfield, 41 N. H. 135; Prindle *v.* Fletcher, 39 Vt. 255; City of Chicago *v.* Robbins, 2 Black, 418; *S. C.* 4 Wal. 651; Bill *v.* City of Norwich, 39 Conn. 222; Market *v.* City of St. Louis, Cent. Law J. Ap. 30, 1874.

Thus in Mayor *v.* Sheffield, 4 Wall. 189, the evidence was that the city of New York, in converting a portion of a park into a street, had cut down a tree and left the stump standing from six to eight inches above the surface, and from fourteen to eighteen inches inside the curbstone on the sidewalk. This was done in 1847, and the stump thus left by the city authorities, who had cut down the tree, remained in this condition until the plaintiff was injured upon it in 1857. These facts were uncontradicted, and the court, Mr. Justice Miller, said, that "stronger proof of notice could not be given."

In Market *v.* City of St. Louis, supra, the circuit judge instructed the jury that the plaintiff was not entitled to recover unless the defendant had notice of the unsafe condition of the gutter and neglected to repair it within a reasonable time thereafter. The jury found for the plaintiff, but the verdict was set aside at general term, on the ground that it was against this instruction. The supreme court, however, reversed the

dental notice to a citizen is sufficient. Thus it has been correctly ruled in Michigan that a municipal corporation is not liable for damages to an individual for injuries caused by an opening in a sidewalk, made by an owner of the soil, or of the adjacent land, without proof of notice of the insufficiency or defect and neglect to have it remedied. And it was held that the notice to the public authorities of such nuisance or defect must be express, unless it should appear that the nuisance or defect was so conspicuous and permanent as to arrest the attention of all persons passing for such a time prior to the injury as to involve constructive notice to the municipal corporation.[1]

§ 964. In Vermont, towns are liable for injuries from insufficiencies of highways caused by sudden freshets if the highway surveyor of the district had time after notice of the defect to repair it before the accident with the means in his control, considering as well his means by virtue of his official statute authority as the means in his hands individually. It has been ruled that no lack of diligence can be charged upon the town until notice to the proper officers of the insufficiency, in a case where it is not claimed that the freshet was itself so extraordinary as to amount to a notice that the road would need repairs, or that the dangerous condition of the road had existed long enough to charge the town officers with fault in not having discovered its condition without notice. It has also been properly ruled that there may be circumstances which would warrant the surveyor in delaying, after notice, the repair of a sudden injury to the road. It may be necessary to delay, in order to make preparations for commencing work, the road being in the mean time securely fenced to protect travel; but the mere fact that the repairs could not be completed on the day notice is given would not alone be enough to justify the surveyor in waiting until the following day to commence that which the statute requires to be done forthwith.[2]

§ 965. At the same time it must be again remembered that if the defect was, at the time of the injury, palpable, dangerous, and in a public place, and had existed for a considerable period

general term and sustained the verdict, on the ground that the instructions were more favorable to the defendant than the law justified.

[1] Dewey *v.* City of Detroit, 15 Mich. 307; see McGinity *v.* Mayor, 5 Duer, 674; Howe *v.* Plainfield, 41 N. H. 135; Griffin *v.* Mayor, 5 Seld. 456; City *v.* Blood, 40 Ind. 62.

[2] Clark *v.* Corinth, 41 Vt. 449.

of time, knowledge on the part of the corporation may be presumed. And while notice to a citizen is not, as matter of law, notice to the city, but may be considered as evidence tending to show such notice, yet if many citizens had knowledge of the defect, so that it had become notorious, the evidence that the city authorities had notice would become very strong.[1]

§ 966. Under the Massachusetts statute, to recover against a town for an injury sustained by a traveller on a highway by reason of the neglect of the town to keep it in repair, the defect which was the proximate cause of the injury must have existed for twenty-four hours, or been brought to the notice of the town, or been such that, with due care, the town might have known of its existence, before the time of the injury; and it is not enough that another defect, which occasioned the defect that was the proximate cause of the injury, had then existed more than twenty-four hours.[2] But where a town, through its water committee, agreed with a contractor that he should make all trenches needed for laying water-pipes in such streets as the committee might from time to time direct, and that he should guard and light the trenches by night for the protection of travellers, it was held that the town was nevertheless liable for an injury to a traveller on the highway caused by negligence in guarding the trenches, although the defect had not existed twenty-four hours and the town had no notice thereof.[3]

§ 967. *Agents of corporation may be deemed its representatives through which it may receive notice of defects.*[4] — This is a necessary incident of corporations who can only act through agents. We advance a step further, however, when we take up the case of an officer of the corporation by whom a defect is caused. And the very causing of such defect by the corporation's officer is to be viewed as notice of it to the corporation.[5]

§ 968. *Defects out of the beaten track of the road.* — In Wisconsin, under a statute which gives damages in case of "insufficiency or want of repair," it has been ruled[6] that towns are not

[1] Bill *v.* Norwich, 39 Conn. 222.

[2] Ryerson *v.* Abington, 102 Mass. 526; Winn *v.* Lowell, 1 Allen, 177; Crocker *v.* Springfield, 110 Mass. 135.

[3] Brooks *v.* Somerville, 106 Mass. 271.

[4] See supra, § 267; Deyoe *v.* Saratoga, 3 N. Y. Supreme Ct. 504; Bush *v.* Trustees, Ibid. 409.

[5] Hardy *v.* Keene, 52 N. H. 370.

[6] Wheeler *v.* Westport, 30 Wisc. 393; Kelley *v.* Fond du Lac, 31 Wisc. 180. See supra, § 105, note 5.

bound to keep county highways in a suitable condition for travel in their whole width; and their liability is limited primarily to damages caused by defects in the travelled track, and such portion of the road as is needed for the full use of the same. Hence it is said that if a traveller, without necessity, or for his own pleasure or convenience, deviates from the travelled track (which is in good condition), and in so doing meets with an accident from some cause outside of such track, the town will not be liable for resulting damages.[1] On the other hand, it is declared that if the travelled portion of the highway is obstructed or dangerous, making it necessary for a traveller to deviate therefrom, and in so doing he uses ordinary care, the town will be liable for damages accruing to him from an accident caused by any defect or obstruction in that portion of the highway over which he is thus necessarily passing. And this rule generally obtains.[2]

[1] See Cassidy *v.* Stockbridge, 21 Vt. 391.

[2] See cases cited supra, § 401. See also Barton *v.* Montpelier, 30 Vt. 650; and particularly opinion of Dixon, C. J., in Wheeler *v.* Westport, 30 Wisc. 393.

In a late case in Maine (Hall *v.* Unity, 57 Me. 529), the evidence was, that from a well-wrought, safe, and convenient travelled path on a highway, a passage-way, not made by the town, led by a slightly circuitous course to a watering-trough, erected without authority of the town, within the limits of the highway, for the purpose of enabling travellers to water their animals, and thence turned into the main track again several rods from the point of departure. The plaintiff, with his wife, travelling along the highway, with a horse and carriage, drove out to the trough and watered his horse; and, while leaving the trough, the wheel of his carriage was drawn upon a rock lying in its natural bed in the passage-way, ten feet from the usually travelled track, and thereby the plaintiff's wife was thrown from the carriage upon the trough and injured. It was held, by Cutting, Walton, Dickerson, and Appleton, JJ., that the actual condition of the passage-way being, in fact, such as it appeared to be, and containing nothing to allure, deceive, or ensnare travellers into concealed or unperceived danger or difficulty, the town is not liable. See to *S. P.*, Cobb *v.* Standish, 14 Me. 98. On the other hand, the liability of the town was affirmed by Appleton, C. J.; Kent, Barrows, and Danforth, JJ.

The question was also recently agitated in Vermont, in a case where the injury sought to be recovered for was received while travelling alongside and west of the track designed by the town for travel. The defendant requested the court to charge: "If the jury find that the east road, at the time of the accident, was in good and sufficient repair, and was of sufficient width, and in proper condition to accommodate all the travel which then had occasion to use it; and that, from its position, form, and construction, it was apparently the place designed by the town as its highway; and that Mrs. Ozier and her son, vol-

§ 969. *Railroad crossings and interferences.* — Where a street in an incorporated town has been opened and graded by the town authorities and under their jurisdiction, although a portion of it may have been conceded as an easement to a railroad, the authorities are not relieved from the obligation to remove dangerous nuisances.[1] The town continues liable, notwithstanding the liability of the railroad company for the defects it causes.[2] And the town is required to see that a railroad crossing, which is part of a highway, is safe.[3]

§ 970. *Crowds of idlers.* — Crowds of idlers, collecting in public highways, may also be nuisances which it is negligence in municipal corporations not to remove.[4]

§ 971. *Coasting on sleds. Wagon on road.* — On the other hand, towns are not liable for injuries to travellers by coasting on sleds

untarily, or by mere choice of their horse, left the wrought way and went upon the west track, — it being conceded that that track was never worked by the town, — the defendant is entitled to a verdict, no matter what the motive for the diversion, or the condition of the margin." It was held, that the defendant was entitled to have this request answered affirmatively. Ozier *v.* Hinesburg, 44 Vt. 220.

In a previous case, in the same state, a party having voluntarily and for his own convenience deviated from a highway which, in its travelled track, was in good condition, and having met with an accident causing damage to him by backing his horse over a bank outside of the highway, but which extended up to the travelled track, so as to make the highway itself dangerous and insufficient outside of the travelled track, is not entitled to recover against the town for the injury. The plaintiff left the highway, which, in its travelled track, was in good condition, to drive into a shed outside of the highway, for the purpose of leaving his team there while attending to some business in the village. In getting out of the shed he backed over a bank extending from the shed to the travelled track of the highway, and having no monuments on the margin. The place of the accident was outside of the highway. *Held*, that the plaintiff could not recover against the town for the injury. Sykes *v.* Pawlet, 43 Vt. 446.

Whether the part of the road kept in order is wide enough and safe enough is for the jury. Johnson *v.* Whitefield, 18 Me. 286; Savage *v.* Bangor, 40 Me. 176; Aldrich *v.* Pelham, 1 Gray, 510.

[1] Norristown *v.* Moyer, 67 Pa. St. 355.

[2] Ibid.; Welcome *v.* Leeds, 51 Me. 313; State *v.* Gorham, 37 Me. 451; Willard *v.* Newbury, 22 Vt. 458; Hutson *v.* N. Y. 9 N. Y. 163; Batty *v.* Duxbury, 24 Vt. 255; Davis *v.* Leominster, 1 Allen, 182.

[3] Willard *v.* Newbury, 22 Vt. 458; Batty *v.* Duxbury, 24 Vt. 155; Barber *v.* Essex, 27 Vt. 62; State *v.* Gorham, 37 Me. 451; Jones *v.* Waltham, 4 Cush. 490; Vinal *v.* Dorchester, 7 Gray, 423.

[4] Norristown *v.* Moyer, 67 Pa. St. 355.

in highways. This is not an insufficiency of a highway, within the meaning of the statute which renders towns liable for injuries by reason of insufficiencies, though the selectmen neglected to forbid coasting.[1] And so as to wagons temporarily standing with their driver and horses on the road.[2]

§ 972. *Unskilful grading.* — A city is liable for injury from defective or unskilful grading.[3]

§ 973. *Defective lights.* — When cities or towns are under no statutory obligations to light highways, they are not liable for the results of failure in this respect.[4] But if in repairing road, holes or other defects are left, notice must be given by lights at night.[5]

§ 974. *Guards or railings.* — The absence of any guard or railing at the side of a bridge forming part of a highway is a fact from which the jury may find that the bridge was defective within the meaning of the statute rendering towns liable for injuries resulting from defective highways.[6] So, when in repairing a road defects are left temporarily in it, the town or corporation should guard or fence it so as to protect travellers.[7]

§ 975. *Railing to keep travellers off from dangerous bridge or tunnel.* — Where a bridge is in a dangerous condition it is the duty of the town to give notice to travellers by a barrier across the road or in some other reasonable way. Nor is the erection of such a barrier sufficient unless the town uses reasonable care to keep it up so long as the bridge is in a dangerous condition.[8] The same precautions are to be taken in respect to a tunnel which has become dilapidated and dangerous.[9]

§ 976. *Negligence in fencing roads.* — This depends upon the same principles as those just stated. The true test is "whether

[1] Hutchinson *v.* Concord, 41 Vt. 271; Ray *v.* Manchester, 46 N. H. 59.

[2] Davis *v.* Bangor, 42 Me. 522; Snow *v.* Adams, 1 Cush. 443.

[3] Infra, § 988; Ellis *v.* Iowa City, 29 Iowa, 229; City *v.* Noble, 8 Kans. 446; Cook *v.* Milwaukee, 27 Wisc. 191; Allentown *v.* Kramer, 73 Penn. St. 406.

[4] Sparhawk *v.* Salem, 1 Allen, 30; Macomber *v.* Taunton, 100 Mass. 277; Randall *v.* R. R. 106 Mass. 276.

[5] Brooks *v.* Somerville, 106 Mass. 271; Storrs *v.* Utica, 17 N. Y. 104; Milwaukee *v.* Davis, 6 Wisc. 377; Sil-vers *v.* Nerdlinger, 30 Ind. 53; Morton *v.* Inhab. 55 Me. 46; infra, § 978; Com. *v.* Cent. Bridge, 12 Cushing, 242.

[6] Houfe *v.* Fulton, 29 Wisc. 296; Woodman *v.* Nottingham, 49 N. H. 327. But it is not necessary that such bridges should be strong enough for travellers to lean on. Stickney *v.* Salem, 3 Allen, 374.

[7] See supra, § 973; infra, § 978.

[8] Thorp *v.* Brookfield, 36 Conn. 320.

[9] Chicago *v.* Hislop, 61 Ill. 86.

there is such a risk of a traveller using ordinary care, in passing along a street, being thrown or falling into the dangerous place (adjoining the highway) that a railing is requisite to make the way itself safe and convenient." [1] Hence a municipal corporation, charged with building and repairing roads, is guilty of negligence in constructing a passage-way by the side of a hill without sufficient guards to protect travellers.[2] But when there are no such dangers, a town is not bound to fence a road to keep passengers from straying.[3]

§ 977. *Negligent decay of bridge.* — It has been held in Pennsylvania,[4] that when a bridge has stood for the time timbers are expected to last, and it may be reasonably expected that decay has set in, it is negligence to omit all proper precautions to ascertain its condition. In such case appearances will not excuse the neglect, but it is the duty of supervisors to call to their assistance those whose skill will enable them to ascertain the state of the structure.[5]

§ 978. *Defective guarding trench.* — Towns are not liable for injuries caused by such excavations or obstructions as are necessarily created in highways in order to repair them, provided reasonable notice of the danger is given to travellers.[6] But the guarding must be adequate for the purpose. Liability for neglect in not sufficiently guarding an excavation in a sidewalk cannot be avoided by showing that the guards put up were such as are customary with builders. The question is, was due diligence shown; the diligence a good business man in such specialty is accustomed

[1] Com. *v.* Wilmington, 105 Mass. 599. See also Adams *v.* Natick, 13 Allen, 429. Hoar, J., in Alger *v.* Lowell, 3 Allen, 402, adopted Murphy *v.* Gloucester, 105 Mass. 472; Woodman *v.* Nottingham, 49 N. H. 327.

[2] City of Joliet *v.* Verley, 35 Ill. 58; Hyatt *v.* Roundout, 44 Barb. 385.

[3] Sparhawk *v.* Salem, 1 Allen, 30; see Bartlett *v.* Vaughan, 6 Vt. 243; See also Palmer *v.* Andover, 2 Cush. 600; Jones *v.* Waltham, 4 Cush. 297; Koester *v.* Ottumwa, 34 Iowa, 290; Stinson *v.* Gardner, 42 Me. 248; Williams *v.* Clinton, 28 Conn. 264; Nebraska City *v.* Campbell, 2 Black, 590.

[4] Rapho *v.* Moore, 68 Pa. St. 404.

[5] Agnew, J.: . . . . "That a municipal corporation, though bound to the duty of maintenance and repair, is not absolutely bound for the soundness of the structures it erects as parts of a public highway, must be admitted. . . . . It is not an insurer against all defects latent as well as patent, but is liable only for *negligence* in the performance of its duties." *S. P.*, Rockford *v.* Thomas, 61 Ill. 287.

[6] Morton *v.* Inhab. 55 Me. 46.

to use.[1] In an action to recover for personal injuries alleged to have been caused by negligence of the defendants in guarding a trench, they objected to the admission of testimony as to the guarding on Friday, upon the ground that the evidence tended to show that the accident was on Saturday; but the judge admitted the testimony, on the ground that the witnesses might be mistaken as to the day of the week they were testifying about, or there might be a mistake as to the day of the accident. It was afterwards conceded that the accident happened on Saturday, and the judge instructed the jury not to regard the testimony as to the guarding on Friday, unless they were satisfied that the witnesses who gave it were mistaken as to the day, and were in fact testifying as to what they saw on the day of the accident. It was ruled by the supreme court that the defendants had no ground of exception.[2]

§ 979. *Derrick on road.* — A derrick within or upon the margin of a highway, or derrick ropes extending over and across the highway, may be an obstruction, a defect, or an insufficiency of the highway, if the derrick or the ropes be insecurely or improperly placed or fastened.[3]

§ 980. *Ice and snow.* — "The mere fact that a highway, of no unusual scope or construction, is slippery by reason of a smooth coating of ice, does not constitute a defect or want of repair, for which a city or town is liable, under the highway act."[4] But "a

[1] Storrs *v.* Utica, 17 N. Y. 104; Milwaukee *v.* Davis, 6 Wisc. 377; Silvers *v.* Nerdlinger, 30 Ind. 53. See supra, § 973–4. See Koester *v.* City of Ottumwa, 34 Iowa, 41.

[2] Brooks *v.* Somerville, 106 Mass. 271.

[3] Hardy *v.* Keene, 52 N. H. 370. In this case, Foster, J., said: . . . . "The case is governed by the principles applied in Hubbard *v.* Concord, 35 N. H. 52; Johnson *v.* Haverhill, 35 N. H. 74; Hall *v.* Manchester, 40 N. H. 410; Clark *v.* Barrington, 41 N. H. 44; Howe *v.* Plainfield, 41 N. H. 135; Palmer *v.* Portsmouth, 43 N. H. 265; and Ray *v.* Manchester, 46 N. H. 59, with which decisions in this respect we are entirely satisfied.

"In Hubbard *v.* Concord, the principle applied was, that if the defect was caused by the recent action of natural causes, the town were not liable unless, under the circumstances of the case, they ought to have repaired the defect before the accident happened, and had reasonable opportunity to do so.

"And in Johnson *v.* Haverhill, and most, if not all the other cases above cited, the same principle was applied in the case of defects caused by human agency, whether with or without fault, provided the fault of the immediate agent was one for which blame could not be imputed, either to the plaintiff or the defendant."

[4] Gray, J. — Pinkham *v.* Topsfield, 104 Mass. 83, citing Stanton *v.* Spring-

way may be defective by being so improperly constructed as to induce a special or constant deposit of ice in a particular locality. It may be built at such an angle, and so exposed to the formation of ice, as to make passing over it in winter especially and usually dangerous. In all of these cases it will be for the jury, under proper instructions, to decide, as a question of fact, whether the way is properly made and is in good repair."[1] So, "if ice, by reason of constant or repeated flowing of water, trampling of passengers, or any other cause, assumes such a shape as to form an obstacle to travel, the fact that it is slippery, does not make it the less a defect in the highway."[2] So in an action against a town for injuries occasioned to a traveller in a street, by her falling on an icy ridge while crossing the sidewalk from the carriage-way to a shop, the refusal of the judge to instruct the jury that on a well constructed sidewalk, ten or twelve feet wide, and having a sufficient width free from ice or hard snow for the safe passage of travellers along it, a ridge of ice or hard snow extending two and a half feet from the curbstone, from four to six inches high, and sloping both ways, is not a defect for which the town is liable, affords the defendants no ground of exception. It was further ruled that in such an action against a town for injuries occasioned to a traveller by an icy ridge which was a defect in the highway, the fact that the accident would not have happened, except for a light snow which was falling at the time and concealed the defective place, is no defence.[3] At the same time the circum-

field, 12 Allen, 566; Nason *v.* Boston, 14 Allen, 508; Stone *v.* Hubbardston, 100 Mass. 49; Gilbert *v.* Roxbury, 100 Mass. 185; Billings *v.* Worcester, 102 Mass. 329. See also Rockford *v.* Hildebrand, 61 Ill. 156; Bush *v.* Trustees, 3 N. Y. Supr. Ct. 409; Crocker *v.* Springfield, 110 Mass. 135.

[1] Hoar, J. — Stanton *v.* Springfield, 12 Allen, 570, adopted in Pinkham *v.* Topsfield, 104 Mass. 83. See Salisbury *v.* Herchenroder, 106 Mass. 458; Landolt *v.* Norwich, 37 Conn. 615; Savage *v.* Bangor, 40 Me. 176; City *v.* King, 9 Kans. 550; supra, § 86.

[2] Gray, J., in Stone *v.* Hubbardston, 100 Mass. 57, citing Hutchins *v.* Boston, 12 Allen, 571, note; Johnson *v.* Lowell, 12 Allen, 172, note; Nason *v.* Boston, 14 Allen, 508; Luther *v.* Worcester, 97 Mass. 268. See Tripp *v.* Lyman, 37 Me. 250; Savage *v.* Bangor, 40 Me. 176; Hall *v.* Manchester, 40 N. H. 410; Providence *v.* Clapp, 17 How. U. S. 161; Green *v.* Danby, 12 Vt. 338; Darkin *v.* Troy, 61 Barb. 637; Mosey *v.* Troy, 61 Barb. 580.

[3] Street *v.* Holyoke, 105 Mass. 82. Colt, J.: . . . . "The court rightly refused the other instructions asked for. It would have been clearly erroneous to have defined, as matter of law, within what limits of extent and elevation an icy ridge accumulated upon a sidewalk could exist and not

stance that in consequence of the permitted pumping of water upon a city street by a fire-engine, ice formed upon the street and sidewalk, and that plaintiff was injured by slipping thereon, would not render the city liable, it not appearing that the engine was not being used for a lawful purpose.[1]

Snow, when falling in heavy masses, may be so beaten down as to cease to be such an obstacle as imposes liability on the town. As to pathways in cities, greater diligence in removal is required.[2]

§ 981. *Negligence in permitting excavations in side of road.* — In a case in Pennsylvania[3] the evidence was, that miners had excavated into the side of a road, making a precipitous bank; no guard was put up; a wagoner in driving along the road broke the bank; his wagon and team fell over and were injured. This was held to be negligence by the supervisors, for which the township was liable.[4]

§ 982. *Snow falling from roof; signs, awnings.* — Under the Massachusetts statute, while the town is liable for negligence causing injuries to be received through an awning stretched over a side-path,[5] it is not liable for injuries caused by the falling of snow from a roof,[6] nor by the falling of a sign which the proprietor of an adjoining building had suspended over the sidewalk on an iron rod, insecurely fastened to the building, although the city had notice of the position and insecurity of the sign and its fastening.[7] So a city was held not to be liable for the falling of

be a defect. Luther *v.* Worcester, 97 Mass. 268, 271. And the fact that a light snow was falling at the time, which concealed the defect, and made it more dangerous, had legitimate bearing only upon the question of the plaintiff's care. The icy ridge was the defect complained of, not the falling snow; and although the injury would not have happened but for the snow, yet the town is not thereby relieved of its responsibility. Day *v.* Milford, 3 Allen, 98."

[1] Cook *v.* Milwaukee, 27 Wisc. 191. See also Balt. *v.* Marriott, 9 Md. 160; Ward *v.* Jefferson, 24 Wisc. 342.

[2] Providence *v.* Clapp, 17 How. U. S. 161.

[3] Lower M. T. *v.* Merkhoffer, 71 Pa. St. 276.

[4] *Per Curiam.* "We have considered the bills of exception in this case, and find them free of error. That the township was answerable in its corporate capacity for the injury complained of in this case, in the absence of satisfying proof of negligence on part of the plaintiff, is a well settled rule in this state." See also Allentown *v.* Kramer, 73 Penn. St. 406; Sterling *v.* Thomas, 60 Ill. 264. Supra, § 834.

[5] Drake *v.* Lowell, 13 Mete. 292; Day *v.* Milford, 5 Allen, 98; see supra, § 789.

[6] Hixon *v.* Lowell, 13 Gray, 59; supra, § 789.

[7] Jones *v.* Boston, 104 Mass. 75.

an iron weight attached to a flag which was suspended across the street by third persons,[1] nor for the falling of a dead limb from a tree in a public square.[2]

§ 983. *Objects calculated to frighten horses; horse injuring master.* — These, also, it is the duty of the town to remove, and it is liable for injuries caused by its negligence in so doing.[3] No doubt the rule is of difficult application, and even in the modes of its enunciation has given cause to much conflict of opinion.[3] But where such objects are ordinarily calculated to alarm road-worthy horses, then, on principle, they must be regarded as defects for which the authorities permitting them are liable.[4] The question to be presented in such a case is, whether it is in the usual course of things that a road-worthy horse will take fright at extraordinary spectacles on a road, or at defects which though not themselves sufficient to injure are likely to alarm. If so, the town is liable for injuries so caused. In conformity with the views already expressed, we must hold to the affirmative of this issue, and this, indeed, is the tendency of recent decisions in Massachusetts.[5]

For suits against individuals for permitting ice, &c., to fall from roof, see supra, § 843.

[1] Hewison *v.* N. Haven, 34 Conn. 136. The Connecticut statute does not require roads to be *safe*. See Norristown *v.* Moyer, supra, § 962, *contra*.

[2] Jones *v.* New Haven, 34 Conn. 1; see Salisbury *v.* Herchenroden, 106 Mass. 458.

[3] Supra, § 104–7; Chamberlain *v.* Enfield, 43 N. H. 358; Winship *v.* Enfield, 42 N. H. 199; Lunt *v.* Tyngsboro, 11 Cush. 563; Foshay *v.* Glen Haven, 25 Wisc. 288; Dimock *v.* Sheffield, 30 Conn. 129; Hewison *v.* N. Haven, 34 Conn. 135; Kelley *v.* Fond du Lac, 30 Wisc. 180; Morse *v.* Richmond, 41 Vt. 435. As to liability of individuals, see supra, § 785. In some prior cases in Massachusetts this liability seems doubted. Keith *v.* Easton, 2 Allen, 552; Kingsbury *v.* Dedham, 13 Allen, 186; Cook *v.* Charlestown, 13 Allen, 190, 191 note; though if the horse be road-worthy this liability, on the reasoning of the court, must attach.

[4] See supra, § 107; and see review of the authorities by Steele, J., in Morse *v.* Richmond, 41 Vt. 435.

[5] Thus in Stone *v.* Hubbardston, 100 Mass. 50, is was held that if a horse driven with due care by a traveller on a highway, without escaping from his control, is caused to step out of the travelled track by an object within the limits of the way, which would cause an ordinary, gentle, and well-broken horse to do so, whereby the traveller is brought into contact with a defect in the surface of the way, or a place on the side of the way defective for want of a railing, and so is injured, the town is liable in damages; but not so, if the shying of the horse is caused by a vicious habit, and is at an object which would not startle a horse ordinarily gentle and well-broken. In Titus *v.* Northbridge, 97

Horse when being extricated injuring his master. — So a town is held liable for injuries sustained by a master when endeavoring to extricate his horse from a hole in a bridge.[1]

§ 984. *Unaccountable fright in road-worthy horses.* — Supposing, however, that road-worthy horses take fright unaccountably, and without blame to any one? On the principle that where *casus* and negligence combine in a disaster the party guilty of the negligence is liable, we would hold, were the case at common law, that the town in such case is liable.[2] But we must remember that the duties imposed upon towns in such cases are statutory, and are limited to the statutory terms. In Massachusetts, as the cases just cited indicate, the loss in such case cannot

Mass. 258, it was held that when a horse, while being driven with due care upon a highway which a town is bound to keep in repair, becomes, by reason of fright, disease, or viciousness actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable in this sense, if he merely shies or starts, or is momentarily not controlled by his driver. Supra, § 103–6.

"This case," said Chapman, C. J., "is unlike that of Palmer *v.* Andover, 2 Cush. 600; for in that case, after the horses broke loose from the carriage, they ran away and did no injury, and if the place where they left the carriage had been ascending ground, the carriage would have remained where it was, and no injury would have happened to the passengers. But the bolt was drawn out at a place where the carriage was going down hill, and the natural laws of gravitation and motion carried it to the place where the road was defective. It is not inconsistent with the decision in that case, as explained and limited in Rowell *v.* Lowell, 7 Gray, 100, and in Davis *v.* Dudley, to hold that the defendants are not liable for an injury occasioned, as this has been, by the action of a horse that was at the time of the accident unfit for use, and was beyond the driver's control, although the defect in the highway was also the cause of the injury.

"The court are of the opinion that when a horse, by reason of fright, disease, or viciousness, becomes actually uncontrollable, so that his driver cannot stop him, or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, or upon a place which is defective for want of a railing, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. But a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver." Supra, § 103, 107.

[1] Stickney *v.* Maidstone, 30 Vt. 738.

[2] See supra, § 103–6, 921.

be imputed to the town. In Illinois it is held that when there is a hole or other defect in the road against which a runaway carriage is wrecked, it is no defence that the horses were frightened and beyond control.[1] Various shades of opinion are elsewhere, as has been seen, expressed; but the true issue is, is the road adequate for the ordinary wear of travel. If so, the public authorities cannot be made liable for the *casus*.[2]

§ 984 *a*. *Where a horse, taking fright in an adjacent field, dashes upon the road and is there injured by striking on a defect.* — In such case, as the fright originated from circumstances for

[1] Lacon *v.* Page, 48 Ill. 499; Chicago *v.* Gallagher, 44 Ill. 295; Joliet *v.* Verley, 35 Ill. 58; Springfield *v.* Le Claire, 49 Ill. 476; Champaign *v.* Patterson, 50 Ill. 61. See supra, § 104.

[2] See this discussed at large, supra, § 103–5. In Babson *v.* Rockport, 101 Mass. 93, which was a trial of an action against a town for injuries alleged to have been caused to a traveller by a defect in the highway on which he was driving with a horse and carriage, the jury were instructed that, for the plaintiff to recover, the defect must have been the sole cause of the accident which resulted in the injury; that if the plaintiff's horse became uncontrollable, and was so when the accident occurred, the plaintiff could not recover; but that if there was only a momentary loss of control, and the control would have been instantly regained if the plaintiff's carriage had not come in contact with the place where the way was defective, then the plaintiff could recover. It was held that these instructions were correct.

Chapman, C. J., said: "In order to render a town or city liable on account of an accident happening on a highway, it must happen to a traveller, and the defect of the way must be the sole cause of the injury. Rowell *v.* Lowell, 7 Gray, 100; Stickney *v.* Salem, 3 Allen, 374. If a horse gets loose and runs upon the highway, the town is not liable. Richards *v.* Enfield, 13 Gray, 344; in Davis *v.* Dudley, 4 Allen, 557, this principle was applied to a case where the horse escaped from his driver while travelling on the way. In Titus *v.* Northbridge, 97 Mass. 258, and Horton *v.* Taunton, Ibid. 266, it was applied to cases where the horse had not escaped from the driver, but had got entirely beyond his control. In those cases there was no evidence sufficient in law to establish the fact that the driver was exercising any control over his horse, or that the defect in the highway was the sole cause of the injury." . . .

In Willey *v.* Belfast, 61 Me. 569, it was held that if a defect in a highway causes such a breaking and derangement of a safe and proper vehicle, that the direct and natural consequence is the frightening of a kind, safe, and well-broken horse beyond the control of a reasonably skilful and careful driver, and the horse while violently running down a steep hill falls, and the plaintiff is thrown out and injured, it is competent for the jury to find the defect to be the sole cause of the accident. The fall of such a horse, under such circumstances, is not to be reckoned a contributory cause, but a part of the accident, like the fall of the plaintiff from the carriage.

Whether switching the tail over reins is *casus*, see supra, § 106.

which the town is not responsible, it has been held not liable for the injury. To attach liability, the horse must enter on the road in a condition fit to travel.[1]

§ 985. *Unfitness of horse.* — No horse is perfectly fit for travel; no horse is utterly free from all vices, tricks, or timidities, and to make a town liable only for defects causing damage to a perfect horse would exonerate it in all cases in which a horse is concerned. The true rule is that already in principle foreshadowed,[2] that such viciousness or inadequacy as is among the ordinary incidents of travel is no defence; but that it is a good defence, that the horse was, to the plaintiff's knowledge (express or implied), unfit, either from viciousness or other incapacity, for the ordinary strain of a road.[3]

§ 986. *When the plaintiff is injured by jumping out of a carriage in fright.* — If a defect in a highway which a town is bound to keep in repair causes the horse to fall and the carriage to break, with which a person is travelling thereon with due care, and while the horse is struggling to rise, and every reasonable effort is being made to control it, the traveller, in the exercise of ordinary care, and to avoid apparently imminent danger from the position into which he has been brought by the defect in the way, leaps from the carriage, and is injured in doing so, the town is liable for the injury.[4]

§ 987. *Latent defectiveness of wagon or harness.* — It has been more than once held that where a wagon is broken by a defect in a road the plaintiff is entitled to recover for the injury, provided the accident happened through the insufficiency of the road and

[1] Jackson *v.* Belleview, 30 Wisc. 257. See infra, § 991.

[2] Supra, § 73, 100, 104.

[3] See Dennott *v.* Wellington, 15 Me. 27; Bliss *v.* Wilbraham, 8 Allen, 564; Murdoch *v.* Warwick, 4 Gray, 178.

[4] Sears *v.* Dennis, 105 Mass. 310. Gray, J.: "The liability of towns for defects in a highway is not limited to injuries suffered by reason of a traveller, or his horse, or carriage, coming into immediate contact with the defect, but extends to injuries to the horse while under the immediate impulse or impetus received from the defect, or during reasonable efforts to relieve him from the position into which he has been thrown by coming into contact with the defect, or to the traveller by voluntarily leaping from the carriage, in the exercise of ordinary care and prudence, to avoid apparently imminent danger from being brought into contact with the defect, or from impending consequences resulting therefrom. Stevens *v.* Boxwood, 10 Allen, 25; Babson *v.* Rockport, 101 Mass. 93; Tuttle *v.* Holyoke, 6 Gray, 447; Lunt *v.* Tyngsborough, 11 Cush. 563." See fully, supra, § 93, 94.

without any lack of ordinary care on the part of the plaintiff in the mode of driving and in discovering any imperfection in the vehicle, although it was unsafe and its defects contributed to the accident.[1] The view just stated is virtually accepted in New Hampshire and Illinois,[2] but rejected in Maine,[3] where it is held that the plaintiff cannot in such case recover, though ignorant of the defects. In Massachusetts the tendency now is to regard the traveller as taking upon himself the risk of a defective wagon.[4] But are there any wagons so free from defects that they can escape the consequences of violent shocks? Are not all wagons in this sense more or less defective; and would not the establishment of the rule that a defective wagon bars recovery, bar recovery in all cases of violent shocks? The true rule is, that when in the ordinary course of things the wagon was so defective that it was not road-worthy, then the plaintiff, who ought to have acquainted himself with this fact, cannot recover. If, however, it is road-worthy, then the fact that it has defects which the defects of the road make dangerous is no defence.[5]

§ 988. *Road to be constructed on the best practicable plan under the circumstances.* — As to the general structure of the road it is sufficient to state that, in conformity with the principles heretofore noticed,[6] the parties bound to the maintenance of the road, while required to exercise the diligence that would be exercised by good engineers and road-makers under the same circumstances, are not to be held to the adoption of improvements which, though shown to be valuable, are not such as are applied to roads built in the situation and under the conditions of that under investigation.[7] And the opinion of competent engineers and other

[1] Supra, § 99. See Fletcher *v.* Barnet, 43 Vt. 192; Palmer *v.* Andover, 2 Cush. 601. See also Hunt *v.* Pownal, 9 Vt. 418; Shepherd *v.* Chelsea, 4 Allen, 113; Fogg *v.* Nahant, 106 Mass. 278; remarks of Redfield, J., in Hodge *v.* Bennington, 43 Vt. 458; Wheeler *v.* Townshend, 42 Vt. 15; Whitcomb *v.* Barre, 37 Vt. 148.

[2] Winship *v.* Enfield, 42 N. H. 197; Lacon *v.* Page, 48 Ill. 499; Aurora *v.* Pulfer, 56 Ill. 270.

[3] Moore *v.* Abbott, 32 Me. 46; Moulton *v.* Sanford, 51 Me. 127.

[4] Murdock *v.* Warwick, 4 Gray, 178; though see Palmer *v.* Andover, 2 Cush. 600.

[5] See supra, § 99.

[6] Supra, § 48, 50, 635.

[7] Supra, § 978. See supra, 972; Church *v.* Cherryfield, 33 Me. 460; Fitz *v.* Boston, 4 Cush. 365; Howard *v.* N. Bridgewater, 16 Pick. 189; Koester *v.* City, 34 Iowa, 44; Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463; Hull *v.* Richmond, 2 Wood. & M. 337; Rapho *v.* Moore, cited supra, § 972; Rockford *v.* Thomas, Ibid.

experts will be a protection to the municipal authorities by whom the road is built.[1] Wherever, however, a road so constructed is patently defective, the liability of the municipal authorities attaches: nor does the capacity of the engineers then continue to be a defence.[2]

§ 989. "Safety and convenience" of road are mixed questions of law and fact. The statutes of several states, it has been seen, require the roads to be safe and convenient. What constitutes safety and convenience in each particular case is for the jury under direction of the court.[3]

§ 990. *Burden of proof.* — As in other cases of collision,[4] the burden is on the plaintiff to prove the defect, and to show that the defect was the cause of the damage sustained by him. Yet it must be remembered that the evidence in both these issues must be generally circumstantial, and may be made up of presumptions.[5]

§ 991. "*Travellers*" *alone are under protection of statutes;* which do not apply to persons not travelling, but suffering damage to their property adjacent to the road.[6] Thus the necessary excavations by a town on a road-side, causing damage to an adjoining house are not the ground of action, unless negligently done,[7] nor is such damage caused by the lawful laying of a railroad track in the street.[8] So the statutes do not apply to children playing in the street;[9] nor to a person idling, and not travelling,

[1] Wilson *v.* Mayor, 1 Denio, 795; Waggoner *v.* Jermaine, 7 Hill, 357; 3 Denio, 306; Rochester Lead Co. *v.* Rochester, 3 N. Y. 463; Milwaukee *v.* Davis, 6 Wisc. 377. Supra, § 260.

[2] Weightman *v.* Washington, 1 Black, U. S. 39.

[3] Merrell *v.* Hampden, 26 Me. 234; Tripp *v.* Lyman, 37 Me. 250; Lawrence *v.* Mt. Vernon, 35 Me. 100; Savage *v.* Bangor, 40 Me. 176; Winship *v.* Enfield, 42 N. H. 197; Green *v.* Danby, 12 Vt. 338; Rice *v.* Montpelier, 19 Vt. 470; Cassidy *v.* Stockbridge, 23 Vt. 9; Hutchinson *v.* Concord, 41 Vt. 271; Fitz *v.* Boston, 4 Cush. 365; Aldrich *v.* Pelham, 1 Gray, 510; Billings *v.* Worcester, 102 Mass. 329; City *v.* Clapp, 17 How. U. S. 161; Sterling *v.* Thomas, 60 Ill. 264. Supra, § 420.

[4] See supra, § 421.

[5] Libby *v.* Greenbush, 20 Me. 47; Church *v.* Cherryfield, 33 Me. 460; Lester *v.* Pittsford, 7 Vt. 158; Green *v.* Danby, 12 Vt. 338; Collins *v.* Dorchester, 6 Cushing, 396; Billings *v.* Worcester, 102 Mass. 329; City *v.* Clapp, 17 How. U. S. 161. See supra, § 984.

[6] Ball *v.* Winchester, 32 N. H. 435; Conway *v.* Jefferson, 46 N. H. 521; Stinson *v.* Gardiner, 42 Me. 248.

[7] Radcliffe *v.* Brooklyn, 4 N. Y. 195.

[8] See Adams *v.* R. R. 11 Barbour, 414.

[9] Stinson *v.* Gardiner, 32 Me. 248.

on the highway.[1] But an elephant properly driven may be a "traveller."[2]

§ 992. *Sidewalks* are to be regarded as highways, and when not required by statute to be kept in repair, are at common law such essential parts of the highway, in all cities, that it is incumbent on the municipal government to keep them in a safe condition.[3]

§ 993. *Horses hitched and breaking loose.* — Is hitching a horse and leaving him hitched an ordinary incident of travel? This question has received various answers; and is in fact dependent on the degree of risk in the particular place, and the character of the horse.[4] In a thronged thoroughfare no liability can be held to attach for damage to a horse who, escaping when hitched, strikes a defect on the road.[5] But it may be otherwise in remote rural districts, where, so to hitch and leave horses is among the ordinary incidents of travel.[6]

§ 994. *What damage must be sustained to entitle plaintiff to sue.* — The subject of damages is not within the scope of the present volume. It is enough here to say that to entitle the plaintiff to recover for defects in a highway, he must sustain some damage peculiar to himself. That which he suffers in common with the rest of the community will not be sufficient to sustain a suit.[7] But either diversion of customers,[8] or the necessity of taking a circuitous way,[9] is sufficient damage to sustain a suit.

§ 995. *When plaintiff at the time was violating law. Sunday travellers. Excessive loads.* — Unless the kind of unlawfulness engaged in by the plaintiff was the distinctive immediate cause of his injury, it cannot be set up as a defence by those by whom he is negligently injured. Thus that a person is on an unlawful

[1] Blodgett *v.* Boston, 8 Allen, 237.

[2] Gregory *v.* Adams, 14 Gray, 242.

[3] Supra, § 982; Bacon *v.* Boston, 3 Cush. 174; Shipley *v.* Fifty Associates, 101 Mass. 251; Stockwell *v.* Fitchburg, 110 Mass. 305; Weare *v.* Fitchburg, 110 Mass. 334; Wallace *v.* New York, 2 Hilt. 440; Bloomington *v.* Bay, 42 Ill. 503; Rockford *v.* Hildebrand, 61 Ill. 156; Galesburg *v.* Higley, 61 Ill. 287.

[4] See supra, § 838.

[5] See Davis *v.* Dudley, 4 Allen, 557.

[6] Verrill *v.* Minot, 31 Me. 299; Tallahassee *v.* Fortune, 3 Fla. 19.

[7] Winterbottom *v.* Lord Derby, Law Rep. 2 Exch. 216; Willard *v.* Cambridge, 3 Allen, 574; Lansing *v.* Smith, 8 Cow. 146; Fort Plain Bridge Co. *v.* Smith, 30 N. Y. 44; Blanc *v.* Klumpke, 29 Cal. 156.

[8] Wilson *v.* Hungerford, 2 Bing. N. C. 281.

[9] Wiggins *v.* Boddington, 3 C. & P. 544.

errand does not excuse those by whom, unless for the lawful purpose of arresting him in such errand, he is either intentionally or negligently hurt.[1] Hence a person who is hurt when unlawfully travelling on Sunday is not barred by this fact from recovering from the town for the defect causing the hurt.[2] It is otherwise when the plaintiff was at the time of the accident driving a wagon loaded more heavily than the law permits, and when this heaviness caused, in connection with the defect, the breakage.[3]

§ 996. *Roads to be fit for the infirm as well as for those in full possession of their powers.* — In the natural order of things, infirm and aged persons, with hearing, sight, and strength more or less abated, must travel on the public roads; and it is such travellers, as well as those in full possession of their faculties, whom the road-makers must keep in view in the repair of the roads. Hence when an infirm traveller, whose blindness or lameness is not such as to make it negligence in him to travel unattended, is injured by a defect, it is no defence that this defect would have been perceived and avoided by a person in full possession of sight and strength. In the ordinary course of events injury would follow from such defects; and hence, on the principles heretofore stated, the road-makers are liable for the injury.[4] No person can leave with impunity any obstacle on a highway that may injure travellers, take them as they come, either weak or strong, young or old;[5] and *a fortiori* is this the case when the obstacle is left through the negligence of a person specially charged with the duty of removing such obstacles. At the same time, where a person so infirm as to be unfit to travel alone ventures on the road by himself, he must bear the consequences arising from his striking defects which would only endanger those who in the natural course of events are not expected to travel.[6]

§ 997. *No defence that plaintiff might have taken another road.* — The town or municipal authorities cannot defend themselves, in permitting obstructions or defects in a road, on the ground that

[1] Supra, § 335–345.

[2] Dutton *v.* Ware, 17 N. H. 34; *contra*, Jones *v.* Andover, 10 Allen, 18; and see Heland *v.* Lowell, 3 Allen, 407, where it was held that a plaintiff driving quicker than a by-law permitted could not recover. See supra, § 405.

[3] See Howe *v.* Castleton, 25 Vt. 162.

[4] Supra, § 73, 108, 404–5; Frost *v.* Waltham, 12 Allen, 85; Davenport *v.* Ruckman, 37 N. Y. 568; Cox *v.* Westchester Turnp. Co. 33 Barb. 413.

[5] See supra, § 310–5, 389 *a*, 404.

[6] See Davenport *v.* Ruckman, 37 N. Y. 568. Supra, § 403.

there was another available road which the plaintiff could, if he had chosen, have taken.[1]

§ 998. "*Inevitable accident*" *as a defence.* — As has already been seen,[2] no liability attaches for a casualty to a road produced by inevitable accident,[3] if on notice the town does its duty as to repairs; though it is no defence, where the town neglects to repair a road, that the road was rendered useless by the destruction of a bridge with which it connects.[4] How far the fright of horses is *casus* is independently discussed.[5]

§ 999. *Intervening negligence of third party.* — It has been already seen that the negligence of a third party intervening between the defendant's negligence and the damage breaks the causal connection between the two.[6] This doctrine has been not unfrequently applied to the topic before us. There is no road that has not imperfections; and if a traveller is forced against one of these through the negligence of a third party, it is from the latter, and not from the town, that redress must be sought.[7] Where, however, the negligence of the third party is such as the road-maker ought to provide against as a natural and usual occurrence, then the liability for neglect in repairing is not suspended.[8]

III. INDIVIDUAL LIABILITY OF OFFICERS.

§ 1000. As a general rule, wherever "an individual has sustained an injury by the nonfeasance or misfeasance of an officer who acts or omits to act contrary to his duty, the law affords redress by an action of the case adapted to the injury."[9] This principle has been applied to canal superintendents,[10] to canal

[1] Erie *v.* Schwingle, 22 Penn. St. 384; State *v.* Fryeburg, 15 Me. 405.

[2] Supra, § 953. As to general doctrine, supra, § 114.

[3] See Holman *v.* Townsend, 13 Metc. 297; Prindle *v.* Fletcher, 39 Vt. 255; Chamberlain *v.* Enfield, 43 N. H. 356. The sinking of stones below the surface, caused by frost is not such *casus*. Tripp *v.* Lyman, 37 Me. 250; Kimball *v.* Bath, 38 Me. 219.

[4] Com. *v.* Deerfield, 6 Allen, 449.

[5] Supra, § 984.

[6] Supra, § 134–145.

[7] Moulton *v.* Sanford, 51 Me. 127; Shepherd *v.* Chelsea, 4 Allen, 123; Wellcome *v.* Leeds, 51 Me. 313; Lowell *v.* Lowell, 7 Gray, 100; Richards *v.* Enfield, 13 Gray, 344.

[8] Danville, &c. Co. *v.* Stewart, 2 Metc. (Ky.) 119; Hunt *v.* Pownal, 9 Vt. 411.

[9] Spencer, C. J. — Bartlett *v.* Crozier, 15 Johns. 250. Supra, § 285, 291.

[10] Adsit *v.* Brady, 4 Hill, 630.

contractors,[1] and to commissioners of highways.[2] The point, however, depends upon the general liability of public non-judicial officers; a subject examined under another head.[3]

IV. "PROXIMATE CAUSE."

§ 1001. This topic is fully discussed in prior sections.[4] If a defect in the highway is the sole, true, efficient cause of an accident, it is not necessary that the injury should be actually received upon the precise spot where the defect exists, or that it should appear that there was any defect where the injury was received.[5]

[1] Robinson *v.* Chamberlain, 34 N. Y. 389.

[2] Horn *v.* Barkhoof, 44 N. Y. 113; Rector *v.* Pierce, 3 N. Y. Supreme Ct. 416.

[3] Supra, § 285, 291.

[4] Supra, § 102, 106, 107.

[5] Willey *v.* Belfast, 61 Me. 569; cited more fully, § 983, 984.

APPENDIX.

CAUSATION VIEWED JURIDICALLY.

The doctrine advocated by Mr. J. S. Mill, that the cause of an event is the sum of all its antecedents, has been already summarily rejected as irreconcilable with the principles both of Roman and of Anglo-American law. As the question, however, is one of first importance, I have thought it best to give to it, at this place, a more detailed examination.

At the outset it may be observed that the classical Roman jurists, to whom I first appeal, form a line of authorities who cannot be lightly dismissed. They, at least, are not open to the charge of being either recluses, weaving, in their studies, schemes which cannot bear the strain of practical life, or enthusiastic devotees, dealing only with the spiritual relations of man to God, and not with those of man to man. The jurists whose opinions are collected in the Justinian Digest were eminently men of business, and the ethical as well as the juridical duties of the Roman Empire were moulded by them for the purposes of practical life. The result of their labor is a system of jurisprudence which, from the purity of the principles on which it rests and from its adaptation to the common needs of civilized society, is so admirable, so exact, so homely, and so philosophical, that it is in its leading features as applicable to the civilization of our own day, as it was to the civilization of Rome at her prime. "The Justinian Digest," so Gibbon substantially tells us, "is the most splendid monument of juridical genius that literature retains." "The Code of Justinian," so speaks Hallam, "will form the basis of all other systems, and mingling, as we may hope, with the new institutions of philosophic legislators, continue to influence the social relations of mankind long after its direct authority shall be abrogated. The ruins of ancient Rome supplied the materials of a new city, and the fragments of her law, which have been already wrought into the recent Codes of France and Prussia, will probably, under other names, guide far distant generations by the sagacity of Modestinus and Ulpian." "We look to the Roman jurists," says Sir Henry Maine,[1] in a passage which I quote

[1] Middle Ages, vol. ii. ch. 9, pt. 2.

from memory, "not only for what the law was, but for what it is to be." The opinion of these great, subtle, and at the same time eminently practical intellects, cannot be without weight on an issue on which the whole science of jurisprudence depends.

Nor can it be said that these jurists spoke on this issue without being duly advised of its nature. The hypothesis of Mr. Mill, as Mr. Tyndall has lately reminded us, is as old as the first speculative philosophers. Cicero, who, though not himself claiming to be a jurist, discusses, sometimes from a philosophical, sometimes from a rhetorical stand-point, the questions the jurists were called upon to decide, recurs not infrequently to the distinction between "causes" and "conditions" as fundamental to all sound jurisprudence.[1] A "condition" (or *occasio*), so he tells us, is a mechanical antecedent without causal power; a cause is the responsible voluntary agent changing the ordinary course of nature.[2] So, as Flavel reminds us, "critical and exact historians, as Polybius and Tacitus, distinguish betwixt the ἀρχὴ and the αἰτία, the beginning *occasions*, and the real *causes* of a war."[3] A distinction so universally recognized must have been familiar to the great classical jurists whose duty it was to determine liability for causation. Even Lucretius, fantastic as he was, could not have been unknown to the later jurists of whom he was the contemporary; and when Lucretius declared in words with which Mr. Tyndall tells us there is so great a temptation now to close, that "Nature is seen to do all things spontaneously," no doubt this opinion, if it had been thought of any weight, would have been noticed in those discussions in which questions of causation were settled. If, however, the conjectures of the materialistic philosophers were ever criticised by the great and grave thinkers whose decisions the Pandects preserve, it was probably with some such curt sentence as the following recorded by Cicero: "Nihil tam absurde dici potest quod non dicatur ab aliquo philosophorum."[4] Philosophical discussions on such elementary questions it was not in

[1] See this in his essay *de fato*, where he discusses the views of Democritus on this point.

[2] See also in De Offic. lib. I. the following: "Occasio est pars temporis, habens in se aliquis idoneam faciendi opportunitatem."

[3] Flavel, Discourse of the Occasions of Moral Errors, &c., cited in Fleming's Vocab. p. 361.

[4] Cic. de Div. II. 58. The low rank assigned to the Epicurean philosophers by their contemporaries is noticed by Ueberweg, in his History of Philosophy, vol. I. Am. trans. p. 201. He gives a list of Roman Epicurean philosophers, the last of whom mentioned is "T. Lucretius Carus, (95–52 B. C.) author of the didactic poem *De Rerum Natura*." "Epicureanism," Ueberweg adds, "had very many adherents in the later Roman period, but these were, for the most part, men of no originality or independence."

the line of the jurists to give. Though endowed with the subtlest and at the same time most vigorous mental gifts; though conversant as a prerequisite to their office, with the philosophy of the schools, their business was, not to reopen the foundations of jurisprudence, but to apply its principles both philosophically and exactly to th business questions of the day. Hence we do not find in the opinions of the jurists any discussion of the distinction between "conditions" and "causes," or any expanded vindication of the principle that nothing that is not a free agent can be viewed as a "cause." But while the convertibility of causality with free agency is not discussed, it is everywhere presupposed. Hundreds of cases are given in the Digest in which the question is involved; and in each case, with a dry authoritativeness which shows that the truth of this position is regarded as fundamental, the office of the jurist is to cast out of the issue all "antecedents" that are not free agents, and then to determine which among these free agents was the immediate cause. Among these cases I now select two as illustrations.

A fire is sweeping over the dry grass of a terrace which is crowned by a villa.[1] The villa is consumed. The fire, it appears, originated in a distant field, where it was started for legitimate farming purposes. What is the juridical cause of the burning of the villa? In other words, what is the cause of the communication to this villa of the fire from the remote spot where it was first kindled? The jurist, in answering this question, betakes himself immediately to distinguishing between the "conditions" and the "cause" of the conflagration; in other words, between such antecedents as were inevitable, and hence to be treated as *casus*, and such as could have been avoided by due care on the part of those watching the fire. Physical science, indeed, is invoked to aid in the inquiry; but it is invoked simply as a collector of testimony whose weight and meaning jurisprudence is to determine. "Was the wind blowing at the time in such a way as to make it negligent then to start a fire?" "Were the conditions of the atmosphere, on that hot autumn day such as to make any fire on those dry fields dangerous?" Physical science is employed to search for materials, and even to suggest hypotheses, bearing on these questions; but when it has done this its office is complete. It does not, even if its experts can agree upon a conclusion, decide. Willing or unwilling, it is required to discriminate between the "antecedents" of the fire, and to give, in tones harmonious or conflicting as the case may be, its report as to which of these antecedents are attributable to human intervention, and which are not. Undoubtedly much aid can thus be received by jurisprudence. But this aid is simply that which an expert witness offers to a judge. Lucretius may be the

[1] See L. 30. § 3. D. de Leg. Aq. commented on supra, § 116, 865.

witness. Lucretius may, in his testimony, say that all things are spontaneous; yet even Lucretius will be compelled to answer the question as to which of these antecedents were beyond, and which within, the control of those watching the fire. And no matter what may be the opinion of Lucretius, the jurist decides the question upon the principle that i those watching the fire could have extinguished it when danger was probable, but omitted so to extinguish it, then they are liable for burning the villa.

So as to the question which comes up when a building falls in, and when the jurist has to decide whether the disaster is caused by negligence. This question appears frequently to have arisen, and no wonder, when we contrast the ponderous grandeur of Roman architecture with the risks of inundation at one place from lava torrents, at another from Apennine floods, as well as from the *assiduis pluviis* of which the jurist in the case before us, speaks. To what is the sinking of the walls traceable? Specialists are to be found in this department as authoritative as any who have ranked among the great masters of architecture. Are they to be interrogated as to whether or no the falling of the wall is owing to causes that were unavoidable? Far from this. No doubt architects are summoned to state whether the wall was carefully laid. But when the question of causation arises, then the opinion of these experts is not asked. For, even supposing they should agree as to what caused the particular result (and agreement among experts appears to have been as rare in Roman courts as it is in our own), physicists who treat all antecedents as causes, and who can only judge of material forces, can afford no aid to jurisprudence when it undertakes to distinguish those conditions which are material, and therefore merely consecutive, from those which are moral and causal. The physicist may say, "All these antecedents are causes." The jurist takes up each antecedent in turn, and casting out of account all antecedents which are not the result of the immediate action of a free agent, says that the latter alone constitute a cause, and the latter alone can be held liable as such. If the building fell by such a series of unprecedented rains as ordinary prudence could not have guarded against, then there is no cause which jurisprudence holds liable. If, however, the falling in of the wall was immediately occasioned by the negligent excavation of the builder of a neighboring house, then such builder is the juridical cause.[1]

In Anglo-American jurisprudence we have the same result, if not as advisedly, at least as summarily reached as in the Roman. Of this we may take as an illustration the first leading English case in which the

[1] L. 57. D. loc. 19. 2. cited supra, § 115.

question of causation was distinctively discussed.[1] A., at a fair, as a sort of coarse joke, threw a squib into a market-house. The squib fell upon the table of B., who convulsively and mechanically, to prevent it hurting the goods on the table, tossed it off, when it fell on the table of C. C., in the same way, also to prevent an explosion on his table, threw the squib instantaneously off, when it struck D. in the face, and on the concussion exploded, injuring D. in the eye. What was the cause of D.'s hurt?

Now here is a question as to which physical as well as mental philosophers might well be consulted, for it involves not only the fundamental doctrines of causation, but the distinction, if there be such, between such human actions as are necessitated, and such as are free. We can conceive therefore, of Mill, or of Hume, or of Lucretius, being summoned on such a question; and we can anticipate what wou d be their reply. "A., B., and C. were all antecedents: A. B. and C. were all causes. This is enough." But it is not enough. If B. and C. acted convulsively and mechanically in what they did, then they were not free agents, and therefore not causes. If A. acted negligently or mischievously, and set in motion the agency of B. and C. who acted only mechanically, then he was the cause of the disaster. To make a "cause" it is essential that there should be free agency. So substantially decide the judges in Scott *v.* Shepherd; and this decision is in full accordance with that of the Roman jurists. If we deny causal power to human beings acting mechanically, *a fortiori* must we deny causal power to matter. That such is the conclusion of Anglo-American law is sustained by a vast net-work of cases, which are presented in the preceding pages, and which, however they may differ in detail, unite in assuming that only a free moral agent can be a cause. Unphilosophical no doubt may have been some of the judges who have thus ruled, if to philosophy it is essential that the primary principles of ethics and of jurisprudence should be reopened at every argument. Devoted most of these judges no doubt were to the traditions of the law. But whatever may have been their demerit they do not deserve the charge so often made against the advocate of the supremacy of moral forces over physical, of being mere closet theorists. There is no class of men more observant of human nature, more considerate in the adaptation of fixed principles to that nature as it exists, and yet at the same time more conscientious both in ethical statement and logical application, than the judges of England and of the United States. To say that they are not philosophers is far less to their discredit than to the dis-

[1] Scott *v.* Shepherd, 1 W. Bl. 892; 1 Smith's Leading Cases, 549; 7th Am. ed. 755; supra, § 95.

credit of the philosophy which they ignore. If the materialistic view of causation, even with the high indorsement it has received from Hume and Mill, has not, with rare exceptions, been considered, by Anglo-American courts, to call even for discussion, this shows that so far as concerns practical life, the materialistic view of causation has no ground on which to stand. We might, therefore, in discussing the question of causation, content ourselves with taking the unbroken opinion of those eminent expositors both of Roman and Anglo-American law who have made the questio of responsibility for causation their especial study, and whom the state has from time to time charged with the duty of defining and enforcing this responsibility. Waiving for a moment, however, this authority, I beg leave to suggest in addition the following reasons for rejecting the materialistic scheme of causation.

1. If all the antecedents are the cause of any given effect, then, as all the antecedents existing at a particular time, are the same, all the effects after that time must be the same. It may be replied that each effect has its specific conditions. But as those conditions exist (as antecedents) prior to their effects, and as on this hypothesis as well from the necessary interdependence of all objects in place, they form a united body of phenomena, then all events occurring at one time over all space, being the effect of the same cause, would be the same. If we assume that the same causes produce different effects, this at once destroys the assumption that the same causes necessarily produce the same effects. If we assume that one effect has a distinguishing antecedent which precedes no other effect under the same conditions, then we have an antecedent which is not an antecedent. If it be answered, as is sometimes the case, that each effect is qualified by an antecedent evoked by its own distinctive type, then we have an effect which is its own cause.

2. Next may be noticed the practical communism which this theory of the causal character of all antecedents promotes. "Here is a capitalist among these antecedents; he shall be forced to pay." The capitalist, therefore, becomes liable for all disasters of which he is in any sense the condition, and the fact that he thus is held liable, multiplies these disasters. Men become prudent and diligent by the consciousness that they will be made to suffer if they are not prudent and diligent. If they know that they will not be made to suffer for their neglects; if they know that though the true cause of a disaster, they will be passed over in order to reach the capitalist who is a remoter condition, then they will cease to be prudent. The privileged classes of feudalism were dissolute and reckless because they could not be made to pay for injuries they inflicted. The non-capitalists, who on this theory

of the causal character of all antecedents, will be the privileged classes of our own times, will become dissolute and reckless, because they, being non-responsible in a pecuniary sense, will not be called upon to pay for the injuries they inflict. In one sense this would cure itself, because the distinction between capitalist and non-capitalist would soon cease. If capital is not destroyed in such an encounter, it would decline to expose itself to such risks. No engineer would peer into regions which, rich as they may be, are fraught with perils in proportion to their riches. No factory would be built, for factories, though productive of wealth, have in them wheels against which incautious visitors might run, and require the use of steam or water power which reckless trespassers might abuse. Making the capitalist liable for everything, therefore, would end in making the capitalist, as well as the non-capitalist, liable for nothing; for there would be soon no capitalist to be found to be sued.[1]

3. This levelling of all antecedents to the same parity, in denying man's moral primacy over and responsibility for nature, destroys the true mission of that physical science in whose supposed interest the materialistic philosophy of causation is advanced. The mission of physical science is that of the exploration and direction of physical forces; the mission of jurisprudence, viewing the term in its broad sense, is that of distinguishing between physical and moral forces, and of requiring that physical forces be directed in conformity with moral law. When physical science departs from this service, its speculations are as valueless as are the houses built by a child on the sand. And even when it undertakes the office of determining what is and what is not the result of responsible causation, it acts in subordination to jurisprudence. It merely reports the facts; jurisprudence, so far as concerns the law of the land, not only compels it to make the report, but decides ultimately what the report means.

It is true that there is something at the first view humiliating to physical science to be thus assigned to a subordinate sphere. An eminent physicist, to view the question in the concrete, is placed on the witness stand and asked as to the cause of a particular disaster. He answers that the cause "is the sum of all the antecedents," or that "nature spontaneously acts without moral intervention." He is told, however, by the judge that the answer is frivolous; and he is compelled, on pain of imprisonment for contempt, to repudiate his whole philosophy, and to discriminate between such antecedents as are produced by responsible volition, and such as are not so produced. His duty, he is told, is to collect facts, not to determine their moral bearings; to make

[1] See this argued more fully, supra, § 145–9.

discoveries, if he can, and to direct the forces he discovers, if he can, but to do this only in subordination to moral law. He may revolt at being thus treated as a mere hewer of wood and drawer of water for jurisprudence, and he may be tempted to exclaim, with Caliban, —

> "A plague upon the tyrant that I serve,
> I'll bear him no more sticks."
> "I say, by sorcery he got this isle,
> From me he got it."

But the "sorcery" is simply that which moral power, as a necessity of their common natures, exercises over physical. This supremacy, so far as concerns the topic immediately before us, has not been arbitrarily imposed. Jurisprudence has done her best to secure the services of physical and psychological science in the determination of issues in which physical and psychological incidents are involved. Experts have been cordially welcomed for this purpose, and when it was found that in all questions involving moral considerations such experts were hopelessly distracted; when it was found that no paradox was so startling but that some expert advanced to sanction it by his oath;[1] when it was found that even as to matters purely physical the number of experts testifying on the one side was usually equal to the number of experts testifying on the other side,[2] practical jurists endeavored to devise

[1] Thus we have cases in which materialistic physicians have sworn to the irresistibility of impulse; and other cases in which, after swearing that certain facts showed insanity, witnesses have said on cross-examination that all great crimes presuppose insanity, and that no suicide is sane. So "dipsomania" has been declared to be a specific form of insanity, conferring irresponsibility; and so, generally, as to "moral insanity." See this fully illustrated in 1 Whart. & Stil. Med. Jur. § 196 *et seq.*

[2] In issues of insanity this equipoise is proverbial. There is scarcely a case in which insanity is set up in which philosophers of the materialistic school are not summoned to prove the non-responsibility of particular manias; and the best that the prosecution can generally do is to give the case to the jury with the observation that the expert testimony is hopelessly confused. Nor is it in insanity cases only that this condition exists. On the trial of Mrs. E. G. Wharton, in Maryland, in 1872, the questions whether poison was discovered in the remains of the deceased, and whether the deceased's symptoms were those of poisoning, divided the eminent experts who were examined into two hostile schools. On the trial of Stokes, in New York, in the same year, for the murder of Fisk, one half of the surgical experts swore that the mortal wound came from Stokes, and the other half swore that it came from the surgeons who undertook to cure Fisk. On the first trial of Dr. Schoeppe, in Pennsylvania, in the same year, for poisoning, the court determined to accept the conclusions of the single expert examined for the prosecution; but after conviction it was found that this expert had been governed by rules that one half of his profession had dis-

some new mode by which expert opinion could be brought out more satisfactorily than by examination on trial. In Germany several such schemes have been attempted, but without success.[1] In England and in the United States the ingenuity of legislators has been unavailingly tasked for the same purpose. No plan has as yet been suggested by which physical science can be enabled to pronounce moral judgments satisfactory even to itself; and jurisprudence has reluctantly reached the conclusion that physical science has and can have no capacity to form such judgments, and that its representatives, able, experienced, and honored as they are, must be confined, when examined in a court of justice, to a mere statement of facts, and must be forbidden, when on the witness stand, to express any moral or legal conclusion from such facts.[2] And this prohibition, let it be again noticed, is reluctantly issued. It springs from no jealousy, for nowhere are the true claims of physical science more honored than in courts of law.[3] But the prohibition has arisen from the failure of all efforts to make physical science speak coherently on any issue involving the moral relations of physical facts. And the reason is that to physical science the sceptre of government is, by the nature of things, denied. If a railroad operator, for

carded, and a new trial had to be granted. As to blood stains, in no trial where the question comes up are we spared the spectacle of experts affirming, and then of experts denying the human quality of the blood.

[1] This is fully shown by Liman, in the 5th ed. of Casper's Gericht. Med.

[2] In England this is ruled in R. *v.* Richards, 1 F. & F. 87; R. *v.* Higginson, 1 C. & K. 129. Among the American cases where the same point is decided may be mentioned State *v.* Klinger, 46 Mo. 224; Fairchild *v.* Bascomb, 35 Vt. 398; People *v.* McCann, 3 Parker C. R. 272; White *v.* Ballou, 8 Allen, 408; Luce *v.* Dorches. Ins. Co. 105 Mass. 299; Higgins *v.* Dewey, 107 Mass. 494; Cook *v.* State, 4 Zab. 843.

[3] Thus it was in no unkind feeling, but the necessities of his position, which led Chief Justice Chapman, of Massachusetts, in charging, in 1868, in a homicide case in which a peculiarly wild defence had been sworn to by experts, to say that, "I think the opinions of experts are not so highly regarded now as they were; for, while they often afford a great aid in determining facts, it often happens that experts can be found to testify to any theory, however absurd." Andrews's Trial, p. 356. Judge Davis, of the supreme court of Maine, in a similar emergency, when pressed by a mass of expert testimony denying responsibility, was forced to declare: "If there is any kind of testimony that is not only of no value, but even worse than that, it is, in my judgment, that of medical experts;" and this censure is substantially indorsed by Judge Redfield. Neal's case, cited 1 Redfield on Wills, ch. III. § 13. The proposition of the lord chancellor, after the extraordinary expert testimony in the Windham case, that experts should only be permitted to testify as to facts within their own observation, is an illustration of the same judicial tendency.

instance, runs his road carelessly, and injury to others results, he may either be indicted for the negligence, or a suit may be instituted against him for damages. In the first case, the person of the "physicist" is seized and put in prison; in the second, his property may be taken from him by the sheriff. He may say that this is simply physical force acting on physical force; and that this only confirms his theory of causation, and of the supremacy of physical force. No doubt the sheriff acts physically; but what forces the sheriff to act? Physical force, it may be again said; for otherwise the sheriff would himself be sent to prison. But what puts this process against the sheriff in motion? Ultimately we must fall back upon the conscience of the judge; upon the moral sense of the community, requiring that municipal law should be obeyed; upon the public conviction that this obedience is required by the good of society and by the will of God. And to this moral force physical force must be subordinate, and from its incapacity of moral adjudication must confess its subordination.

Yet it is to this subordination of physical to moral force that physical science owes its true glory. It has won no victories in any campaigns in which it has not thus served. As the servant of moral and juridical law its discoveries have been at once brilliant, beneficent, and secure. To the shelter of that law it has owed its opportunities for studious exploration. To the patents granted by that law it owes the enjoyment of the fruits of such discoveries. To the severe axiom of that law, that care in the exercise of material forces must be in proportion to the greatness and peril of such forces, does it owe those qualities of delicate and subtle modification and compensation by which the powerful agencies discovered by the physicist may by the physicist be made beneficial to mankind. There have undoubtedly been periods when physical science has thrown off this yoke, and when the physicist has appeared to the vulgar eye as a diviner; but these have been the most inglorious eras of scientific history, — the eras when astronomy was lost in astrology, and chemistry in alchemy, open and responsible science in occult charlatanry. The true conquests of physical science have been achieved under this very system of the subordination of the physical to the moral. If genius, independently of this system, has made great discoveries, it has only been through this system that these discoveries have been so moulded and guarded as truly to benefit and elevate mankind. Under other systems physical science may be sometimes worshipped with ignorant and superstitious awe. It shines with its true splendor and wins its just applause only where moral force is supreme.

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